

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

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1

**REPLY OF POSTCOM *ET AL.* TO DECEMBER 12 RESPONSE OF USPS
IN OPPOSITION TO MOTION TO SEVER**

The Association for Postal Commerce, Alliance of Nonprofit Mailers, Magazine Publishers of America, Inc., National Postal Policy Council, Parcel Shippers Association and The Direct Marketing Association (“PostCom *et al.*”) respectfully submit this reply to the December 12 response of the Postal Service to the December 5 motion of the undersigned parties to (1) sever consideration of the Postal Service’s October 17, 2008 filing of Proposed Mail Classification Schedule Language for Four Products it Requests Should be Added to the Product Lists As Postal Services, and (2) establish a separate docket for consideration of the proposed new product listing pursuant to Part 3020 Subpart B of the Commission’s rules. The Postal Service’s December 12 response does not – and cannot – dispute the key facts:

(1) No product may be added to the list of competitive or market dominant products without the approval of the Commission. 39 U.S.C. § 3642.

(2) The Commission may not approve the addition of any product to the list of competitive or market dominant products without considering the factors enumerated in 39 U.S.C. § 3642(b). These factors include:

- the extent of the Postal Service’s market power over the product (§ 3642(b)(1));

- the availability and nature of enterprises in the private sector engaged in the delivery of the product (§ 3642(b)(3)(A));
- the views of mailers (§ 3642(b)(3)(B));
- the likely impact of the proposed classification on small businesses (§ 3642(b)(3)(C)).

(3) The Postal Service may not *request* that Commission add any product to the list of competitive or market-dominant products without taking the following steps:

- filing a notice of the request with the Commission (§ 3642(d)(1));
- publishing the notice in the Federal Register (*id.*);
- including in the notice information sufficient to find that the proposed classification satisfies the criteria of 39 U.S.C. § 3642(b).
- if the Postal Service seeks to have the product classified as competitive, the notice must also establish that the product covers its attributable costs and is not subsidized by other products (39 U.S.C. § 3642(d)(1), incorporating 39 U.S.C. § 3633(a)).

See also Rule 3020.32 (specifying the documentation that the Postal Service must provide in support of any proposed revision to the lists of market dominant or competitive products); Rule 3020.31(e) (further directing that this documentation must be provided *as part of the Postal Service's request*).

(4) The Postal Service has not begun to satisfy 39 U.S.C. § 3642 and Rule 3020.32.

The following items are particularly conspicuous by their absence (PostCom *et al.* Reply Brief at 9-14):

- The full scope and nature of each of the specific address management products which are provided by the Postal Service.
- The value of each product offering.
- The extent of the Postal Service's market power in the provision of each product.
- The nature of the enterprises in the private sector that offer similar, related, or licensed services.

- The extent to which the product is used as an input by private competitors of the Postal Service.

The Postal Service, in its December 5 response, seizes upon a parade of its earlier pleadings in an effort to create the impression that the Postal Service has already satisfied the statutory in this docket. *See* USPS Response at 1-3 (alluding to filings of March 19, April 1, June 23, September 10 and October 17, 2008). Even a cursory reading of those filings, however, demonstrates that most of them are merely statements of the Postal Service’s intention to continue Address Management Services as postal (rather than nonpostal) services, and assertions that the Postal Service “planned to make appropriate filings concerning the services” at some point in the future. USPS Response at 1-2. With respect to the specific question at issue here – whether these services are competitive or market dominant – the Postal Service has never followed through. The most detailed description of “Address Quality and Support” and “Move Update” offered by the Postal Service, a four page description appearing on pages 5-8 of the June 23 Statement of Alice VanGorder, offers no discussion of market dominance and competition at all.¹

(5) The Postal Service has not requested a waiver of 39 U.S.C. § 3642 and Rule 3020.32, and the Commission has not granted such a waiver—in Order No. 74 or anywhere else. Indeed, because the primary evidentiary requirements for changes to the list of competitive and

¹ Appendix A to the Postal Service’s December 12 filing, which belatedly offers descriptions of several other services that the Postal Service now seeks to classify as postal—PAVE System Certification, MAC System Certification, MAC Gold System Certification, MAC Batch System Certification, PAGE System Certification, MQC Certification, Postal Explorer CD-ROM, and Advance Notification and Tracking System—is an admission that for these products, the Postal Service has not previously offered even descriptions comparable to Ms. VanGorder’s.

market-dominant services were prescribed by Congress in 39 U.S.C. § 3642, the Commission could not waive those requirements even if the Postal Service had so requested.²

* * *

Apparently recognizing that the existing record provides an inadequate basis for classifying specific “Address Quality and Support” and “Move Update” services as competitive, the Postal Service concedes that “nothing prevents the Commission from deferring certain issues concerning these services and the specific provisions of chapter 36 (such as the application of the price cap to the market-dominant Address Management Services).” USPS Response at 4. Given the Postal Service’s failure of proof, however, deferring a Commission decision on these issues is not only permitted but necessary. And the Postal Service’s failure of proof, along with the potential harms that could result from improvidently classifying these services as competitive, warrant their classification as market dominant until the Postal Service proves otherwise.

² The jurisdictional nature of the requirements imposed by 39 U.S.C. § 3642 also disposes of the Postal Service’s claim that the Commission should ignore the Postal Service’s failure to comply with these requirements because PostCom *et al.* did not raise the issue sooner. The onus of ensuring that the Postal Service (and the Commission) follow the statutory requirements for adding to the list of competitive or market dominant products falls on the Postal Service, not PostCom *et al.* In any event, the Postal Service’s failure to submit the required information and provide the required notice did not become clear until the Postal Service’s October 17 filing, by which point too little time remained to comply with those requirements before the statutory deadline for a decision.

Conclusion

For the reasons stated above, the Commission should sever or redocket the filing, establish a separate proceeding, and order the Postal Service to comply with 39 U.S.C. § 3642 and 39 C.F.R. Part 3020.

Respectfully submitted,

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