Oral Argument Not Yet Scheduled

No. 12-1367

In The United States Court of Appeals
for the District of Columbia Circuit

NEWSPAPER ASSOCIATION OF AMERICA,
Petitioner,

v.

POSTAL REGULATORY COMMISSION,
Respondent.

On Petition for Review of an Order of the Postal Regulatory Commission

BRIEF OF INTERVENORS NATIONAL NEWSPAPER ASSOCIATION, VALPAK DIRECT MARKETING SYSTEMS, INC., AND VALPAK DEALERS' ASSOCIATION, INC.

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Intervenor National Newspaper Association ("NNA") is a nonprofit, association of nearly 2,300 newspapers and newspaper executives. It is incorporated in Missouri and recognized by the Internal Revenue Service as tax exempt under 28 U.S.C. § 501(c)(6). It has no parent company, and has not issued any shares or debt securities to the public; thus, no publicly-held company owns 10 percent or more of its stock. NNA was founded as the National Editorial Association in 1885. It is a continuing association of numerous organizations and individuals operated for the purpose of promoting the general commercial, professional, legislative, and other interests of the membership, and it therefore constitutes a trade association for purposes of D.C. Circuit Rule 26.1.

Intervenor Valpak Direct Marketing Systems, Inc. ("VPDMS") is a wholly owned subsidiary of Cox Target Media, Inc., which is a wholly owned subsidiary of Cox Media Group, Inc., which is a wholly owned subsidiary of Cox Enterprises, Inc., a privately held corporation organized under the laws of the State of Delaware. Intervenor Valpak Dealers Association, Inc. ("VPDA") is an incorporated association of the franchisees of VPDMS, having no parent company, but affiliated with VPDMS. No publicly held company or corporation has a 10 percent or greater

ownership interest in VPDA. (VPDMS and VPDA are referred to herein collectively as "Valpak.")

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. Except for *amici* The Newspaper Guild–CWA, all parties, intervenors, and amici appearing before this Court are listed in the Brief of Petitioner Newspaper Association of America.

(B) Ruling Under Review. References to the ruling at issue appear in the Brief of Petitioner Newspaper Association of America.

(C) Related Cases. This matter has not been previously before this Court or any other court. Counsel for intervenors are unaware of any related cases pending before this Court or any other court.

/s/ Steven C. Douse
Steven C. Douse

/s/ William J. Olson
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GLOSSARY OF ABBREVIATIONS

ACD	Annual Compliance Determination
ACR	Annual Compliance Report
ChIR	Chairman's Information Request
NAA	Newspaper Association of America
NNA	National Newspaper Association
NOI	Notice of Inquiry
NSA	Negotiated Service Agreement
PAEA	Postal Accountability and Enhancement Act, Pub. L. 109-435
PRC	Postal Regulatory Commission
SSNIP	Small but significant and non-transitory increase in price
USPS	United States Postal Service
VPDA	Valpak Dealers' Association, Inc.
VPDMS	Valpak Direct Marketing Systems, Inc.

STATEMENT OF THE ISSUES

Intervenors NNA and Valpak adopt the Statement of the Issues set forth in the Brief for Petitioner Newspaper Association of America ("NAA"), as supplemented below:

1. Did the Commission require the Postal Service to demonstrate that the Valassis Negotiated Service Agreement ("NSA") met each of the statutory requirements?

2. Can the statutory phrase "unreasonable harm to the marketplace" reasonably be read as incorporating an antitrust standard, and if so, did the Commission properly apply this standard to the Valassis NSA?

3. Did the Postal Service establish that the Valassis NSA will be made available on public and reasonable terms to "similarly situated mailers"?

4. Did the Commission give the statutorily required "due regard" to the Valassis NSA's likely effects on small businesses required to establish a new product?

5. Did the Governors of the Postal Service validly delegate their authority to enter into the Valassis NSA to Postal Service management?

STATUTORY PROVISIONS

All applicable statutes are contained in a Statutory Addendum to the Brief for Petitioner Newspaper Association of America.

STATEMENT OF FACTS

The Intervenors adopt the Statement of Facts contained in the Brief of Petitioner Newspaper Association of America.

SUMMARY OF ARGUMENT

The Postal Accountability and Enhancement Act ("PAEA") requires that the Commission approve only those Negotiated Service Agreements which meet specified criteria, with the Postal Service being required to make that showing. The Valassis NSA provoked unprecedented, near unanimous opposition. After comments were filed, the Commission concluded that the Postal Service had not established its case, but then re-opened the docket to give the Postal Service another opportunity to make its case. The Commission uncritically accepted the Postal Service's subsequent filings, despite having good reason not to, and disregarded opposing submissions. The Commission concluded that the opponents of the NSA had not rebutted the Postal Service's case, improperly shifting the Postal Service's burden onto them.

The Commission incorrectly construed the statutory requirement that the Valassis NSA not cause "unreasonable harm to the marketplace" as incorporating an antitrust standard. It then compiled an inadequate record and misapplied antitrust principles in finding that the NSA was procompetitive, and therefore would not cause unreasonable harm.

The Commission never required the Postal Service to demonstrate the Valassis NSA would be made available to "similarly situated mailers." The Postal Service, and the Commission, conflated the statutory term "similarly situated mailers" with a requirement that each similarly situated mailer be given an NSA that is "functionally equivalent" to the Valassis NSA. Thus, the Commission never established which mailers would be "similarly situated," improperly allowing the Postal Service complete discretion to refuse to enter into future NSAs.

Many small businesses submitted comments expressing their belief that the Valassis NSA would harm their businesses, which the Commission failed to acknowledge and apparently never read. This violated the Commission's statutory obligation to give "due regard" to a new product's likely impact on small business concerns.

Subject to the Commission's role, PAEA vests exclusive rate making authority in nine Presidentially appointed Postal Service Governors. The Governors unlawfully delegated their power to Postal Service management, who approved the Valassis NSA. The Commission misconstrued Valpak's argument that the NSA was filed pursuant to an unlawful delegation, thereby sanctioning a violation of the PAEA ratemaking process. As the NSA was never properly before the Commission, the Commission's decision was void.

ARGUMENT

I. The Commission Failed to Require the Postal Service to Demonstrate the Lawfulness of the Valassis NSA.

A. The Commission must scrutinize Negotiated Service Agreements to ensure they meet protective statutory standards.

The Postal Accountability and Enhancement Act requires the Commission to establish "a modern system for regulating rates and classes for market-dominant products." 39 U.S.C. § 3622(a). Although almost all market dominant product pricing under PAEA utilizes general tariff schedules offering prices available to all mailers, one of PAEA's many factors and objectives requires the Commission to "take into account" the "desirability of special classifications for both postal users and the Postal Service in accordance with the policies of this title." 39 U.S.C. § 3622(c)(10). The Commission has promulgated regulations by which it reviews "special classifications" called "Negotiated Service Agreements." 72 *Fed. Reg.* 63662 (Nov. 9, 2007). The regulations detail the information the Postal Service initially must submit so that interested parties may file informed comments and the Commission can "issue an order announcing its findings." 39 C.F.R. § 3010.44. The Commission's "objective" in reviewing an NSA is to "allow implementation" only

of those NSAs that "satisfy the statutory requirements of 39 U.S.C. 3622(c)(10)."[1] 39 C.F.R. § 3010.40.

Each NSA also constitutes a new product, requiring the Postal Service to file specific additional information necessary to "[d]emonstrate why the change is" lawful, *inter alia*, so that the Commission may decide whether to add the product to the product list in accordance with applicable statutes and regulations. 39 C.F.R. § 3020.30-32. After reviewing public comments, the Commission may approve requests for those products that meet the statutory and regulatory standards. 39 C.F.R. § 3020.33-34. The pricing adjustment docket (Docket No. R2012-8) and the product list docket (Docket No. MC2012-14) for the Valassis NSA were considered together.

The Postal Service purported to provide information required by the Commission's rules in Attachment E ("Statement of Supporting Justification") to its Request, but that filing was substantially deficient (JA1-40), deficiencies which were only partially remedied by responses to three Chairman's Information Requests. *See generally* Valpak Initial Comments, JA179-86.

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[1] Only one other market dominant NSA has been entered into since enactment of PAEA, with Discover Financial Services. Docket No. MC2011-19/R2011-3.

B. The Commission initially determined that the Postal Service failed to demonstrate compliance.

Of the 11 NSAs considered by the Commission prior to and since enactment of PAEA, none was opposed by more than a few parties. In contrast, in the Valassis NSA, the Commission's final Order observed, "[m]ost of the 44 initial comments filed below opposed the proposed NSA" — a remarkable understatement, as only one of the initial comments actually supported the NSA, and that one was not filed by a mailer, but by an individual. Order No. 1448, JA529. Even including reply comments, the only support the NSA received was from the parties to the agreement: the Postal Service and Valassis.

After all initial and reply comments had been filed, the Commission observed that the "Request generated substantial opposition from over 40 commenters [which] contend that the Valassis NSA does not satisfy the requirements of [PAEA]."[2] The Commission essentially ruled that the Postal Service had not proven its case: "Based on its review of the record, the Commission concludes that neither the claims of the Postal Service nor those who oppose the Valassis NSA have yet been fully developed." *Id.* Normally, this would have been the end of the case, with the

[2] Notice of Inquiry ("NOI") No. 1, JA310-11.

Commission determining that the Postal Service had failed to provide credible evidence to support its Request — but that is not what happened below.

The Commission gave the Postal Service another bite at the apple, unprecedented in PAEA rate cases, by opening a supplemental inquiry. JA310-15. The Commission reopened the proceedings "to afford all interested persons an opportunity to provide additional material on relevant issues ... to more fully support their respective positions with quantitative information...." *Id*., p. 2 (emphasis added). Based only on the responses received from the Postal Service and Valassis (and perhaps Discover Financial Services — which had previously received two NSAs) to NOI No. 1, the Commission changed its mind, concluding that the Postal Service had met all three preconditions to the NSA.

C. The Commission could not have reasonably found that the Postal Service met the statutory preconditions for the Valassis NSA.

To ensure that its decision is based on the evidence before it, the Commission is required to "issue an order announcing its findings." 39 C.F.R. § 3010.44(b). Although the Commission's final Order contains an "Analysis," it never made enumerated findings, simply accepting passively all of the Postal Service representations and projections, and pointedly rejecting all contrary information as mere speculation or opinion. JA541-43. This Circuit has determined that "in the

context of the APA, the substantial evidence test (which is applied only to formal ... rulemakings...) and the arbitrary and capricious test (which governs review of *all* proceedings...) 'are one and the same' insofar as the requisite degree of evidentiary support is concerned." *Consumers Union v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986).[3] "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight..., when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed...." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Measured by this standard, the Commission's decision was arbitrary and capricious.

As to the NSA requirement that it improve net Postal Service finances, the Commission found that the opponents of the Valassis NSA opponents failed to make their case:

> The assertion that price competition for Sunday insert advertisements will cause a significant number of newspapers to abandon midweek TMC advertising is **insufficiently supported** to allow the Commission to conclude that the NSA will not benefit the Postal Service. On balance, these assertions **do not successfully rebut the Postal Service's projections** that the NSA will produce net financial benefits. [Order No. 1448, JA543 (emphasis added).]

As to the requirement an NSA "not cause unreasonable harm," the Commission did not find that the Postal Service made its case with substantial evidence, but that its

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[3] *See* Valpak Response to NOI, JA470.

opponents failed to prove otherwise: "[t]he discounted prices have **not been shown to be unlawful**...." Order No. 1448, JA552 (emphasis added). As to the requirement that the NSA "must be available on public and reasonable terms to similarly situated mailers," the Commission never established which mailers, if any, would meet that standard. Instead, the Commission stated that it "expects the Postal Service to negotiate in good faith with mailers," deferring "[a]llegations of possible discrimination" to "a complaint proceeding." Order No. 1448, JA556. *See* Section IV, *infra*.

The Commission's regulatory responsibility over NSAs cannot be discharged by trusting that the Postal Service (i) will do the right thing or (ii) make necessarily accurate forecasts. Indeed, no reason for Commission deference to Postal Service projections can be found in prior NSA dockets. For example, for the NSAs with Bookspan, Bradford Group, and Lifeline, which have been completed, comparing the net contribution the Postal Service achieved with what it projected it would achieve, the percentage amount actually realized was 0.27 percent, -0.30 percent, and 2.65

percent, respectively.[4] Averaging these three NSAs, the Postal Service realized a net contribution of about 1.0 percent of the original estimate.

In contrast to the Commission's embrace of the Postal Service's case, the Commission completely disregarded the extensive legal and factual analysis contained in the filings by NAA, NNA, and Valpak[5] (which total 142 pages plus an Excel Spreadsheet reporting NNA Survey Results), as well as all other opponents. The Commission summarily determined that "the newspapers' estimates were 'speculative'" and "not sufficiently probative to be useful." Order No. 1448, JA541. Only Commissioner Hammond dissented, stating "too much evidence was presented ... by the many opponents of this NSA for me to conclude that it would not cause unreasonable harm to the marketplace." JA586.

Although the PAEA does not require the Commission to apply ratemaking rules "on the record," subject to a strict requirement governing burden of proof, the Commission must employ some reasonable standard to determine whether the Postal

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[4] *See* Docket No. MC2005-3, Request, p. 5; Docket No. MC2007-4, Request, pp. 4-5; Docket No. MC2007-5, Request, p. 5; Docket No. ACR2009, FY 2009 ACD, pp. 113-14; Docket No. ACR2010, FY 2010 ACD, pp. 135-36; Docket No. ACR2011, FY 2011 ACD, pp. 151-52.

[5] *See* NNA comments, JA126-40; NAA comments, JA141-71; Valpak comments JA172-210; Valpak reply comments, JA287-309; NNA response to NOI, JA358-70 (and see fn. 34); NAA response to NOI, JA371-96; Valpak response to NOI, JA468-78.

Service has demonstrated by substantial evidence that an NSA meets the three criteria laid down in 39 C.F.R. § 3010.40 — one that does not shift the burden to those who oppose the NSA. It is the Postal Service that is required to present "detailed" evidence of a "net financial position" and "detailed" evidence that the proposed NSA "will not result in unreasonable harm to the marketplace." *See* 39 C.F.R. § 3010.42(c) and (e). Yet in this case it appears that the Commission put the burden on the Valassis NSA's opponents to persuade otherwise. Such a shift in burden is arbitrary and capricious. It is also inconsistent with the Commission's own rules and the principles governing the quasi-judicial process whereby NSAs are reviewed.[6] Indeed, the purpose of requiring that the Commission make specific findings is to ensure that the Commission can support its decision with substantial evidence.

The Commission's approval of this NSA may be explained in part by its desire to impose only "light-handed" regulation on the Postal Service, generally giving the Postal Service what it requests.[7] This may be especially true as the Postal Service

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[6] In promulgating rules for evaluation of NSAs prior to PAEA, the Commission explained: "the Postal Service is burdened with demonstrating that the proposed Negotiated Service Agreement complies with the requirements of the Act...." 69 *Fed. Reg.* 7578 (Feb. 18, 2004).

[7] The Commission has never rejected an NSA. And, no matter how poorly NSAs have performed, the Commission has never exercised its authority to terminate a money-losing NSA. *See* 39 U.S.C. § 3662; Valpak Initial Comments, JA186-88. Indeed, the Commission has found pricing for only one product to be noncompliant

attempts to develop new revenue sources. But the Commission's role is not to be a cheerleader or enabler for the Postal Service. Rather, its role is to protect against abuse of the Postal Service's monopoly, particularly with respect to market-dominant products.[8] If the Commission abdicates its role, and defers to the Postal Service's judgment in granting reduced rates to favored mailers, the statutory scheme collapses, the monopolist is left unregulated, and the Commission ceases to deserve deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See* NAA Brief, pp. 29-31.

II. The Postal Service Failed to Establish that the Valassis NSA Would Not Cause "Unreasonable Harm to the Marketplace."

A. "Unreasonable harm to the marketplace" is not an antitrust standard.

When Congress intends to incorporate antitrust principles into a regulatory regime, it does so explicitly, using well-known terms of art from the nation's

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with law during its five PAEA Annual Compliance Reviews. *See, e.g.*, Docket No. ACR2010, FY 2010 ACD, pp. 106-07; Docket No. ACR2011, FY 2011 ACD, pp. 17-19.

[8] *See* 39 U.S.C. §§ 601, *et seq.*, 18 U.S.C. § 1725. *See also* J. Campbell, Jr., "Report on Universal Postal Service and the Postal Monopoly" (2008), http://www.jcampbell.com/index_reports.htm.

competition laws and policies.[9] Indeed, it did exactly that elsewhere in PAEA.[10] The fact that Congress used a different formulation ("unreasonable harm to the marketplace") in 39 U.S.C. § 3622(c)(10)(B) — one unknown in antitrust law and economics — to describe the required market inquiry, means it almost certainly intended something other than an antitrust standard.

The phrase most likely means "harm to competitors," not only for the reasons discussed by NAA,[11] but also because this interpretation best fits the overall statutory scheme. PAEA segregated postal products according to whether they are market-dominant or competitive, providing different rules for each.[12] Competitive products, which are lightly regulated, are subject to the antitrust laws; market-dominant products, which are heavily regulated, are not.[13]

Antitrust laws are designed to function in unregulated markets. While their underlying principles can be adapted to the regulatory context, the differences are

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[9] *See*, *e.g.*, 12 U.S.C. § 1828(c)(5) (bank mergers).

[10] PAEA's definition of market-dominant products incorporates a commonly used description of market power. *Compare* 39 U.S.C. § 3642(b)(1) *with* Herbert Hovenkamp, Federal Antitrust Policy § 3.1 at 79 (3d ed. 2005).

[11] Brief of Petitioner at 28-42.

[12] *See* 39 U.S.C. §§ 3621-33.

[13] *See* 39 U.S.C. § 409(e)(1).

significant. For example, the predatory pricing test, ostensibly applied by the Commission in this case, seeks to determine the likely effect the dominant (or would-be dominant) firm's pricing behavior will have on its competitors and whether that behavior will contribute substantially to durable market power.[14] But here the dominant firm has a statutory monopoly, with legally enforced barriers to entry.[15] This fact alters the assumptions on which the predatory pricing test is based. This is not to say that antitrust principles are irrelevant in the regulatory arena, merely that it is unlikely Congress was trying to fit the round antitrust peg into the square postal regulatory hole using this particular phrase.

This conclusion is also consistent with the fact that in unregulated markets competition policy trumps competing concerns,[16] but in regulated markets competition policy, in the form of economic efficiency, is usually just one of many objectives the regulator must take into account. In PAEA, for example, Congress expressed special solicitude for, and required the Commission to consider the

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[14] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225-26 (1993).

[15] *See* 18 U.S.C. §§ 1693-99 and 39 U.S.C. §§ 601-06 (letter monopoly); 18 U.S.C. § 1725 (mailbox monopoly).

[16] *National Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 688-92 (1978).

interests of, small businesses,[17] even though such considerations are often at odds with the pure efficiency concerns of modern antitrust law.[18]

Congress's instruction that the Commission consider whether a product will cause unreasonable harm in the marketplace more closely resembles a provision protecting small business than it does an antitrust standard. Given the regulatory context, this is not surprising. In unregulated markets, where all firms are free to participate and social welfare is maximized by vigorous rivalry, it is appropriate to protect competition, but not individual competitors. In a regulated market, however, where firms are subject to legal constraints on their ability to compete, sound policy requires that the regulatory regime not only promote efficient outcomes, but also that it be fair to all participants.[19] The "unreasonable harm to the marketplace" inquiry is about fairness, not economic efficiency.

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[17] 39 U.S.C. § 3642(b)(3)(C).

[18] *See, e.g., Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986) ("the antitrust laws do not require the courts to protect small businesses").

[19] *See* Douglas Jones & Patrick Mann, *The Fairness Criterion in Public Utility Regulation: Does Fairness Still Matter?*, 35 J. Econ. Issues 153 (2001).

B. The record was inadequate to support an antitrust analysis of the affected markets.

Even if the Commission was correct that "unreasonable harm to the marketplace" incorporates an antitrust standard, it failed to make a record that would support the kind of economic analysis this implies.

First, the Commission failed to give advance notice to the participants of its interpretation of 39 U.S.C. § 3622(c)(10)(B),[20] which deprived the Commission of relevant input and denied the parties fundamental due process. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317-18 (2012) (agency's failure to notify broadcasters that its interpretation of the statutory requirements had changed was a denial of due process). Had the parties known at the outset that the Commission intended to apply an antitrust standard, the focus of the regulatory proceeding would have been very different. With better informed submissions from the participants, the errors made by the Commission could have been avoided.

Second, the Commission failed to obtain the information needed to apply an antitrust standard. It is telling that the Commission drew on the Department of

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[20] *Compare* the Commission's Notice of Inquiry No. 1 at JA313 (asking commenters alleging that they will be unreasonably harmed by the Valassis NSA to estimate the portion of their advertising revenues that might be lost to the NSA) *with* the Commission's Order at JA547 (holding that only harm to competition, not individual competitors, is relevant).

Justice and Federal Trade Commission Horizontal Merger Guidelines ("Guidelines")[21] for a market definition paradigm. *See* JA545-47. When one of those agencies applies the Guidelines to a potentially anticompetitive merger, it conducts an extensive investigation and gathers facts that are directly relevant to the various issues posed by the Guidelines' tests. *See* Guidelines §§ 2.2, 4.13.[22] To apply the hypothetical monopolist test, the agencies gather evidence of past and projected substitution patterns for the candidate product and geographic markets in response to particular price changes. Some of this comes from statistical data, some from internal company documents, some from anecdotal accounts of responses to particular price movements, and some from interviews of customers asking about their likely response to a small but significant and non-transitory increase in price (a "SSNIP"). *See id.* One searches the record in this case in vain for anything comparable.

Third, the Commission failed to obtain expert economic analysis. The antitrust enforcement agencies have large staffs of economists. The staff of every merger investigation includes one or more (usually more) economists, who provide insights

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[21] The 2010 Horizontal Merger Guidelines are available at http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[22] *See also* Antitrust Modernization Commission Report and Recommendations ("AMC Report") 162-72 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm (discussing the extensive second request process by which the agencies gather information about a merger).

and analysis throughout the investigation and play a key role in the agency's final decision.[23] The reason is simple. These are complicated matters involving difficult concepts. An understanding of price theory and industrial organization economics, and the ability to use them to make sense of a welter of facts, are critical to figuring out how a particular market works. *See id.* at 16. The Commission's reliance on economic testimony from a prior proceeding, JA548-50, highlights both the importance of such testimony and its complete absence from this record.

Fourth, the Commission failed to invite either of the federal antitrust enforcement agencies to participate in this proceeding. Both the Antitrust Division of the Department of Justice and the Federal Trade Commission have active and long-standing competition advocacy programs in which they appear before administrative agencies such as the Commission.[24] The Commission was presumably well aware of this, as the FTC was invited on a number of occasions to participate in proceedings

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[23] *See* Charles James, *Antitrust in the Early 21st Century: Core Values and Convergence ("Core Values")*, an address presented at the Program on Antitrust Policy in the 21st Century, pp. 15-17 (May 15, 2002), available at http://www.justice.gov/atr/public/speeches/11148.pdf (describing the role of economists at the antitrust enforcement agencies).

[24] *See* James Cooper, Paul Pautler, Todd Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L.J. 1091 (2005); Stuart Chemtob, *The Role of Competition Agencies in Regulated Sectors*, remarks at the 5th International Symposium on Competition Policy and Law, pp. 14-15 (2007), available at http://www.justice.gov/atr/public/speeches/225219.pdf.

before the Commission's predecessor agency.[25] The FTC also has recent expertise in the postal area, having submitted a report entitled "Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors" ("FTC Report") to the Commission in 2008 as required by 39 U.S.C. § 3633.[26]

C. The Commission misapplied the antitrust concepts and procedures that it was relying on.

1. The Commission chose the wrong methodology to define the relevant market.

The Commission adopted a forward-looking market definition from the Merger Guidelines that is unsuited to a market dominance/exclusionary conduct inquiry, thereby repeating what is commonly known as the "*Cellophane* fallacy."[27] The Guidelines methodology asks how the market would change in response to future price increases as a way of measuring how the merger might increase the firms' market power. In a monopolization case, however, the first question is not whether

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[25] *See*, *e.g.*, Comments of the Staff of the Bureau of Economics of the Federal Trade Commission before the Postal Rate Commission, Docket No. RM89-5 (Feb. 20, 1990), available at http://www.ftc.gov/opp/advocacy/1990/ V900016.pdf.

[26] The FTC Report is available at http://www.ftc.gov/os/2008/01/080116postal.pdf.

[27] *See, e.g.,* Hovenkamp, *supra* note 10, § 3.4. The name comes from *United States v. E.I. du Pont de Nemours & Co. ("Cellophane")*, 351 U.S. 377 (1956), in which the Supreme Court famously committed this error.

market power will increase in the future but how much currently exists. Market definition should be backward-looking, asking what products would be good substitutes at a competitive price compared to the current price, which reflects already-exercised market power. This is a more difficult inquiry and raises issues the Commission never recognized or addressed.

2. The Commission did not conduct even a rudimentary inquiry into the critical elements of market definition.

Whether the Merger Guidelines test was right for this case is a moot point because the Commission failed to follow it. It never identified a candidate market, never asked the SSNIP question, never gathered any data regarding substitution patterns, and never addressed the cross-elasticity of demand between different forms of distribution and different forms of advertising.

With respect to the product market, the biggest challenge seems to be determining the point at which two highly differentiated products — postal delivery and private carrier delivery — become good substitutes for a critical number of advertisers. There are econometric tools that can be used for this purpose,[28] but the Commission never considered whether they might be helpful here.

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[28] *See generally* ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* (2005).

Geographic markets are a different matter. Here they are apparently local, but the markets in which the NSA will operate were never specifically identified. This is a problem, as the test must be applied individually to each, using locality-specific data. *See* Guidelines § 4.2. As this was never done, the likely results can only be guessed at.

3. The Commission failed to apply the correct standard in determining whether the Valassis NSA was predatory.

The Commission recognized that below-cost pricing by a dominant firm can be anticompetitive, but it found the NSA unobjectionable because "[p]rices under the NSA are compensatory, *i.e.*, in excess of attributable costs. Hence, the Postal Service pricing policy is not anti-competitive." JA549. In reaching this result, the Commission took several shortcuts that undermine the validity of its conclusion.

a. The Commission failed to identify or explain the cost test it was applying.

The Commission never confronted the difficult issue of defining the "appropriate measure" of cost that the monopolist's prices must cover. *Brooke Group*, 509 U.S. at 222 and n.1. In describing predatory pricing the Commission referred to marginal cost. JA549. Even if this is a theoretically appropriate benchmark, a subject on which there is some debate, there is no practical way of calculating marginal cost for these purposes. A variety of proxies, all with their own

difficulties, have been proposed. *See, e.g.,* Michael Denger & John Herfort, *Predatory Pricing Claims After Brooke Group*, 62 Antitrust L.J. 541, 547-51 (1994). This Circuit has declined to adopt any one of them as the definitive test. *See Southern Pacific Communications Co. v. AT&T*, 740 F.2d 980, 1003-07 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

The Commission made no attempt to reconcile any of the cost tests accepted in antitrust law with "attributable costs" under PAEA. Instead, it simply assumed, *ipse dixit*, that covering attributable costs resolved the issue beyond any need for further discussion. JA549. This failure to consider the proper cost standard was not an insignificant omission.

Predatory pricing law assumes that the putative monopolist is an unregulated, profit-maximizing firm operating in the private sector. In such an environment, firms will find it difficult to profit from price predation, making it an unlikely strategy for a rational firm to undertake. The elements of the offense are structured accordingly.

Here, however, the Commission found that a subset of a market-dominant product — Standard Mail — competes with newspapers and independent carriers in an unregulated market for delivery of free-standing inserts. If this conclusion is correct, the dynamics of this market are very different from those in which the predatory pricing test is normally applied. Congress recognized as much in PAEA

when it distinguished between market-dominant and competitive products and created rules designed to prevent cross-subsidization of competitive products. A state-owned enterprise, such as the Postal Service, selling a product protected by a statutory monopoly has a very different set of incentives and abilities to engage in below-cost sales.[29] This increases the difficulty, and importance, of making a nuanced, market-appropriate decision as to the proper cost standard, something the Commission never attempted.

b. The Commission failed to add the value of additional benefits that accrue to the Postal Service but not its private competitors.

The Postal Service's cost calculations failed to recognize the benefits the Postal Service receives from its status as a quasi-government agency and from its statutory postal and mailbox monopolies. These are the benefits that the FTC in its 2008 report to the Commission said must be included in order to do a true cost calculation for competitive postal products. FTC Report, *supra* note 18, at 81-86. Although it was referring to products classified as competitive under PAEA, the same principle

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[29] *See* Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 B.Y.U.L. Rev. 1713, 1748-54, 1768-88 (2009); David Sappington & Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 Antitrust L.J. 479 (2003).

applies here, and these imputed benefits, which are substantial, give the Postal Service an unfair competitive advantage.

4. The Commission improperly discounted the effects of the NSA in downstream markets.

The Postal Service provides delivery services to firms that sell printed advertisements. Although it has a monopoly on postal delivery, the Postal Service competes with newspapers and independent carriers that offer home delivery through other means. The Postal Service does not participate in the downstream market for sale of advertising. Valassis and other direct mailers, including newspaper publishers, buy mail delivery services from the Postal Service. They may also buy home delivery services from carriers who bypass the mailbox. Many newspapers are vertically integrated and supply some or all of their own carrier delivery.

The Commission considered primarily the delivery market, although its discussion did not always clearly distinguish between the two. *See* JA544-47 (defining the relevant market in terms of distribution but referring to advertisers as the potentially affected consumers). The effects of this NSA, however, will likely be felt much more strongly by firms that compete with Valassis for sale of print advertising than by firms that compete with the Postal Service for delivery of that advertising. The Commission used what was essentially an efficiency rationale in

dismissing the concerns of Valassis's competitors: the NSA lowers Valassis's cost, which will allow it to underprice its competitors, which will benefit advertisers who are the ultimate consumers of the products and services at issue here. This, the Commission believed, aligns with the ultimate policy objective of the antitrust laws, which is to enhance consumer welfare by promoting competition, even if individual competitors are harmed in the process. JA552 and n.35.

The Commission is correct that enhancing consumer welfare is the goal of antitrust policy.[30] It is also correct that allowing the low-cost producer to price down to its marginal cost normally promotes consumer welfare. Where it erred was in assuming that attributable costs under the NSA represent the full costs to the economy of producing those services. They do not. *See* FTC Report, *supra* note 18, at 23-35. This results in an inefficient misallocation of resources (too many devoted to postal delivery, too few to competitive delivery services), which diminishes overall consumer welfare. *See id.* at 47-74.

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[30] There is a debate over whether this goal encompasses aggregate welfare or only consumer welfare. *See, e.g.,* Roger Blair & Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 Antitrust L.J. 471 (2012). The Commission adopted the latter view, JA552, but failed to recognize that newspapers and other sellers of advertising are consumers of the delivery services sold by the Postal Service.

The Commission also failed to realize that because of the postal and mailbox monopolies, one of the competitive responses that would normally be open to firms affected by the NSA — entry into the postal space by providing mailbox delivery — is foreclosed. This barrier to entry distorts the competitive process in both the delivery and sale-of-advertising markets. It forces firms to compete with the Postal Service and Valassis with one hand tied behind their backs. These market distortions undermine the Commission's conclusion that casualties of the NSA are simply less efficient competitors whose demise is the unavoidable byproduct of "fair competition." JA552.

III. The Postal Service Never Established that the NSA Will Be Made Available to Similarly Situated Mailers.

The Commission described the requirement in 39 U.S.C. § 3622(c)(10),[31] that NSAs must be made "available on public and reasonable terms to similarly situated mailers...," as "an essential part of the Commission's analysis." Order No. 1448, JA554. As special classifications are the exception to the rule that postal rates are offered on the same terms to all mailers, this requirement bars the Postal Service from granting preferential rates to one mailer unless it is demonstrated that similarly situated mailers would also qualify for such rates.

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[31] *See also* 39 C.F.R. § 3010.40(c).

The Postal Service's Request gave scant attention to this requirement:

> the Postal Service believes that the defining characteristics of Valassis are [i] its size, [ii] its nationwide distribution network, and [iii] its significant volume of Saturation Mail.... In offering a similar agreement to other customers, the Postal Service will look for all of these characteristics, as well as [iv] any other conditions that might affect a favorable contractual arrangement. [USPS Notice, JA7.]

The Commission apparently found the Postal Service's treatment of this requirement in its Request unsatisfactory, questioning whether the Postal Service's definition of the Valassis NSA in terms of Valassis' uniquely large size, scope, and volume — as well as additional unspecified criteria — would preclude any other mailers from being considered similarly situated. While expressing an openness to discuss follow-on NSAs with other mailers, the Postal Service response confirmed the Commission's suspicion: "Based on existing Postal Service data, no other mailers that have shared mail program volumes of 400 million pieces annually mailed to 50 percent of existing SCF areas are currently identified." USPS Response to ChIR No. 2, question 1, JA55-56.

Again, the Commission requested information from the Postal Service, and the Postal Service's next response did nothing to help it meet this requirement:

> Neither the contract itself nor the Postal Service's Notice were intended to interpret "similarly situated" for any hypothetical purpose....
>
> The terms of the Valassis NSA outline circumstances and conditions that both the Postal Service and Valassis have agreed would

> result in pricing incentives that would be beneficial to both parties. [USPS Response to ChIR No. 3, question 1, JA71-72.]

Importantly, the Postal Service did not withdraw its previous statement that there were no other comparable mailers. Instead, it dismissed the Commission's question as posing a mere hypothetical that need not be addressed.

Petitioner NAA characterized the Postal Service's response as "declin[ing] to address what could be a similarly situated mailer." NAA Initial Comments, JA169. Valpak argued that: "If no other mailers can meet the arbitrary standard it set, there could be no functionally equivalent NSAs. This is prima facie evidence that this NSA is unduly discriminatory." Valpak Initial Comments, JA197. In response, the Postal Service only repeated that "the Valassis NSA ... was never intended to interpret 'similarly situated' for any hypothetical purpose," that it "would be premature to speculate" about future agreements, and arguments about discrimination against similarly situated mailers "would not be ripe until the Postal Service [was] approached by a mailer and it were to deny a similarly situated mailer a functionally equivalent NSA." USPS Reply Comments, JA274.

Adoption of the Postal Service's view — that the "similarly situated" issue was only hypothetical in the context of the Valassis NSA — would transform the Commission's decision as to whether the statutory "similarly situated" requirement

had been met into a mere aspirational hope that the Postal Service would exercise discretion to grant like treatment to other mailers. By any standard, at the close of comments, the Postal Service had provided nothing from which the Commission could conclude that the Valassis NSA necessarily would be available to any similarly situated mailer.

Refusing to let the Valassis NSA fail just because the evidence did not support it, the Commission gave the Postal Service yet another chance to rehabilitate its case: "Please discuss the meaning of a 'similarly situated mailer' under 39 U.S.C. 3622(c)(10) as it relates to the Valassis NSA." NOI No. 1, JA313. In response to this third "mulligan," the Postal Service offered historical context and statutory construction arguments, and indicated that mailers smaller than Valassis might qualify for a future NSA — all the time reserving the discretion to decide which mailers those might be. JA430-437.

> It would be premature to pronounce definitively what core elements in the Valassis NSA would determine functional equivalency, prior to presentation or consideration of a specific contract proposal. Nevertheless, by examining the terms of the Valassis NSA, and the circumstances that gave rise to it, it is probably safe to conclude that a functionally equivalent agreement would focus on several elements. These would not depend on matching Valassis' size and operational characteristics to conclude that a mailer was similarly situated. [JA435.]

The Commission pronounced this fourth Postal Service response as adequate for its purposes.

> The Postal Service's Response significantly expands its definition of similarly situated mailers by enumerating more appropriate elements of functional equivalency.... It now states that to be functionally equivalent, an NSA must (a) be a rate incentive designed to induce new volume in the delivery of a segment of Standard Mail Saturation Flats, (b) produce new volume and not merely diversion from existing mail programs, and (c) lead to financial gain for the Postal Service. A mailer would be similarly situated if it could fairly negotiate a functionally equivalent NSA that would incorporate features designed to ensure that the above conditions are met, including limitations on source and content of advertising and prohibition against diversion....
>
> The Commission finds that the Postal Service's Response, which clarifies the terms on which agreements would be available to similarly situated mailers, resolves the objections presented by the commenters. [Order No. 1448, JA555-56.]

But this finding conflates the "similarly situated" requirement with the requirement that each similarly situated mailer be given an NSA that is the "functional equivalent" of the one negotiated with Valassis. Unless a mailer is initially established as being similarly situated, the Postal Service would not be required to offer an NSA that is the functional equivalent of the Valassis NSA. Based on the totality of the Postal Service's responses in the proceeding below, the Commission had no reasonable basis to find the Postal Service will offer a Valassis-type NSA to similarly situated

mailers.[32] This misreading of the statute resulted in a decision that is arbitrary and capricious.

The Postal Service's original description of the Valassis NSA remains accurate: "the defining characteristics ... are its size, its nationwide distribution network, and its significant volume of Saturation Mail." JA7. The Valassis NSA was tailored to meet the needs of one uniquely large national mailer and, even though the Commission was finally able to extract from the Postal Service a statement identifying possible terms of a "functionally equivalent" NSA, it never demonstrated which mailers are similarly situated, failing to meet the statutory requirement that the Valassis NSA will be made "available on public and reasonable terms to similarly situated mailers...." 39 U.S.C. § 3622(c)(10).

IV. The Commission Failed to Consider the Valassis NSA's Impact on Small Business.

When adding a new market-dominant product, the Commission must give "due regard" to its likely impact on "small business concerns." 39 U.S.C.

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[32] In the six months since the Valassis NSA was approved, there have been no similarly situated NSAs filed with the Commission. Indeed, the Postal Service has entered into only four follow-on NSAs since the first NSA in 2002, and has not entered into any follow-on NSA for a domestic market dominant product in over six years.

§ 3642(b)(3)(C).[33] The statute gives the Commission wide latitude in how it weighs these effects, but it may not ignore them. A "due regard" standard is deferential but not toothless. *See PAZ Securities, Inc. v. SEC*, 494 F.3d 1059, 1065-66 (D.C. Cir. 2007) (SEC's failure to review NASD's expulsion of securities dealer with "due regard for the public interest and the protection of investors" was an abuse of discretion and required remand); *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1153-58 (D.C. Cir. 1983). *See also PAZ Securities, Inc. v. SEC*, 566 F.3d 1172, 1175-76 (D.C. Cir. 2009).

In its Notice of Inquiry No. 1, the Commission invited small businesses to submit comments addressing both the extent to which they sold advertising potentially covered by the NSA and the NSA's likely impact. JA312-13. In response, NNA surveyed publishers of community newspapers and asked them to respond to a series of questions that tracked the Commission's request for information. NNA compiled the results in two electronic spreadsheets, one for NNA members and one for non-members. Because the exhibits contained customer information, NNA sought and received permission to submit them as non-public filings.[34] *See* JA358-70.

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[33] PAEA adopts the Small Business Act's definition of a "small business concern." *See* 39 U.S.C. § 3641(h); 13 C.F.R. part 121.

[34] At NNA's request, the Commission recently lifted the confidentiality designation for the exhibit containing NNA member responses, and the parties have

The spreadsheet containing survey responses from NNA members shows that of 233 respondents, 200 identified themselves as small businesses. It also shows that the vast majority of these respondents listed advertisers who were eligible for the Valassis NSA among their customers, expected the NSA would harm their businesses, and opposed the NSA. *See* NNA Member Survey Responses, *supra* note 34.

The Commission apparently never read these submissions. According to its opinion, "[n]o specific information was provided in response to [the Commission's] question," asking for "specific examples of small business concerns likely to be impacted by the Valassis NSA." JA558. The Commission asserted that only one small business, the Tifton Gazette, had commented on the NSA and that NAA was the only industry organization to address the question directly. JA558-59. The Commission then concluded, based on no competent record evidence and contrary to the survey results, that small businesses relied primarily on "regional, local, service related, and grocery advertisements," and that the NSA's impact on small businesses will therefore be "minimal." JA559-60.

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stipulated to its inclusion in the appellate record. Because of the size and format of the file, NNA will submit a motion for leave to file the survey results in native format as a supplemental appendix. The file is also available at http://www.prc.gov/Docs/86/86451/NNA%20Survey.xls.

Because the Commission failed to consider any of the evidence in the record relating to the NSA's impact on small businesses, the case should be remanded with instructions to give that evidence the "due regard" required by the statute.

V. The Valassis NSA Was Never Properly Presented to the Commission, because It Was Filed Pursuant to an Unlawful Delegation by the Governors.

A. The Valassis NSA was not properly initiated by the Governors.

Subject to the regulatory role of the Commission, the authority to establish postal prices and classifications is vested by Congress exclusively in the Governors of the Postal Service. *See* 39 U.S.C. § 404(b). In prior dockets, the Governors specifically approved each NSA contract and rates before the NSA was signed and submitted to the Commission.[35] However, the Valassis NSA was signed in April 2012, and was submitted by Postal Service management to the Commission, pursuant to a Governors' Resolution dated March 2011, 13 months prior, which delegated the Governors' authority to establish such classes and rates through NSAs "with Postal Service customers," subject to review and approval of prices by the "Chief Financial Officer (or his delegee(s))." That Resolution reserved to the Governors only oversight and revisory authority based upon (a) quarterly and annual reports required

[35] *See*, *e.g.*, Docket No. MC2011-19/R2011-3, Notice of the United States Postal Service (Jan. 14, 2011), Attachment A, http://www.prc.gov/Docs/71/71587/Not.USPS.DFSNSA.pdf.

of management by the resolution, and (b) reporting obligations otherwise required of management by postal regulations. *See* Governors Resolution No. 11-4, JA9-11. That delegation was unlawful and invalid.

An important distinction exists between the **Governors**, who are the nine Presidentially appointed, U.S. Senate-confirmed individuals, and the **Board of Governors**, which includes the nine Governors, as well as the Postmaster General and Deputy Postmaster General. *See* 39 U.S.C. §§ 102(2) and (3), 202(a). Although powers vested in the **Board of Governors** may be delegated, powers vested in the **Governors** may not be. *See* 39 U.S.C. § 402 ("Except for those powers, duties, or obligations specifically vested in the **Governors**, as distinguished from the Board of Governors, the **Board** may delegate the authority vested in it to the Postmaster General...." Emphasis added.). For this reason, the Governors never validly authorized Postal Service management to sign the Valassis NSA, nor to create the NSA as a new product, nor to set the prices that would be charged under the NSA, nor to set the effective date. The NSA even specified that it would go into effect immediately after Commission approval, without requiring any action of the Governors. JA17.

Valpak argued below that the Governors' Resolution was an invalid delegation of powers reserved solely to the Governors. *See* Valpak Initial Comments, JA176-

179. The Postal Service's response conceded that the Governors' powers under section 404(b) cannot be delegated, but disagreed about whether the Governors' Resolution constituted a delegation:

> Valpak correctly cites section 404(b) and Chapter 36 of Title 39, United States Code, which requires the Governors to establish the mail classification and rates corresponding to Domestic Market-Dominant Agreements. **The Postal Service shares Valpak's view that this authority cannot be delegated**. However, the Governors did not delegate such authority to Postal Service management. [USPS Reply Comments, JA275 (emphasis added).]

The Postal Service then explained that the purpose of the Resolution was to authorize management to take action on the authority of the Governors — while denying that such authorization was, in fact, a delegation:

> The purpose of Governor's Resolution No. 11-4 was to eliminate the need for a specific resolution with each and every contract. Through the Resolution, the Governors **authorized** the Postal Service to negotiate service agreements so long as the prices established in those agreements conformed to the requirements of [law]. The Resolution further gives **senior management authorization** to prepare any necessary product description, including text for inclusion in the Mail Classification Schedule, and to present such product description to the Commission so long as the product meets the requirements of the PAEA. [*Id*., JA275-276 (emphasis added).]

The Postal Service asserts that the resolution merely "authorized" NSAs consistent with law, that the Governors were "presented the terms and prices contained in the Valassis NSA " but no official action was required of or taken by the

Governors on this particular NSA. Reply Comments, p. 20, JA275-76. The Postal Service overlooks the undeniable fact that this Resolution vests in management both the exercise of judgment as to whether the NSA prices "conformed to the requirements of [law]", and the decision as to whether the NSA "meets the requirement of PAEA" — the very essence of the powers exclusively vested by Congress in the Governors (subject, of course, to the role of the Commission).[36] *See* 39 U.S.C. § 402.

In its decision, the Commission dismissed Valpak's argument in a footnote:

> Valpak also claims that the NSA was not specifically approved by the **Board of Governors**, and therefore invalidly delegated. Valpak Comments at 3-6. The Postal Service responds by stating "the Governors did authorize the Postal Service to enter into this NSA and reviewed the specific terms and prices that would be charged prior to filing the Notice." Postal Service Comments at 19. It correctly references Governors' Resolution No. 11-4, Attachment A to the Request, which obviates the need for a separate specific authorization for every contract consistent with that resolution. *Id.* [Order No. 1448, JA530 (emphasis added).]

The Commission completely misstated Valpak's argument as if it applied to powers delegated by the "Board of Governors." Although 39 U.S.C. § 402 does authorize the Board of Governors to delegate, that section specifically excludes "the powers,

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[36] The Commission gave significant deference to the Postal Service filing in approving the NSA, but Resolution 11-4 reveals that deference actually was being given to Postal Service management, not to the Governors. *See* Section I, *supra*.

duties, or obligations specifically vested in the Governors."[37] In misstating and rejecting Valpak's argument, the Commission sanctioned a practice by the Governors in violation of 39 U.S.C. § 404(b) which undermined the very "system for regulating rates and classes" (39 U.S.C. § 3622(a)) which it devised and oversees, rendering its decision arbitrary and capricious.

B. Important policy reasons support the limit on delegation.

Congress had important reasons for specifically denying the Governors a power of delegation. The nine Governors are appointed by the President and confirmed by the United States Senate. 39 U.S.C. § 202(a)(1). To ensure that the public interest remains paramount, the Governors must be "chosen solely on the basis of their experience in the field of public service, law, accounting or on their demonstrated ability in managing organizations or corporations ... of substantial size; except that at least 4 of the Governors shall be chosen solely on the basis of their demonstrated" managerial ability. *Id.* Not more than five of the nine Governors may

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[37] The Governors' Resolution also violated the Bylaws of the Board of Governors. Among the "matters ... reserved for decision by the Governors" which cannot be delegated to the Postmaster General according to the Bylaws are an "Authorization of the Postal Service to **adjust the rates and fees** for market dominant products under 39 U.S.C. 3622" and an "Authorization of the Postal Service to request that the Postal Regulatory Commission, under 39 U.S.C. 3642, **change the lists of market dominant and competitive products**...." 39 C.F.R. § 3.4, 3.4(e) and (f) (emphasis added). *See also* 39 C.F.R. § 1.2. The Valassis NSA implicates both of those powers. *See* USPS Notice, JA1.

be "adherents of the same political party," to the end that the "Governors shall represent the public interest generally...." *Id.* In short, "[t]he Governors shall not be representatives of specific interests using the Postal Service...," but of the American people. *Id.* The Board of Governors also includes a Postmaster General and a Deputy Postmaster General, who are appointed by and can be removed by the Governors. 39 U.S.C. § 202(c)-(d). The Postmaster General and Deputy Postmaster General report to the Governors, but the Governors report to Congress. The full-time managers of the Postal Service, once removed from Congressional accountability, might be motivated by institutional interests that would make them less sensitive to statutory constraints. Accordingly, Congress charged the Governors with a non-delegable power to sign and submit an NSA to the Commission in order to provide a public interest check on interests of individual mailers and the Postal Service.

The Postal Service sought to justify the delegation by arguing that the Commission "owes the Governors deference in such matters of internal Postal Service governance." USPS Reply Comments, JA277. Deference may be owed with respect to matters of purely internal governance, but the statutory duty vested in the Governors to ensure that products and prices comply with the law is more than an "internal" matter. It bears on the Commission's duty to conform the ratemaking process to law. Because the Governors' delegation was unlawful, the NSA proposal

was never properly before the Commission. Thus, the Commission never had jurisdiction to review it, rendering its decision a nullity.

CONCLUSION

For the foregoing reasons, the Court should vacate the Commission's order and remand the matter to the Commission.

Respectfully submitted,

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February 26, 2013

CERTIFICATE OF COMPLIANCE

It is hereby certified, pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, that the foregoing brief complies with the type-volume limitation of this Court's order of January 2, 2013 because it contains 8,697 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 13.0.0.568 in 14-point Times New Roman.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEWSPAPER ASSOCIATION OF AMERICA,	)	
Petitioner,	)	
v.	)	No. 12-1367
POSTAL REGULATORY COMMISSION,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2013, the foregoing Brief of Intervenors National Newspaper Association, Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. was served upon counsel for the following parties and intervenors by the Court's Case Management/Electronic Case Files system:

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