

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

Reporting Requirements for)
Nonpostal Services)

Docket No. RM2004-2

OFFICE OF THE CONSUMER ADVOCATE AND CONSUMER ACTION
COMMENTS ON PROPOSED RULEMAKING CONCERNING
REPORTING REQUIREMENTS FOR NONPOSTAL SERVICES
(April 15, 2004)

The Office of the Consumer Advocate ("OCA") and Consumer Action ("CA") hereby respond to the Commission's Proposed Rulemaking ("Notice") inviting comments on or before April 15, 2004, on the Commission's proposal to add new paragraphs to Rule 54 regarding the contents of formal requests for changes in rates or fees. 39 C.F.R. §3001.54(h)(1) ("Rule 54(h)(1)").¹ CA is an independent non-profit membership organization founded in San Francisco in 1971. It serves consumers nationwide by advancing consumer rights.²

The Commission's proposal would require the Postal Service to provide with each application for a change in rates or fees information describing nonpostal services

¹ "Proposed Rulemaking Concerning Reporting Requirements for Nonpostal Services," Order No. 1394, March 5, 2004.

² CA refers consumers to complaint-handling agencies through a free hotline, publishing educational materials in English, Spanish and a variety of major Asian languages including Russian, and advocating for consumers in the media and before legislators. The organization also assists consumers by comparing prices on credit cards, bank accounts, and long distance services. CA previously filed before the Commission on October 15, 2002 a petition requesting the institution of Commission proceedings to review the jurisdictional status of fourteen specified services and to establish rules accounting for costs and revenues of non-jurisdictional domestic services. See "Order Denying, in Part, and Granting, in Part, Petition," *Consumer Action Petition for Review of Unclassified Services*, Order No. 1388, January 16, 2004.

(including nonpostal services discontinued during the relevant fiscal years) and the total, annual, accrued direct and indirect costs for each service, as well as total annual revenues for each service. (Commission-proposed Rule 54(h)(1)(i)). Nonpostal services include those based on a strategic alliance or contract between the Postal Service and one or more parties. (Commission-proposed Rule 54(h)(1)(ii)).

OCA and CA commend the Commission for instituting this proposal. There has been a growing concern about the lack of transparency in the Postal Service's finances.³ Furthermore, the Postal Service's pursuit of an ever-increasing number of non-traditional commercial activities forces captive customers, competitors, and the Commission to be more vigilant in ensuring that these activities are not being cross-subsidized. As the Commission noted in its order, OCA and CA originally urged the Commission to initiate this rulemaking in the Petition and letter filed with the Commission in Docket No. *2003.⁴ The order disposing of that Petition indicated the Commission would institute a rulemaking regarding reporting requirements for services not otherwise subject to Commission review under Chapter 36.

³ See, e.g., *U.S. Postal Service Deteriorating Financial Outlook Increases Need for Transformation*, GAO-02-355 Report, February 2002, at 35 ("Transparency and accountability are fundamental principles to ensuring public confidence in USPS."); "US Postal Service: What Can Be Done to Ensure Its Future Viability?", Senate Governmental Affairs Committee Hearing, September 17, 2003, Statement of Senator Joe Lieberman and Statement of James A. Johnson, Co-Chair, Presidential Commission on the U.S. Postal Service; and "The Report of the Presidential Commission on the U.S. Postal Service: Preserving Access and Affordability," Senate Governmental Affairs Committee Hearing, November 5, 2003, Statement of Comptroller General David Walker.

⁴ Petition of Consumer Action Requesting that the Commission Institute Proceedings to (1) Review the Jurisdictional Status of 14 Specified Services and (2) Establish Rules to Require a Full Accounting of the Costs and Revenues of Non-Jurisdictional Domestic Services, October 15, 2002 (Petition). In support of its petition, CA incorporated by reference a letter signed by its executive director and the Office of the Consumer Advocate that provided the legal basis for the petition and the substantive and procedural relief requested (Joint Letter).

This rule is needed, as the Commission must have accurate financial data regarding non-jurisdictional services to forecast accurately the costs and revenues of jurisdictional (domestic) services. This is essential to insure that the costs associated with these services are not being recovered through jurisdictional rates. The non-jurisdictional activities are commercial in character and compete in the marketplace with private companies. Their scope, attributes, and financial condition must be fully reported in order for the Commission to understand the potential impact on the competitive market. To the extent the activities are not deemed postal services, the Commission must provide for transparent reporting of the operating details of each service and all costs and revenues related to each service.

In Order No. 1394 in this proceeding at 12, the Commission stated that the incremental cost test is the preferred method to check for cross subsidies of non-jurisdictional services by jurisdictional services: "To the extent that nonpostal service incremental costs can be calculated, the incremental cost test would be an appropriate vehicle for testing the existence of cross-subsidies." OCA and CA would add to this test the further check that jurisdictional service rates be set so as not to produce revenues higher than their stand-alone costs (to the extent that stand-alone costs can be calculated).⁵

⁵ Dr. Panzar recommends using both incremental and stand-alone tests to assure that recommended rates are free of cross-subsidy. USPS-T-11 at 11-12 (Docket No. R97-1). See also, "Optimal Price Regulation for Natural and Legal Monopolies," October 2000, by Professor Ingo Vogelsang, at 12 ("Antitrust economists usually argue for stand-alone costs as an upper limit and incremental costs as a lower limit, based on cross subsidization and competition considerations. Prices above stand-alone costs subsidize others and could never be maintained indefinitely with free entry. Prices below incremental costs are subsidized by others and would never be maintained indefinitely by a profit-maximizing firm (and could not be maintained by a multiproduct firm in contestable markets.") <http://www.cre.gob.mx/cid/docinv/ivogelsang-optimal.pdf>

OCA and CA wholly concur with the Commission that full authority to promulgate this rule is grounded in Section 3603 of the Postal Reorganization Act, 39 U.S.C. §3603. The rule is necessary to properly carry out the functions under §§3621 and 3622, as well as §403(c), which prohibits undue discrimination and undue preferences.

The Term Nonpostal Should Not Be Used in Rule 54(h)(1)

In previous comments filed with the Commission by OCA and CA in Docket No. RM2004-1,⁶ we indicated that the term “nonpostal” must be defined in the rules so as to clear up the confusion surrounding the word. As argued at length in our joint comments in that docket, OCA and CA asked the Commission to define the term “nonpostal” in the proposed rule in Docket No. RM2004-1 by adding a new paragraph, Rule 54(s). Based upon a fair and clear reading of the history and congressional intent underlying the Postal Reorganization Act, in our view, the definition of nonpostal should be limited to services provided by the Postal Service on behalf of other governmental agencies. (See OCA and CA Comments, Docket No. RM2004-1 at 9-15.)

In the view of OCA and CA, using the term “nonpostal” in Rule 54(h)(1) proposed here would create considerable confusion about which products and services are subject to the new, detailed reporting requirements and which are not. OCA and CA, therefore, further ask that proposed Rule 54(h)(1) *not* use the term “nonpostal service” to identify the services that are subject to the new, detailed accounting and reporting requirements. This will avoid confusion engendered by the phrase. Even the Commission order here recognizes the confusion created by the term nonpostal service.

⁶ "Office of the Consumer Advocate and Consumer Action Comments on Proposed Amendment to the Commission's Rules of Practice and Procedure," *Proposed Amendment to the Commission's Rules*, March 15, 2004.

It explains the term is "intended to encompass all of the Postal Service's commercial nonpostal activities, whether deemed a service, a product or otherwise styled differently." (Order at 11.) But, the Commission uses the phrase "commercial nonpostal activities" which is not a phrase used in the legislative history of the Postal Reorganization Act, and which appears to be inconsistent with both Congress' and Judge Sirica's use of the phrase in *Associated Third Class Mail Users v. United States Postal Service*, 405 F. Supp. 1109, 1117 (D.D.C. 1975) ("ATCMU"). Reference to nonpostal commercial services and products cannot be found in any of the cited authorities. As far as OCA and CA are able to determine, there is no consistent, universal understanding or agreement of what is meant by a "nonpostal commercial service."

Rather than merely using shorthand to describe activities to be reported that are not covered by the definition of postal service, the Commission should elaborate more fully in the rule the precise types of activities that it covers. In this way, confusion may be avoided in the future and those governmental activities of the Postal Service for which it is reimbursed will not be intermingled with these commercial services. Instead, OCA and CA respectfully ask the Commission to substitute new language set forth in Appendix A to these comments.

Confusion will be minimized by fully *describing* the types of products and services subject to the rule, as opposed to the use of the word "nonpostal" for which

there are conflicting interpretations. For consistency, a conforming change must be made in the Commission-proposed Rule 54(h)(1)(ii) to delete the word "Nonpostal."⁷

OCA and CA also want to point out the risk of allowing the Postal Service to define the term "nonpostal" according to its policies and institutional culture. In the Report on Nonpostal Initiatives, the Postal Service states plainly that the services cited in CA's petition are sometimes classified as "nonpostal" services by the Postal Service and sometimes not:

The Petition lumps together a disparate array of . . . initiatives, some of which involve nonpostal services provided by the Postal Service to the public, and some of which do not provide services to the public or *have never been characterized as "nonpostal" services.*⁸

In addition, the Postal Service claims authorization for the provision of non-traditional services under more than just the "nonpostal" section of the Postal Reorganization Act, *i.e.*, 39 U.S.C. §404(a)(6). In comments in Docket No. *2003, the Postal Service states that it "does not rely exclusively on section 404(a)(6)."⁹ It claims that this authority also comes from its "statutory mission and functions."¹⁰ The Postal Service frequently cites a statement contained in one of the House Reports on H.R. 17070:¹¹

⁷ A technical correction is necessary to the Commission's proposed ordering paragraph 2.b. to add a reference to a new paragraph (h)(1)(ii). (See Order at 15.)

⁸ "Report on Nonpostal Initiatives," filed March 10, 2003 in Docket No. *2003 at 2 (Emphasis added).

⁹ Filed on January 30, 2003, at 16 – 17.

¹⁰ Id.

¹¹ *E.g.*, "Report on Nonpostal Initiatives," Docket No. *2003 at 1.

The Postal Service is empowered to engage in research and development programs directed toward the expansion of present postal services and the development of new services responsive to the evolving needs of the United States.

Use of the term “nonpostal” in the new accounting/reporting rule leaves the definition of “nonpostal” entirely up to the Postal Service. It is possible to imagine the Postal Service accepting OCA’s and CA’s argument that “nonpostal” means “governmental” or “public service” for purposes of reporting under the rule, or to abandon the characterization of non-traditional commercial activities as “nonpostal services” and devise a new label for them. If that were to be the case, then it is possible that the Postal Service could conclude it had little or nothing to report under the new reporting rule.

It is far safer to describe exactly which services are to be reported on in the new rules. The approach recommended by OCA and CA is not as susceptible of judgmental and subjective interpretations. In OCA’s and CA’s formulation, whether the services that are subject to the new accounting and reporting rules have been recommended by the Commission under 39 U.S.C. §§3622 and 3623 is a fact not subject to interpretation.

Pilot Tests and Trials of Non-Traditional Services

Proposed Rule 54(h)(1) should, in the interests of full transparency of Postal Service costs and revenues, cover pilot tests, operational tests, trial tests, market tests, experiments, and like trials of non-traditional commercial services that fall outside the Commission’s definition of “postal services” (i.e., the definition finally adopted by the Commission in Docket No. RM2004-1). A Postal Service management decision to

gauge the market for a contemplated new, non-traditional commercial service or to test the operational procedures for such a service must be funded by other non-jurisdictional services, not captive domestic services. Serious competitive injury can as easily be inflicted on competitors by non-permanent services as by permanent ones.

Furthermore, captive customers who have no say in the offering of such services should not be required to fund them. To this end, OCA and CA propose a new section, §3001.54(h)(1)(ii)(c). The new section is set forth in Appendix A.

Wherefore, OCA and CA ask that the Commission adopt the version of accounting and reporting rules for non-jurisdictional services that we have appended to these comments.

Respectfully submitted,

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Appendix A

§ 3001.54 Contents of formal requests.

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(h) Separation, attribution, and assignment of certain costs. (1) Every formal request shall separate the Service's actual and estimated total cost, for the fiscal years specified in paragraph (f) of this section, as between (i) postal services (including international mail) and (ii) domestic services that fall outside the definition of a postal service as specified in §3001.5(r). §3001.54(h)(1)(ii) domestic products and services are those that are provided to the public, whether for a fee or at no additional charge, without first being recommended by the Commission under 39 U.S.C. §§3622 and 3623.

(a) With respect to each such product or service subject to §3001.54(h)(1)(ii), for the fiscal years specified in paragraph (f) of this section, the Postal Service shall provide:

(i) An identification and reasonably thorough description of the service, including any service terminated or discontinued during the relevant fiscal years;

(ii) The total, annual, accrued direct and indirect costs, separately identified, to provide the service, including, but not limited to, development costs, start-up costs, capital costs, common and joint costs, and costs associated with each service that has been terminated or discontinued.

(iii) The total annual revenues earned by the Postal Service in providing the service.

(b) Services subject to paragraphs (h)(1)(ii) include those based on a strategic alliance or contract between the Postal Service and one or more parties.

(c) The following types of activities do not exempt a service from the application of paragraph (h)(1)(ii):

(i) The service is non-permanent.

(ii) The service is of short duration.

(iii) The service is provided to a limited number of recipients.

(iv) The service is limited in geographic scope.

(v) The service is offered on a trial basis, such as a pilot test, operations test, market test, or experimental basis

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