

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Request to Add Private Address Forwarding To the Market  
Dominant Product List

Docket No. MC2013-60

PETITIONER'S RESPONSE TO USPS' OPPOSITION TO DISCOVERY

October 28, 2013

Earlier today, the USPS filed an opposition<sup>1</sup> to my motion for an order seeking disclosure of documents related to this proceeding<sup>2</sup>. The USPS raised essentially two substantive points that I believe compel my response.

1. Whether the USPS has documents that are relevant to this proceeding

The USPS' opposition (page 2) says that "Petitioner appears to have misread the USPS ... [T]he Postal Service reveals that product concepts similar to Private Address Forwarding (PAF) have been conceived internally, and that all product concepts compete for internal financial, analytical and developmental resources and consideration by postal management. From there, it appears that Petitioner has jumped to the conclusion that the Postal Service has analyzed, deliberated and/or determined the operational feasibility, cost and market demand for a PAF-like product."

Particularly salient is the immediately following quote (page 3): "the Private Address Forwarding product concept, like many others over the years, have been conceived by and subjected to varying degrees of brainstorming among headquarters personnel" but that "no determination has been made".

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<sup>1</sup> <http://prc.gov/Docs/88/88134/USPS.Opp.2.Discovery.pdf>

<sup>2</sup> <http://prc.gov/Docs/88/88066/sai-paf-motion-for-disclosure-order.pdf>

The USPS' opposition is incorrect in its interpretation of my belief, and simply beside the point. I have not requested that the USPS produce any final determinations about PAF-like proposals; they have explicitly stated that they have not made any, and I have not questioned that. Nor have I requested in this motion that the USPS be ordered to conduct any new review, determination, plan, development, or the like.

The USPS' statement that "the October 16th Reply offers no basis for concluding that the concept has gained any such traction internally" is not an explicit denial, and in any case the degree of internal traction irrelevant to my motion for discovery. I have no particular belief about whether such ideas have "achieved elevated status in the competition for scarce financial, analytical and developmental resources at postal headquarters". Nor do I contest that the USPS' resources are limited and there is competition for those resources.

The USPS has, to quote the USPS' opposition and initial comments, "brainstormed", "circulated", "presented to postal managers and analysts", and made "presently under consideration", multiple similar concepts in the past decade. All of these actions have surely produced documents which are relevant to this proceeding.

The USPS has successfully obtained one patent, applied for another, and registered a trademark, again for what it agrees are substantially similar ideas. Such actions are not ones that any entity undertakes without a significant degree of analysis both before and during the application process about the substantive issues relating to those ideas — analysis will have produced documents relevant to this proceeding.

The USPS' opposition **does not deny** that it has documents that are relevant to this proceeding and to commenters' and the PRC's ability to *independently* evaluate the concerns raised in the USPS' reply<sup>3</sup>. Whether such documents have reached a level of internal finality or a formal "internal cross-functional feasibility review" is irrelevant.

What I have requested is simple: that whatever USPS documents that *currently* exist;

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<sup>3</sup> <http://prc.gov/Docs/88/88005/USPS.Reply.Ord.1838.pdf>

pertain to related proposals; and may be relevant to determinations as to whether my proposal meets the criteria expressed in 39 USC §§ 3642(b), 3622(b, c), 3691(b,c), and 3641(b); should be publicly disclosed, well before the deadline for reply comments. Without such disclosure, the public and the PRC would be crippled in *independently* assessing the those statutory criteria and the concerns raised in the USPS' initial reply.

2. Whether this motion for production of documents is procedurally appropriate, and the PRC's authority under 39 USC 3642 and in light of 39 USC 403(a)

The USPS' opposition characterizes my motion as "ask[ing] the Commission to immediately institute proceedings to consider the merits" under 39 CFR 3020.55 or 3020.56. I have not done so; as the USPS has noted, such a proceeding will come only after the final date for reply comments.

Pertinent discovery regulations are 3001.27(a) (permitting discovery of documents relevant to a PRC proceeding), 3005.11(a) (authorizing "the Chairman [and] any designated Commissioner" to issue subpoenas to the USPS for "the production of documentary or other evidence with respect to any proceeding" [11(c)]), and 3005.13 (authorizing subpoenas in response to third party request "in any proceeding").<sup>4</sup>

I have requested only that the USPS produce documents that exist and are directly relevant to this proceeding because they deal with substantially similar products and various considerations that the USPS has already discussed about those products, which considerations it raised in its initial comments responding to my request.

The USPS' opposition (and initial reply) argues that a request under 3020.50 should not be granted without determination of its feasibility. I completely agree that the PRC should not approve a proposal without properly considering the criteria expressed in 39 USC §§ 3642(b), 3622(b, c), 3691(b,c), and 3641(b).

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<sup>4</sup> The fact that I have filed a FOIA request for the same documents is irrelevant to whether a PRC order for production of USPS documents is merited here.

However, the USPS further argues, in essence, that it is the USPS rather than the PRC whose duty it is to make such determinations; that the USPS may *unilaterally* refuse to comply with efforts to make such determinations; that the PRC shouldn't "interfere with the process of determining new product concepts" or "compel postal management to justify its current priorities"; that the PRC shouldn't "require negotiations" with a requester or direct the USPS to "expend resources" for "**any** ... proposed product", etc.

This directly contradicts the clear wording of 39 USC § 3642(a, b), which specify that the PRC makes all such changes and determinations, and the USPS' role is to *propose* such changes (with, presumably, good evidence based on internal review for why such changes are justified). 39 USC § 403(a) says that "[t]he Postal Service shall plan, develop, promote, and provide adequate and efficient postal services". It does not say that the USPS has the sole authority to *decide* which services to plan or develop, only that they have the duty to do so when appropriate, nor does it contradict that it is the PRC's *exclusive* role to decide what changes to products lists to adopt and to determine whether proposals meet the relevant criteria.

§3642(a), which postdates §403(a) and thus should be read as controlling any ambiguity in the latter (especially given Congress' clear intent in enacting the PAEA to make the USPS "*accountable*"), clearly contemplates that both "users of the mails" and the PRC itself may propose "*new products*", which the PRC decides whether to accept.

§3642 does not distinguish, as the USPS implies, between a proposal for a *new* product and a *change* to an existing product; both are subject to exactly the same §3642(b) criteria (and determination by the PRC). In determining these criteria, the PRC has a clearly implied power as the USPS' regulatory agency (explicitly reiterated in 39 CFR 3005) to require production of USPS documents that are relevant to its proceedings.

The USPS has twice brought up that my proposal is not based on a violation of Title 39. I agree, and I have at no point alleged any such violation; this argument is a red herring. This proceeding is not a complaint under of undue or reasonable discrimination based on 39 USC §§ 101(d), 403(c), 404(b), or 3622(b)(8). §3642 in no way requires such a complaint,

nor does it require or even imply that a proposal should only be fully considered in order to remedy a violation of Title 39.

Accepting the USPS' arguments about the balance of authority in 39 USC §§ 3642 and 403, or permitting the USPS to withhold documents relevant to proceedings under §3642, would nullify the effect of Congress' intent in passing the PAEA modifying 39 USC § 3642 to permit "users of the mails" to request "adding new products" to the lists.

I urge the Commission to carefully consider how the Congressional mandate expressed by the PAEA giving the PRC extensive regulatory oversight of the USPS — and giving ordinary users of the mail the ability to propose new products — would be effectively gutted if it were to accept the USPS' arguments.

Accordingly, I respectfully reiterate my request that the Commission to grant my motion to compel the USPS to produce documents relevant to this proceeding.

I would also like to reiterate that it is my **strongly** preferred desire to work **in cooperation** with the USPS on this matter. However, when the USPS does not act in good faith to further such cooperation, or when it argues to *de facto* nullify the effect of an Act intended to further postal accountability and the participation of the general public, I have no choice but to oppose the USPS' stance on this matter.

Sincerely,  
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