

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268

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

:
:
:
Docket No. RM2013-4

**REPLY COMMENTS OF TIME INC.
REGARDING ORDER NO. 1739
(August 29, 2013)**

Time Inc. submits these reply comments in response to the initial comments of various parties on Order No. 1739, Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a (June 5, 2013), in which the Commission proposes expedited procedures for complaints filed under § 3662 of the Postal Accountability and Enhancement Act ("Act") that are based on alleged violations of § 404a of the Act.¹

I. PROPOSED PROCEDURAL CHANGES

Time Inc.'s initial comments on Order No. 1739 concluded, "the fact that no complaint has ever been filed with the Commission under section 404a suggests that the Commission has devised a remedy for a problem that does not exist."² Some of the comments filed by other parties failed to recognize the existing legal

¹ See also 78 Fed. Reg. 35826 (June 14, 2013).

² Docket No. RM2013-4, Comments of Time Inc. in Response to Order No. 1739 (July 29, 2013), at 17.

restrictions on unfair competition and procedures for enforcing those restrictions, perhaps helping to account for a perceived need where no actual need exists. Stamps.com and Endicia state that "[i]t is important to have rules for enforcing [§ 404a's] restrictions," as if the Commission had not put such rules into effect in 2009.³ The National Association of Presort Mailers (NAPM) states that "[t]he proposed rules must prohibit the Postal Service from unfairly using its status as a government agency to obtain an unfair competitive advantage when it competes with private mail service providers," as if the text of § 404a(a)(1) did not already do precisely that.⁴

Several commenters express their support for the proposed expedited procedures, or for the general goal of designing more efficient and expeditious procedures for § 3662 complaints, but also state that the Commission is wrong about at least one of the predicates it mentions for proposing the procedures it sets out in Order No. 1739. Those predicates are:

- that "[f]or the vast majority of issues expected to arise under 39 U.S.C. 404a, complainants should have the information and documentation needed to support their claims well in advance of filing a complaint" [Order No. 1739 at 12];
- that "[t]he complainant will be in a good position to know whether the issues raised by the complaint are best suited for these proposed accelerated procedures or the traditional complaint procedures found in 39 CFR part 3030" [*id.* at 14];
- that "[d]iscovery from the Postal Service would not be expected to appreciably help the complainant demonstrate how the Postal Service's action causes competitive harm" [*id.* at 13];

³ Docket No. RM2013-4, Joint Comments of Stamps.com and Endicia (July 29, 2013), at 1; see Order Establishing Rules for Complaints and Rate or Service Inquiries (Order No. 195), Docket No. RM2008-3 (issued March 24, 2009).

⁴ Docket No. RM2013-4, Comments of the National Association of Presort Mailers (July 29, 2013), at 2; see 39 U.S.C. § 404a(a)(1).

- that "section 404a complaints are expected to involve a limited number of participants" [*id.* at 14]; and
- that "[a]s proposed, the rules allow the participants to fully develop their theories of the case, applicable legal requirements, and the facts" [*id.* at 12].

Valpak

Valpak, after arguing that "the accelerated procedures for 404a complaints may be suitable for *all* complaints," proceeds to argue that the proposed rule on intervention establishes too "high [a] bar for mailers to simply provide some written input to the Commission."⁵ Valpak continues:

A mailer could have an important interest that is being "indirectly" impacted rather than "directly" impacted. It is impossible for the Commission to evaluate whether comments are truly "necessary" to that mailer.

Id.

Time Inc. agrees with Valpak that the proposed provision for intervention is inadequate, though not because it excludes parties who may be indirectly affected by the decision but because it prevents parties who may be directly affected from "expand[ing] the scope of the proceeding by addressing issue(s) outside of the scope of the complaint and answer" (proposed subpart 3033.11). Valpak's suggestion that it would be little trouble for the Commission to allow persons who may be indirectly affected by a decision "to simply provide some written input" suggests that it has little appreciation of the Commission's responsibilities in

⁵ Docket No. RM2013-4, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. [Valpak] Initial Comments on Notice of Proposed Rulemaking (July 29, 2013), at 2 (font regularized; emphasis added), 3.

adversary proceedings that could result in mandatory remedies affecting large numbers of mailers or even entire sectors of the national economy.⁶

Pitney Bowes

Pitney Bowes also expresses its support for the proposed expedited procedures but acknowledges an inescapable fact:

The Commission states that it anticipates section 404a complaints will “involve a limited number of participants.” This may be true in some cases, but not others.⁷

Pitney Bowes does not go on to consider whether a complainant may be most likely to exercise its absolute discretion to opt for expedited procedures when it expects the number of parties adverse to its position to be large. As a tactical matter, giving the complainant the option whether to use the accelerated procedures could have the result that they would be used when the circumstances are least appropriate.

Grayhair Software

Grayhair Software also commends the Commission's desire to streamline the litigation process. But, it observes:

The Commission's assumption that “complainants should have the information and documentation needed to support their claims well in advance of filing of a complaint” for “the vast majority of issues expected to arise under 39 U.S.C. 404a” (78 Fed. Reg. 35830) is overoptimistic.

⁶ Valpak states: “It does not take an inordinate amount of time for the Commission to read some mailer comments. If the comments are helpful in reaching a proper decision, that is good for all. If they are extraneous, they can be disregarded.” Initial Comments at 3. Unless such comments were subjected to a less casual evaluation than what Valpak describes, they would not be an appropriate basis for a judgment in a complaint proceeding.

⁷ Docket No. RM2013-4, Comments of Pitney Bowes (July 29, 2013), at 7 (internal citation omitted).

Moreover, while there may be some cases in which the disputed issues are narrow enough to be litigated effectively through the proposed expedited procedures, a complainant will not know whether this is true [in a particular] case until the Postal Service discloses its defenses in its answer. By then, however, the complainant will be stuck with whatever procedure it chose at the outset.⁸

Grayhair also remarks:

The accelerated procedures could be unfair to the Postal Service as well. The Postal Service may wish to assert defenses that legitimately require either (1) discovery from the complainant or (2) economic analysis and testimony that may require more than 20 days to develop.

Id. at 13. Time Inc. agrees with these observations. Grayhair's counsel, who has represented GameFly throughout the lengthy GameFly complaint proceedings, must certainly be regarded as especially well informed in this area.

The Public Representative

The Public Representative "supports the Commission's efforts to overhaul its rules so that complaints brought pursuant to 39 U.S.C. § 404a can be resolved expeditiously." He believes that "[a]doption of the Commission's proposed rules would present a good first step in the direction of making complaint proceedings more efficient."⁹ However, "[w]hile supportive of the Commission's efforts to accelerate section 404a proceedings, the Public Representative believes that this is not the docket in which to make these changes." *Id.* at 15.

⁸ Docket No. RM2013-4, Comments of Grayhair Software Inc. [Grayhair] (July 29, 2013), at 11, 13.

⁹ Docket No. RM2013-4, Public Representative Comments (July 29, 2013), at 12.

The reasons why, in the view of the Public Representative, the Commission should not adopt the proposed new procedures in this docket are numerous. Each retracts some increment of the expedition and efficiency that at the outset of his comments the Public Representative suggested was to the credit of these procedures.

- "The limitation on intervention . . . would ensure that interveners are only intervening when a complaint will have a direct impact on their interests." PR Comments at 16.

The Public Representative agrees with Valpak that this is a deficiency in the proposal.

- "The Public Representative does not support the imposition of a threshold standing requirement. . . . By limiting access to the complaint process to persons who have been harmed, the Commission creates a risk of discouraging meritorious complaints from being brought." *Id.* at 16-17.

Of course, as much can be said for any standing requirement. The Public Representative does not inquire whether the proposed standing requirement also creates something approaching a certainty of discouraging an even greater number of complaints that are not meritorious.

- "Proposed section 3033.10 expressly prohibits the parties from making assertions based on information and belief (i.e. assertions lacking a factual foundation). While this rule will have the laudable effect of forcing the parties to stick to the facts in accelerated proceedings, in practice, it may operate a bit harshly. . . . The Public Representative suggests that this provision not be included in the final rules." *Id.* at 19-20.

The proposed rule does not, as the Public Representative asserts, prohibit assertions based on information and belief. It states: "Assertions based on information and beliefs are expressly prohibited *unless accompanied by affidavit(s) or declaration(s) explaining the basis for the belief and why the facts could not be*

reasonably ascertained." Proposed subpart 3033.10(a) (emphasis added). That is an entirely different proposition. To permit assertions based on information and belief, without at any stage requiring an explanation of the basis for the belief and why the facts could not be ascertained, or permitting the adversary party to seek such an explanation through discovery, would be to abandon the notion that the Commission's ultimate findings should be based entirely on evidence.

It is without doubt possible to resolve § 404a complaints expeditiously and efficiently without requiring that complainants have a direct interest in the outcome, or have suffered any injury, or have direct knowledge of any relevant facts, or be supported by a preponderance of evidence as to any particular claim. But such extreme adaptability yet efficiency in procedures is a hallmark of arbitrariness.

II. PROPOSED SUBSTANTIVE CHANGES

A number of the matters discussed in initial comments under the heading of "substantive changes" concern issues better left for resolution on a case-by-case basis. As recently as the term just completed, the Supreme Court cautioned:

As a leading antitrust scholar has pointed out, "[t]here is always something of a sliding scale in appraising reasonableness," and as such "the quality of proof required should vary with the circumstances." *California Dental*, supra, at 780 (quoting with approval 7 Areeda ¶1507, at 402 (1986)).

As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. See 7 *id.*, ¶1508c, at 438–440.

FTC v. Actavis, Inc., _____ U.S. _____, slip op. at 21 (July 17, 2013).

The initial comments also reveal, however, that there are some questions about the substantive meaning of § 404a(a)(1) that are dispositive of issues of standing, burden of proof, and whether the provision includes an affirmative defense. Time Inc.'s initial comments, at 13-14, argued that the jurisdictional scope of § 404a(a)(1) is not fully resolved. We think that the Commission should devote its attention to this latter category of substantive questions.

In that regard, Time Inc. agrees with a number of other commenters that, at a minimum, the Commission has failed to adequately explain the requirement in proposed subpart 3032.5 that "[a] complaint alleging a violation of 39 U.S.C. 404a(a)(1) must show that . . . [t]he rule, regulation, or standard harms or harmed the person filing the complaint and competition."¹⁰

We think that the requirement of harm to "the person filing the complaint" can only be a rule of standing. Time Inc. would not oppose a somewhat broader rule that would, for instance, permit associations representing persons harmed to file complaints.

The requirement to show harm to "competition" could be understood as nothing more than an aspect of the requirement that the complainant show that the rule complained of has the effect of either "preclud[ing] competition" or "establish[ing] the terms of competition," either of which is *per se* harmful if done by a government monopoly (the Postal Service) in a competitive market and is

¹⁰ See Comments of Pitney Bowes at 2-4; Public Representative Comments at 7-8; Initial Comments of United Parcel Service [UPS] in Response to Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. § 404a (July 29, 2013), at 5, 7-8.

therefore prohibited under § 404a(a)(1) *unless* the rule does not give the Postal Service an unfair competitive advantage. That is to say, since harm to competition is an ineluctable consequence when a government monopoly exercises its regulatory power to preclude competition or set the terms of competition in a competitive market, the requirement to show harm to competition may be intended for the purpose of establishing that the regulation has in fact precluded competition or set the terms of competition.

Time Inc. therefore does not agree that the requirement that a complainant show harm to "competition" in proposed subpart 3032.5 is tantamount to a requirement that the complainant rebut in advance the affirmative defense that the Postal Service has not gained an unfair competitive advantage.¹¹ Rather, harm to

¹¹ Pitney Bowes, UPS, and the Public Representative all object to proposed subpart 3032.5 on grounds that implicitly make such an argument.

Pitney Bowes argues that "[s]ection 404a obviates the need for the Commission to devise . . . a rule" requiring a showing of harm to competition, because there is a "rebuttable presumption [that a] regulation . . . that establishes the terms of competition is . . . harmful . . . unless the Postal Service demonstrates otherwise." Pitney Bowes Comments at 4. Pitney Bowes contends that "[t]he relevant history of section 404a confirms this reading," because the original version of § 404a "has no provision for the Postal Service to demonstrate that a rule that established the terms of competition did not create an unfair advantage," whereas "[s]ubsequent iterations of this provision expressly assign the burden to the Postal Service to demonstrate that any rule establishing the terms of competition does not create an unfair advantage for the Postal Service." Pitney Bowes Comments at 4. Clearly, that analysis confounds the presumption of harm that Pitney Bowes has correctly identified with the affirmative defense that is made available by the *unless* clause of § 404a(a)(1). Section 404a(a)(1) states in relevant part:

Except as specifically authorized by law, the Postal Service may not . . . establish any . . . regulation . . . the effect of which is to . . . establish the terms of competition *unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself*. . . . [emphasis added]

Pitney Bowes restates the text, incorrectly, as follows:

Section 404a(a)(1) prohibits the Postal Service from establishing any regulation that establishes the terms of competition or creates

[footnote continues]

competition is established by showing that a rule precludes competition or establishes the terms of competition. A showing by the Postal Service that such a rule, *although it harms competition*, does not create an unfair competitive advantage for the Postal Service, is the affirmative defense offered by § 404a(a)(1).

Finally, Time Inc. notes that the Public Representative would have the Commission, in interpreting § 404a, reject as a guide the Sherman Act and the teaching of the *Microsoft* case that to show unfair competition a plaintiff must show conduct which "harm[s] the competitive process and thereby harm[s] the consumer," and not merely show "[h]arm to one or more competitors."¹² According to the Public Representative, the Commission should "not . . . adopt a limitation that precludes competitors from showing a violation of section 404a(a)(1) has occurred solely by reference to harm to the Postal Service's competitors":

an unfair competitive advantage for the Postal Service *unless the Postal Service demonstrates that the regulation does not harm competition*.

Pitney Bowes Comments at 2 (emphasis added in part).

UPS, like Pitney Bowes, confuses the required showing of harm from a rule establishing the terms of competition with the potential affirmative defense available to the Postal Service and mistakenly concludes that "the proposed rule improperly shifts to the complainant a burden that the statute imposes on the Postal Service." UPS Comments at 7.

The Public Representative argues that "[t]he Commission should amend section 3032.5(b)" to treat a Postal Service demonstration that a regulation does not create an unfair competitive advantage for itself "merely as a defense" rather than as an affirmative defense and should "permit the complainant to overcome this defense by showing that the competitive harm to the market outweighs the regulatory benefit of the rule, regulation, or standard." Public Representative Comments at 12-13. Thus where Congress ordained an affirmative defense the Public Representative would have the Commission provide a balancing test based on a concept, "regulatory benefit," that is rooted nowhere in § 404a or title 39.

¹² *United States v. Microsoft Corp.*, 253 F.3d 58 (D.C. Cir. 2001) (*quoted in* Order No. 1739 at 7).

Section 404a(a)(1) is written in broad terms. . . . [N]othing in this language suggests that Congress was expressing special solicitude for consumers rather than competitors. . . . 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 competition is not present when the Commission examines the Postal Service's regulations.

Id. at 8-9. The argument that the Sherman Act deals with "competitive behavior" whereas § 404a(a)(1) deals with "regulations" attends only to form and is barren of substance. As a government agency, the Postal Service conducts its business through regulations or their equivalent; regulations, policies, and standards are its means of taking actions or expressing its intentions as an institution.

More importantly, the issue is hardly a matter of first impression. The Commission has twice rejected allegations that particular postage rates gave the Postal Service an unfair advantage in competitive markets, relying on conventional Sherman-Act antitrust analysis--once under the Postal Reorganization Act of 1970, and again under the PAEA of 2006.

In *Direct Marketing Ass'n. v. U.S. Postal Service*, 778 F.2d 96 (2d Cir. 1985), the Court considered "claims that the PRC failed 'to give meaningful consideration to the effect of the approved BRR rates upon competitors engaged in the private, non-postal delivery of advertising material,' in violation of § 3622(b)(4) of the Postal Reorganization Act, which required the Postal Rate Commission, when recommending rates, 'to consider the effect of rate increases upon the public, business mailers, and competitors of the Postal Service.'" 778 F.2d at 105, 104. In rejecting arguments that "the PRC erred in considering the Areeda-Turner test, since this case is not an antitrust matter," the Court stated:

It is . . . clear that ratemaking agencies may consider antitrust principles in assessing impact upon competition. See *Northern Natural Gas Co. v. FPC*, 130 U.S. App. D.C. 220, 399 F.2d 953, 959 (D.C. Cir. 1968).

778 F.2d 105. Responding to private competitors of the Postal Service who alleged that they were unable to compete successfully under the new rates, the Court observed:

In evaluating competition-related arguments under subsection (b)(4), it must be remembered that the PRC's task is to protect *competition*, not particular *competitors*. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). The PRC adequately did so. See also PRC Opinion at 295-96.

Id. at 106.

More recently, in Dockets No. MC2012-14/R2012-8, Valassis NSA (Order No. 1448) (August 23, 2012), at 6, the Commission found that "[a]lthough this product is proposed as market dominant, it is apparent from the record that it exists within a competitive market." It then

assessed the potential effects of this NSA on competition as a whole, rather than the impact on individual competitors. This is consistent with precedent under the antitrust laws. See, e.g., *Brown Shoe Company v. U.S.*, 370 U.S. 294, 320 (1962) ("It is competition, not competitors, which the [antitrust laws] protect[.]"); *Spectrum Sports, Inc. v McQuillan*, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.").

Id. at 26-27. Relying again on a particular a version of the Areeda-Turner predatory pricing test, it found that the NSA "will not cause unreasonable harm to the

marketplace" and that "the Postal Service pricing policy is not anti-competitive." *Id.*
at 23, 28.¹³

Respectfully submitted,

s/

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¹³ As noted in Time Inc.'s initial comments, at 14, the Commission held in Order No. 1448, at 40, that § 404a was inapplicable to the NSA, on the grounds that "[t]he NSA is not a rule or regulation promulgated pursuant to chapter 4 of title 39." That distinction certainly provides no reason to think that the *substantive* content of § 404a(a)(1) is significantly different from that of the rule that NSAs must not cause "unreasonable harm to the marketplace," or of former § 3622(b)(4).

UPS argues in its initial comments, at 5-6, that in view of the fact that Congress "[i]n Section 409(e) of PAEA . . . explicitly made the Postal Service subject to federal antitrust laws and to unfair competition claims under Section 5 of the FTC Act," to import "elements required under the antitrust and unfair competition laws . . . into Section 404a(a)(1) . . . would render Section 404a(a)(1) superfluous." Even if the substantive standards of conduct applicable to the Postal Service under the two provisions were identical, which we are not aware has ever been asserted, the practical differences between a right to bring an action in federal court and a right to file a complaint with the Commission are so stark that it is absurd to assert that the two avenues of remedy would be redundant rather than parallel.