

BEFORE THE
UNITED STATES POSTAL REGULATORY COMMISSION
WASHINGTON, D.C.

Report to Congress and the President on
Docket No. PI2009-1 Universal Postal
Service and the Postal Monopoly

Docket No. PI2009-1

COMMENTS OF
FEDERAL EXPRESS CORPORATION

M. Rush O'Keefe, Jr.
FEDERAL EXPRESS CORPORATION
Senior Vice President and General Counsel
Steven H. Taylor
FEDERAL EXPRESS CORPORATION
Vice President, Regulatory
3620 Hacks Cross Road
Memphis, TN 38125

Communications with respect to this document should be sent to:

Nancy S. Sparks
FEDERAL EXPRESS CORPORATION
Managing Director, Regulatory Affairs
1700 Pennsylvania Avenue, NW
Suite 950
Washington DC 20006
Tel: 202 628-0679
Fax: 202 628 0654
nssparks@fedex.com

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Federal Express Corporation (FedEx) appreciates the opportunity to comment upon the Commission's "Report to Congress and the President on Universal Postal Service and the Postal Monopoly" pursuant to Order No. 152 (December 19, 2008) (the "Report").

We applaud the decision of Congress—in the Postal Accountability and Enhancement Act ("PAEA") of 2006—to require detailed reports on key elements of postal policy from the Federal Trade Commission (differences in the legal treatment of public and private delivery services), the Postal Regulatory Commission (universal service and the postal monopoly), and the Government Accountability Office (institutional framework for the Postal Service). Collectively these reports should provide Congress and the public a solid analytical basis for what we believe will be a necessarily ongoing process of reform of national postal policy. The Report represents an extensive and important contribution to this fund of knowledge. Above all, therefore, we would like to commend the Commission for this solid work.

As required by the PAEA, the Report touches upon a broad array of long-term public policy issues relating to the development of universal postal service and legal monopolies over postal services and access to private mailboxes. During Congressional deliberations leading up to the PAEA, Frederick W. Smith, Chairman, President, and CEO, FedEx Corporation, described in detail FedEx's views on how national postal policy could be and should be transformed to better meet the needs of the public in the twenty-first century. Much of what Mr. Smith said then remains highly relevant to the topics raised in the Report. Taken as a whole, Mr. Smith's testimony embodies our considered approach toward postal reform. In the few weeks since the Report was issued, it has not been possible (and probably would not be useful) to try to reproduce all those views in a context of a comment on the Report. We would, however, respectfully encourage the Commission to review Mr. Smith's earlier testimony from this perspective and will be glad to provide copies. For current purposes, we will focus the two issues which we believe to be overwhelming importance.

1 The Commission may not, consistent with due process, adopt a highly questionable interpretations of the scope of criminal laws without, at a minimum, giving affected parties due notice and a full opportunity for comment.

The laws creating the postal monopoly and mailbox monopoly are criminal laws, essentially 18 U.S.C. §§ 1696 and 1725, respectively.

For more than three decades, private carriers and their customers have been periodically threatened by lawyers and inspectors of the Postal Service with charges of violating the postal monopoly law, 18 U.S.C. § 1696, based on the Postal Service's own interpretations of that law. FedEx has repeatedly protested such conduct to Congress and the Postal Service without gaining a final resolution one way or the other because of the

political sensitivity surrounding the postal monopoly. In recent years, the Postal Service has limited monopoly-related activities by the Postal Inspection Service but maintained the right to resume at any time by persisting in its broad interpretation of the postal monopoly law. FedEx has carefully researched the postal monopoly and firmly believes the Postal Service's interpretation of the postal monopoly law is incorrect as a matter of law and contrary to the public interest. Nonetheless, FedEx's position has always been that it has no wish or desire to litigate against the Postal Service unnecessarily. So long as the Postal Service does not press the issue with FedEx or its customers, we have been willing to agree to disagree.

The scope of the mailbox monopoly, 18 U.S.C. § 1725, is likewise a matter of continuing concern to FedEx. In this case, the scope for dispute is narrower because the law is clearer. Nonetheless, the inability of the FedEx to deliver non-monopoly items to the mailboxes of consenting householders raises our costs of operation. The result is waste. Our customers pay higher rates than necessary. Our trucks are on street for longer than necessary. Small packages that could be delivered to the security of the mailbox must often be left in a more exposed position at the addressee's door. Any extension of mailbox monopoly beyond the narrow requirements of Congress is therefore a matter for concern.

While the findings and recommendations of the Commission on pages 4 and 5 make no reference to the scope of 18 U.S.C. §§ 1696 and 1725, tucked away on pages 36 and 37 are statements that appear to put the Commission on record in support of questionable and controversial interpretations of these provisions. On page 36, the Report declares:

As a practical matter, the postal monopoly, as applied on December 19, 2006, now has the authority of statutory law. In effect, the Postal Service's administrative determinations, suspensions, and regulations have been adopted by Congress as part of its formulation of the postal monopoly.

On page 37, the Report states under the heading "the current mailbox monopoly":

As of December 19, 2006, the statutory basis of the mailbox monopoly was provided by the 1934 mailbox statute, and by section 403 of the Postal Reorganization Act.²³ *The pertinent rules and regulations governing the mailbox monopoly on December 19, 2006, were set forth in part 508 of the Domestic Mail Manual.* The PAEA made no changes to the mailbox monopoly.

As of December 19, 2006, Postal Service regulations declared that its "letter" monopoly prohibited private carriage of such seemingly non-letter items such as blueprints, legal briefs, payroll checks, driver's licenses, microfiche records, price stickers for new cars, football and airline tickets, posters, credit cards, newspaper and magazine clippings, as computer tapes. The same regulations stated that (the?)Postal Service could establish and levy a fine on customers of private carriers for violation of the postal monopoly, a fine *in addition to* criminal penalties adopted by Congress (with appropriate procedural protections). Indeed, Postal Service regulations declared that the Postal Service could try parties accused of violating the monopoly its own administrative courts.¹ As of the same date, Postal Service regulations declared that "no part of a mail receptacle may be used to deliver any matter not bearing postage, including items or matter placed upon, supported by, attached to, hung from, or inserted into a mail receptacle." The mailbox monopoly law itself, however, refers only to any person who

¹See, e.g., Report, Appendix C at 195-98, and sources cited there.

"deposits any mailable matter . . . in any letter box . . . with intent to avoid payment of lawful postage thereon."

One does not have to be a lawyer to appreciate that, on December 19, 2006, Postal Service regulations purporting to "interpret" 18 U.S.C. §§ 1696 and 1725 adopted what is, to say the least, a broad view of the law.

While reasonable persons might differ on precisely what was the scope of these monopolies in effect on December 19, 2006, the Report seem to state as a firm conclusion that all of the Postal Service's regulations of December 19, 2006, *are* the current law. One can easily imagine the Commission or the Postal Service citing such statements as definitive precedent in the future.

What is the specific legal basis for the Commission's statements? Neither statement is supported by the detailed legal analysis of Appendix C to the Report. Is the Commission interpreting the original intent of Congress? Is the Commission construing subsequent case law? Has the Commission ruled that Congress *tacitly* ratified administrative practice notwithstanding that "tacit ratification" is a notoriously slippery legal slope? How can such conclusions be reconciled with the limitations on the Postal Service's rulemaking authority enacted by PAEA?

The oft-expressed position of FedEx is that the pre-PAEA regulations of the Postal Service interpreting the postal monopoly, and to a lesser extent the mailbox monopoly, exceeded the statutory authority granted by Congress in selected but fundamental respects. This is certainly not solely the view of FedEx. Over the years, diverse parties ranging from a public counsel for the Postal Rate Commission to the staffs of the Department of Justice, the Federal Trade Commission, and the Interstate

Commerce Commission to legal scholars such as George Priest (author of the best known history of the postal monopoly) have come to similar conclusions. Indeed, the Postal Service's tendency to overreach its rulemaking authority over the postal monopoly was the very reason why Congress repealed this authority in the PAEA.

It is not apparent to us whether the Commission is in fact authorized to adopt legal conclusions with respect to the scope of provisions of the criminal law such as 18 U.S.C. §§ 1696 and 1725. The Commission's jurisdiction seems at first blush to be limited authority to implement the *exceptions* to the criminal law set out in 39 U.S.C. § 601. Yet if the Commission is determined to adopt any sort of ruling on the current scope of the postal monopoly and the mailbox monopoly—to make any statement that the Commission or the Postal Service might rely upon in the future— then we urge the Commission to initiate a specific proceeding that is clearly directed to this end. We urge the Commission give all affected parties a full and complete opportunity to brief all the complex range of issues that would be presented in such a proceeding. And we urge the Commission to set out its findings with specific legal bases for each. Keeping in mind that these laws may have consequences for FedEx and its customers, we believe that due process requires no less.

2 The Commission should firmly recommend termination of the annual appropriations rider that bars the Postal Service from making reasonable and necessary changes in service levels.

On January 28, 2009, Postmaster General asked Congress to end annual appropriations bill rider that requires the Postal Service to deliver mail six days each week. The request of the Postmaster General is timely, meritorious, and important to the development of a universal postal service suited to the needs of the nation in the twenty-

five century. We urge the Commission to support the request of the Postmaster General and recommend that Congress terminate the annual appropriations rider limiting changes in universal service.

The annual appropriations rider includes two key restrictions on the Postal Service's ability to make needed adjustments in the levels of universal service. Since 1980 (i.e., the appropriations bill for fiscal 1981), Congress has included a prohibition against delivery frequency in every postal appropriations act or budget reconciliation act. Since at least 1985, these prohibitions have also absolutely forbidden consolidation or closure of "small rural and other small post offices."

The Commission's Report amply demonstrates that these provisions are holdovers from another era, one that bears no reasonable resemblance to the present. The appropriations riders were originally intended as temporary, one-year solutions of immediate, government wide budget issues. At that time, the annual volume of mail was about 468 items per capita. That is far below current levels, notwithstanding the extraordinary declines recently experienced by the Postal Service (and all other delivery services). At the same time, the country was vastly more dependent on postal communications for business and social relations than today. In terms of postal and delivery services, the early 1980s was, quite simply, a different world.

In 2003, the President's Commission on the U.S. Postal Service strongly recommended an end to the annual appropriations rider that limit reasonable adjustments in service levels. Similarly, in 2004, FedEx's chairman, Frederick W. Smith, testified to Congress,

The gale force winds reshaping global commerce are blowing at Postal Service headquarters no less than at our own. The implications of these

forces must be faced squarely by Congress, mailers, and the management and employees of the Postal Service. . . . When the Postmaster General says, "Management needs the flexibility to manage" he is not repeating a pious nostrum; he is identifying the basic tool necessary for the survival of the Postal Service."

The Commission's own national survey indicates that today more than two-thirds of the population would not be affected very much or at all if the Postal Service delivered only five days a week; only thirteen percent of respondents thought five-day service would affect them a great deal.¹

The Postmaster General has courageously raised a politically sensitive but crucially important issue. A 25-year-old, absolute bar on changes in service levels is not sensible or responsible government. Section 702 of the PAEA asked the Commission to include "any recommended changes to universal service and the postal monopoly as the Commission considers appropriate." We urge the Commission to support the Postmaster General's initiative.

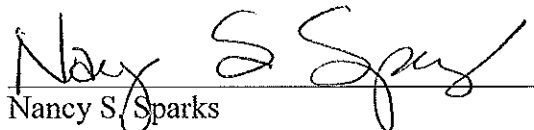
At the same time, however, FedEx is emphatically not recommending an immediate or precipitous reduction in the level of universal postal service. Nor are we suggesting that the Postal Service should be restricted in any respect from providing six (or seven) day per week service where it considers such service is reasonable and appropriate. Nor are we urging that the Postal Service be granted unchecked discretion to reduce service in cases where six-day per week service is truly needed.

We are urging only that the Commission support the Postmaster General's call for an end to the annual appropriations rider. This is a necessary first step in developing a

¹Report, Appendix G at 9.

more flexible regulatory regime for ensuring an appropriate level of universal service for the American people. At the same time, we encourage the Commission to work with Congress to develop well-designed, flexible tools to protect the public interest. The Commission's Report has already identified several possible approaches. No doubt there are others. But until the appropriations rider has ended, there will little incentive to find a better way.

Respectfully submitted



Nancy S. Sparks
FEDERAL EXPRESS CORPORATION
Managing Director, Regulatory Affairs
1700 Pennsylvania Avenue, NW
Suite 950
Washington DC 20006
Tel: 202 628-0679
Fax: 202 628 0654
nssparks@fedex.com

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