

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

)
Review of Nonpostal Services)
)

Docket No. MC2008-1

PUBLIC REPRESENTATIVE MOTION TO COMPEL UNITED STATES POSTAL
SERVICE TO FILE COMPLETE LIST OF NONPOSTAL SERVICES

(March 25, 2008)

In initiating this docket, the Postal Regulatory Commission (Commission) directed the Postal Service to file a complete list of nonpostal services so it could fulfill its responsibilities under 39 U.S.C. § 404(e) in determining which nonpostal services should continue and how to classify those continuing services. The Postal Service has not fully complied with that directive. For the reasons discussed below, the Public Representative respectfully requests that the Commission issue an order directing the Postal Service to file a complete list and descriptions of its offerings that may be subject to this proceeding.

On December 20, 2007, the Commission issued an order directing the Postal Service to file a sworn statement to “identify and provide a complete description of each nonpostal service offered by the Postal Service,” no later than March 19, 2008. PRC Order No. 50 (December 20, 2007) at 2. On March 19, 2008, the Postal Service filed a sworn statement including a list of several nonpostal services.¹ Accompanying the Sworn Statement, the Postal Service filed a pleading arguing that many other offerings

¹ See Statement of Tina M. Lance on Behalf of United States Postal Service (March 19, 2008) (Sworn Statement). The Sworn Statement contained the following offerings as the exhaustive list of nonpostal services: Passport Photo Service, Photocopying Service, Notary Public Service, Stored Value Cards, and Officially Licensed Retail Products. *Id.* at 2-13.

by the Postal Service are not nonpostal services as that term is used in 39 U.S.C. § 404(e).² It did not identify and provide a complete description of these other offerings; although in certain circumstances it provided a limited number of examples.³

The Postal Service contends that the new statutory framework of title 39 allows the Postal Service to provide three types of services to the public: (1) “postal services” within the meaning of section 102(5);⁴ (2) “nonpostal services” within the meaning of section 404(e); and (3) other statutorily authorized services that the Postal Service does not consider either a postal service or a nonpostal service within the meaning of 404(e). USPS Notice at 3. It also attempts to distinguish several of its other offerings as not subject to this proceeding since they are not “services.” *Id.* at 27. As to these service and non-service offerings, the Postal Service’s filing only provides a list and descriptions of nonpostal services which it interprets as covered under section 404(e).

At this time, the Public Representative does not take a position on the Postal Service’s legal arguments summarized above. The Public Representative reserves its rights in that regard. The purpose of this Motion is to obtain a complete list of Postal Service offerings in order to allow the public to accurately assess whether or not a given service offered by the Postal Service is a nonpostal service under § 404(e).

Without information as to the offerings that the Postal Service believes are subject to the other categories listed above, the public is at a distinct disadvantage determining whether certain Postal Service offerings are nonpostal services or subject to this proceeding. The PAEA tasks the Commission, not the Postal Service, with the responsibility of deciding which offerings are nonpostal services and which of those offerings should continue. Yet the Commission cannot make that determination, and

² United States Postal Service Notice of Submission of Sworn Statement on “Nonpostal Services” Pursuant to 39 U.S.C. § 404(e) (March 19, 2008) at 3-4 (USPS Notice).

³ See, e.g., USPS Notice at 29-30 (using Electronic Postmark as an example).

⁴ It should be noted that if the Postal Service is taking the position that certain of its offerings are postal services within the meaning of section 102(5), it cannot offer those services to the public until a proceeding is completed which classifies those services as either market dominant, competitive, or experimental and places those products on the mail classification schedule. See 39 CFR § 3020 subpart B; 39 U.S.C. § 3642(e).

the public cannot adequately assess whether certain Postal Service offerings should be subject to this proceeding without information regarding those offerings.

The Postal Service is asking the Commission to categorically exclude large segments of its product offerings from this proceeding without having the benefit of reviewing those particular offerings. In essence, allowing this to occur would inappropriately shift the responsibility of determining which Postal Service offerings are subject to this proceeding from the Commission to the Postal Service with respect to those offerings that are “close calls.”⁵ That was not what Congress intended, and it was not the Commission’s intent in initiating this proceeding. PRC Order No. 50 (December 20, 2008) at 1 (“The purpose of this review is to determine which nonpostal services should continue...”).

Additionally, the Postal Service has unilaterally, and without authorization from the Commission, decided to bifurcate this proceeding. As a first step, it is asking the Commission to categorically exclude large segments of its product offerings from consideration as part of this proceeding without any detailed information as to the characteristics of those offerings. However, as a second step, if the Commission does determine that perhaps some of those offerings might be subject to this proceeding, the Postal Service requests the Commission to “issue a decision to that effect in enough time before the December 20, 2008 deadline to allow for the Postal Service to consider its options, including seeking to get those services approved before that deadline.” USPS Notice at 33-34. If the Commission were to follow that path, it would inevitably have to restart this entire process with respect to those offerings that it decided should be subject to this proceeding after it issues its initial decision on the merits. This would require additional Commission time and resources.

The current procedural schedule does not allow for Commission adjudication of these matters until early July 2008. Even assuming that the Commission can make a quick decision on these complex legal matters, this would leave less than five months for the participants to put on their respective cases, litigate the issues and have the

⁵ Cf. *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (“[a]s a general proposition, agencies should remain free to determine, in the first instance, the scope of their own jurisdiction....”).

Commission issue a decision and adjudicate the merits of allowing the Postal Service to continue providing those additional nonpostal services.⁶ The Postal Service believes that the current procedural schedule “provides enough time for additional services to be authorized pursuant to this proceeding.” *Id.* at 34. The Public Representative respectfully disagrees. The best way to adjudicate this proceeding is for all participants to have the same information and be on a level playing field from the beginning.

Therefore, the Public Representative respectfully requests the Commission enter an order directing the Postal Service to supplement its Sworn Statement identifying and providing a complete description of those offerings the Postal Service is describing in its Notice and any other offerings which a reasonable person could read as being a nonpostal service offered by the Postal Service.

Respectfully Submitted,

/s/ Robert Sidman

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Docket No. MC2008-1

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⁶ The Commission is directed to review each nonpostal service offered by the Postal Service by December 20, 2008. 39 U.S.C. § 404(e)(3).