

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1

FURTHER RESPONSE OF THE UNITED STATES
POSTAL SERVICE TO ORDER NO. 74, AND NOTICE OF
FILING OF SWORN STATEMENTS
(June 23, 2008)

On April 29, 2008, the Commission issued Order No. 74, in response to an earlier motion by the Public Representative to compel the Postal Service to provide additional information on matters alleged to be at issue in this proceeding. In Order No. 74, the Commission agreed with the Public Representative that the scope of this proceeding was broader than originally contemplated by the Postal Service. Consequently, Order No. 74 directed the Postal Service to provide a variety of additional materials by June 9, 2008. On May 28, 2008, the Commission in Order No. 77 provided additional clarification of Order No. 74.

Broadly speaking, the material requested in Order No. 74 can be split into two categories. The first category is a complete listing and description of, and FY06 and FY07 annual revenue for, each activity that generates revenue and is not currently classified as a postal service, regardless of the statutory authority claimed for such activity. The second category is material intended to support whatever future treatment (e.g., continued as a "grandfathered" nonpostal service, reclassified as a postal service, etc.) the Postal Service proposes for these activities. On June 9, the Postal Service filed its initial response to Order No. 74, intended to provide the first category of

materials – identification of the universe, so to speak, of revenue generating activities that are not currently regulated by the Commission. Also on June 9, the Postal Service filed a motion requesting an extension of time, until June 23, 2008, to file the second category of materials requested by Order No. 74. On June 11, 2008, the Commission issued Order No. 82, in which it granted the requested extension until June 23. The Postal Service hereby provides the second category of materials requested by Order No. 74. Those materials consist largely of sworn statements, and the Postal Service also hereby gives notice of filing the following accompanying sworn statements:

Statement of Patrick R. Donahoe

Statement of Thomas J. Foti

Statement of Margot A. Meyer

Statement of Pranab M. Shah

Statement of Alice VanGorder

DISCUSSION

In relevant part, Order No. 74 seeks the following material with respect to revenue-generating activities which were identified by the Postal Service in its June 9 filing as “not currently classified as postal services”:

For those it wishes to continue, the Postal Service should provide a sworn statement by a knowledgeable person (or persons) addressing the public need for each such service and such other matters, if any, the Postal Service deems relevant (collectively, Postal Service statement).

With respect to nonpostal services that it now wishes to have classified as postal services, the Postal Service is directed to file a list of such services ... accompanied by a sworn statement by a knowledgeable person (or persons) in support of and justifying the proposal.

Order No. 74 (April 29, 2008) at 14. The Postal Service wishes to continue all of the activities and programs identified in its June 9 filing. Order No. 74, however, obviously

contemplated that, among those it wishes to continue, the Postal Service is to identify separately those that it wishes to have classified as postal services, as distinct from those it wishes to continue on some other basis. The Postal Service previously filed a list of offering that it wishes to classify as postal services as part of Attachment One to its April 1, 2008, Response to the Public Representative's Motion to Compel. That list is as follows:

- Address Management Services
- ReadyPost
- International Money Transfer Services
- Greeting Cards

The Postal Service now wishes to add Customized Postage to the list of offerings it proposes to classify as postal services. Therefore, sworn statements providing the factual backgrounds supporting and justifying the proposal to have each of these classified as a postal service are provided by Tom Foti (Customized Postage), Margot Meyers (ReadyPost and Greeting Cards), Pranab Shah (International Money Transfer Service), and Alice VanGorder (Address Management Services).

With respect to those revenue-generating activities which the Postal Service wishes to continue, but does not wish to have classified as postal services, there seems to be a clear difference of opinion between the views of the Postal Service, and the preliminary views of the Commission expressed in Order No. 74.¹ In the view of the Postal Service, the "grandfathering" procedures were intended to apply only to those services which were previously assumed to be authorized as "nonpostal services" under

¹ Order No. 77 (May 28, 2008) clarified that the views expressed in Order No. 74 were preliminary, and that the additional facts received in response to Order No. 74 would be used to evaluate which activities are services that will ultimately be subject to section 404(e).

previous subsection 404(a)(6) of title 39. Section 102 of the PAEA specifically repealed previous subsection 404(a)(6), but immediately followed that repeal with the establishment of the “grandfathering” procedures now appearing in section 404(e)(3) of title 39. See Attachment One to this pleading, which reproduces Section 102 of the PAEA. The structure of that section of the PAEA provides a clear indication of the limited intended scope of the “grandfathering” procedures contained within section 404(e): services for which enabling authority is repealed in the first portion of section 102 can nonetheless be reviewed and maintained by following the procedures specified in the second portion. Strongly reinforcing the limited scope of section 404(e) is the fact that the PAEA, although expressly repealing previous section 404(a)(6), made no changes in other provisions of the law granting the Postal Service other general and specific powers under which many revenue-generating activities have historically been (and currently are) conducted.

Order No. 74, on the other hand, appears to contemplate that perhaps all revenue-generating activities or programs that are neither currently classified as postal services, nor proposed to be classified as postal services, must be authorized to continue through the “grandfathering” process established by 39 U.S.C. § 404(e)(3). Order No. 74 at 7-12. This conclusion is apparently the consequence of viewing the Postal Service’s activities as coextensive with two product lists (market dominant and competitive), with the result that every revenue source must be on one of the two lists. The Postal Service does not dispute that there are only two product lists, but submits that those lists, and the costs and revenues associated with the products thereon, are subsets of the two funds created by the PAEA: the Postal Service Fund, and the

Competitive Products Fund. Rather than attempting to guarantee transparency and public accountability for various revenue-generating activities through a procrustean exercise of assigning them to product lists and subjecting them to regulatory pricing requirements plainly not designed with such activities in mind, the Postal Service believes that the PAEA's goal of transparency was intended to be achieved through the Commission's unquestioned authority to specify the format and content of financial reports. That is, all revenue must be assigned to either the Postal Service Fund or the Competitive Products Fund, and would be reflected in the financial reports for these two funds.²

In accordance with Order No. 74, the Postal Service is providing (or already has provided) sworn statements intended to cover all of those activities and programs identified in its June 9 filing which it does not propose to classify as postal services. Within that set of activities and programs, however, the Postal Service wishes to distinguish clearly between those which it requests be treated under the "grandfathering" procedures of 39 U.S.C. § 404(e)(3), and those which it believes are offered under a grant of authority other than previous section 404(a)(6), are thus outside the scope of current section 404(e)(3), and thus may continue without review pursuant

² For example, if the Postal Service earns investment income on money in the Competitive Products Fund, it would be entirely appropriate to treat the yield from that particular investment activity as similarly "competitive," and assign its proceeds to the Competitive Products Fund. By and large, however, most of the revenues generated by the types of programs and activities described in the June 9 filing would reasonably flow into the Postal Service Fund.

to the instant “grandfathering” proceeding.³ The activities which the Postal Service indicated earlier in this proceeding it wished to have “grandfathered” are:

- Passport Photo Service
- Photocopying Service
- Notary Public Service
- Stored Value Cards
- Officially Licensed Retail Products (OLRP)

Each of these offerings was discussed in detail in the Statement of Tina Lance, filed on March 19, 2008. In addition, the Postal Service now proposes to add the following offering to the list of those it wishes to be “grandfathered”:

- Electronic Postmark (EPM)

³ One may question why the Postal Service is compelled to pursue such a distinction in light of the fact that, whether an activity is grandfathered by the Commission or authorized under a separate statutory grant of authority, either way, the Postal Service may continue to engage in that activity. Very briefly, there are three reasons why the distinction is important to maintain, notwithstanding that either branch could ultimately constitute a path which would allow the Postal Service to continue. First, the Postal Service rejects the suggestion that the Commission has the authority under section 404(e) to cause the Postal Service to terminate those activities which have always been authorized by provisions other than the previous provision regarding “nonpostal” services. The Postal Service’s authority to engage in such activities continues regardless of what the Commission does or does not do between now and December 20, 2008. If section 404(e) were intended to allow the Commission to revoke legislative grants of authority established by other portions of title 39, that section would arguably run afoul of Constitutional prohibitions against “improper delegation of legislative power.” Second, the provision in revised section 3662(a) regarding the Commission’s authority to entertain complaints was carefully crafted to limit the Commission’s complaint jurisdiction, and that jurisdiction does not extend to activities conducted by the Postal Service under portions of the statute other than those specified therein. Acknowledging the Commission’s authority to “grandfather” certain other activities could perhaps be interpreted as acquiescence to the Commission’s ability to entertain complaints regarding them, which would be inconsistent with the plain language of the statute. Third, as noted above, if the Commission “grandfathered” these activities, then pursuant to section 404(e)(5), it would need to determine how they should be regulated, and the Postal Service appropriately prefers to be able to continue to manage these portions of its business without the encumbrances and uncertainty of inapplicable regulatory constraints. It makes no sense to attempt to classify many of these revenue-generating activities as either “market dominant” or “competitive.”

EPM is discussed in the sworn statements of Tom Foti.

Beyond the offerings listed above, however, the Postal Service maintains that the remaining activities and programs identified in its June 9 filing are offered under a statutory grant of authority other than previous section 404(a)(6). The explicit repeal of previous section 404(a)(6), therefore, had no effect on the Postal Service's authority to conduct these activities and programs. Nonetheless, in an effort to be fully responsive to Order No. 74, the Postal Service is providing further statements to discuss the rationale behind its conduct of these activities and programs. These statements address, for example, how the public benefits from these activities, either directly or indirectly. Discussions along these lines appear in the sworn statements of Alice VanGorder (Movers Guide) and Patrick Donohoe (all activities and programs not discussed elsewhere).

In many instances, however, it is difficult, if not impossible, to discuss coherently why the private sector could not provide a suitable alternative to conduct of the activity in question by the Postal Service. For example, if the activity is the transfer of a property interest from the Postal Service to private sector firms or individuals (e.g., the sale of surplus postal vehicles), logic dictates that the private sector cannot perform this function, as the underlying property interest resides with the Postal Service. (This is not to suggest that the private sector could not perhaps aid the Postal Service as an intermediary in such transactions, but no amount of private sector involvement would eliminate the ultimate generation of revenue accruing to the Postal Service in exchange for the surrender of some portion of *its* property rights.) Furthermore, if the activity is inherently governmental (e.g., FOIA or Privacy Act Copying Fees), it would be

nonsensical to suggest that the private sector exists as a viable alternative provider. Indeed, the total incongruity of attempting to apply the factors of section 404(e)(3) to most of these activities is further proof of the lack of any Congressional intent to include those activities within the scope of section 404(e).

At this time, for those revenue-generating activities other than those it wishes to be classified as postal or “grandfathered” as nonpostal, the Postal Service thus provides the requested sworn statements purely for purposes of complying with Order No. 74. Conversely, the Postal Service recognizes that the Commission may reach different conclusions with respect to some of these activities, and may determine that some are subject to section 404(e). As noted above, the Postal Service currently intends to continue to engage in all of the activities identified in its June 9 filing. If the Commission finds that the sworn statements provided by the Postal Service (along with any sworn statements submitted by other parties on July 30, 2008) constitute adequate justification pursuant to section 404(e) for continuing certain activities in addition to those for which the Postal Service has expressly requested such a finding, it may be beneficial for the Commission to note those conclusions. For each individual activity regarding which such a conclusion is stated, it could at least resolve the threshold issue of whether or not the Postal Service’s authority to continue to engage in that activity after December 20, 2008 was still open to question. Unresolved, of course, might be the conditions under which those activities could be offered (e.g., administered as under current procedures or regulated by the Commission). Nevertheless, there would be value in knowing, on the one hand, those activities which the Commission concluded were sufficiently justified to continue and, on the other hand, those activities regarding which

the Commission had reached the opposite conclusion. In weighing its options, the Postal Service could consider these findings, as well as its own views of its inherent statutory authority, to determine how best to proceed.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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June 23, 2008

SEC. 102. POSTAL SERVICES.

(a) IN GENERAL.—Section 404 of title 39, United States Code, is amended—

(1) in subsection (a), by striking paragraph (6) and by redesignating paragraphs (7) through (9) as paragraphs (6) through (8), respectively; and

(2) by adding at the end the following:

“(c)(1) In this subsection, the term ‘nonpostal service’ means any service that is not a postal service defined under section 102(5).

“(2) Nothing in this section shall be considered to permit or require that the Postal Service provide any nonpostal service, except that the Postal Service may provide nonpostal services which were offered as of January 1, 2006, as provided under this subsection.

“(3) Not later than 2 years after the date of enactment of the Postal Accountability and Enhancement Act, the Postal Regulatory Commission shall review each nonpostal service offered by the Postal Service on the date of enactment of that Act and determine whether that nonpostal service shall continue, taking into account—

“(A) the public need for the service; and

“(B) the ability of the private sector to meet the public need for the service.

“(4) Any nonpostal service not determined to be continued by the Postal Regulatory Commission under paragraph (3) shall terminate.

“(5) If the Postal Regulatory Commission authorizes the Postal Service to continue a nonpostal service under this subsection, the Postal Regulatory Commission shall designate whether the service shall be regulated under this title as a market dominant product, a competitive product, or an experimental product.”.

(b) CONFORMING AMENDMENTS.—Section 1402(b)(1)(B)(ii) of the Victims of Crime Act of 1984 (98 Stat. 2170; 42 U.S.C. 10601(b)(1)(B)(ii)) is amended by striking “404(a)(8)” and inserting “404(a)(7)”.

TITLE II—MODERN RATE REGULATION**SEC. 201. PROVISIONS RELATING TO MARKET-DOMINANT PRODUCTS.**

(a) IN GENERAL.—Chapter 36 of title 39, United States Code, is amended by striking sections 3621 and 3622 and inserting the following:

“§ 3621. Applicability; definitions

“(a) APPLICABILITY.—This subchapter shall apply with respect to—

“(1) first-class mail letters and sealed parcels;

“(2) first-class mail cards;

“(3) periodicals;

“(4) standard mail;

“(5) single-piece parcel post;

“(6) media mail;

“(7) bound printed matter;

“(8) library mail;

“(9) special services; and

“(10) single-piece international mail,

Deadline.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document in accordance with Section 12 of the Rules of Practice and Procedure.

Eric P. Koetting

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