

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Modification of the Mail Classification Schedule
Transfer to Competitive Product Category
Premium Forwarding Service (PFS)

Docket No. MC2008-4

PUBLIC REPRESENTATIVE COMMENTS ON POSTAL SERVICE
REQUEST TO TRANSFER PREMIUM FORWARDING SERVICE
TO THE COMPETITIVE PRODUCTS CATEGORY
(June 16, 2008)

The Public Representative hereby comments on the request of the United States Postal Service to modify the Mail Classification product lists. The Postal Service is seeking approval from the Commission pursuant to 39 U.S.C. § 3642 and 39 C.F.R. § 3020.30 *et seq.* to move Premium Forwarding Service (PFS) from the Special Services class in the market-dominant product list to the competitive product list in the Mail Classification Schedule.¹ By notice and order, the Commission designated the undersigned as Public Representative in this proceeding and directed that comments are due no later than June 16, 2008.²

Summary of Comments

In this case of first impression, the Postal Service has failed to provide sufficient information as required by the PAEA and the Commission's regulations to warrant

¹ "Request of the United States Postal Service," May 30, 2008.

² "Notice and Order Concerning Postal Service's Request to Transfer Premium Forwarding Service to the Competitive Products Category," Order No. 80, June 3, 2008.

Commission authorization to modify the product list as proposed. In fact, based upon preliminary analysis of the rationale offered by the Postal Service in support of its request, the Postal Service may not be able to provide the necessary justification. The available facts will more likely refute the justification offered by the Postal Service inasmuch as it appears that PFS is not provided in a competitive market, contrary to the claim of the Postal Service.³ The Postal Service will exercise virtually unlimited market power with PFS in a significantly large segment, if not virtually all, of the relevant market if PFS is moved to the competitive list of the Mail Classification Schedule.

The Postal Service has failed to demonstrate it does not have sufficient market power over prices, quality of service and output so as to warrant transferring the product to the competitive category. Consequently, if the request is granted, residential mailers who use PFS would be subjected to the virtually unfettered power of the Postal Service to raise prices, to reduce the quality of PFS, and to limit PFS output. The only safety valve for the consumer would be to file a complaint pursuant to § 3662 of the PAEA for a determination the Postal Service is not operating in conformity with the applicable provisions of the law. The Commission should, therefore, either reject the request pursuant to section 3020.34(d) of its rules or not approve the request and institute further proceedings pursuant to section 3020.34(b).⁴

³ “...PFS is provided within a competitive market.” See Statement of Supporting Justification at 5. This is contrary to previous Postal Service testimony when applying for experimental PFS. See Docket No. MC2005-1, discussed below.

⁴ If the Commission invokes section 3020.34(d) to “Direct such other action as the Commission may consider appropriate” and rejects the request, the Postal Service would not have the opportunity to either respond to the Commission concerns or to respond to discovery or for hearings, as contemplated by section 3020.35.

Argument

This is an important case of first impression. For the first time, the Commission must determine the support necessary to justify a finding pursuant to its rules and the PAEA that the Postal Service lacks market power in the market affected. This change must not be permitted lightly. The impact on small customers relying upon service could be enormous. If the Postal Service is incorrect about its lack of market power and in fact, there is no realistic competition, the Postal Service would be free to modify its service and lower the value of the service with very little opportunity for the mailing public to return to the status quo, and harm would be done. The burden of persuasion would shift to those least able to demonstrate that market power does exist. Rather, the burden is now on the Postal Service, the party most able to provide evidence about the PFS market. It should be held accountable to the standard in the Commission's rules and the PAEA.

The Postal Service requests authorization to move PFS to the competitive products list pursuant to section 3020.30, *et seq.* The rules require the Postal Service to, "provide all supporting justification upon which the Postal Service proposes to rely...." (Section 3020.31(e).) Among other things, the supporting justification "shall:"

(d) Verify that the change does not classify as competitive a product over which the Postal Service exercises sufficient market power that it can, without risk of losing a significant level of business to other firms offering similar products:

- (1) Set the price of such product substantially above costs;
- (2) Raise prices significantly;
- (3) Decrease quality; or
- (4) Decrease output.⁵

⁵ Section 3020.32(d). The Commission's rule in section 3020.32 essentially tracks the language of § 3642(b)(1) of the Postal Accountability and Enhancement Act, 39 U.S.C. 3642(b)(1).

The Postal Service has failed to verify the lack of market power on all four counts.

The Postal Service Request includes a statement by a Postal Service official, Maura Robinson, Manager, Pricing Systems Analysis, providing supporting justification for the Request to transfer PFS to the competitive product list.⁶ The Statement contends PFS has enough competitors that it lacks market power to adjust the value of its service. This is contrary to the view expressed by the Postal Service when it applied for experimental service.⁷

The fundamental issue when determining market power is whether the Postal Service exercises a monopoly over access to the defined good or product.⁸ The product provided is the temporary and regular forwarding of *all* mail received by an individual or household. PFS is available only to residential customers and not available for commercial customers.⁹ The feature distinguishing PFS is that “all classes of mail are reshipped.”¹⁰ The Postal Service claims it lacks monopoly power in that market. The relevant question is, are there substitutes for the product (PFS service) in the relevant market? The Postal Service has not demonstrated that alternative

⁶ Attachment B.

⁷ See note 16, *supra*.

⁸ Defining and determining market power is a fundamental issue in antitrust cases. This cursory analysis does not rely upon relevant tests of market power that are long established and have been implemented by the Department of Justice, the FTC or other agencies and the courts dealing with issues of market power.

⁹ Postal Service witness Hope, in the recent proceeding whereby the Postal Service sought permanent approval of PFS, characterized PFS as a personalized service for residential customers who want to receive all of their mail at a temporary domestic address via Priority Mail. Testimony at 2. See *Premium Forwarding Service*, Opinion and Recommended Decision, Docket No. MC2007-3, January 7, 2008 at 7.

¹⁰ *Id.* at 3, see also, *Premium Forwarding Service*, Opinion and Recommended Decision, Docket No. MC2007-3, January 7, 2008 at 8.

substitute products exist such that a “significant level of business” would be lost if the Postal Service lowers the value of PFS by raising prices substantially above costs, raising prices significantly, decreasing quality, or decreasing output.

If prices rise or service deteriorates, what alternative choices exist for potential PFS customers and what is the impact on the level of PFS business? Initially, it might seem that the most likely readily available alternatives for any potential PFS mail customer are either (1) to request mail to be held for 30 days, or (2) to file a temporary or permanent forwarding change of address. For either temporary or permanent forwarding, the Postal Service will only forward all First-Class mail and, for 60 days, periodicals. Packages are only forwarded locally.¹¹ Standard Mail is not forwarded and, after 60 days, neither are periodicals. Periodicals are usually received many days later.¹²

Not only do these forwarding options provide for forwarding of fewer classes of mail than the mail that is forwarded by PFS, there is no service standard (in delivery days) for forwarded mail.¹³ Forwarding service is known to be inconsistent and often

¹¹ *Premium Forwarding Service*, Opinion and Recommended Decision, Docket No. MC2007-3, January 7, 2008 at 9.

¹² In the MTAC report, cited above, the periodicals subgroup deferred to the recommendations of the First-Class Mail subgroup. *Id.* at 31.

¹³ There were detailed recommendations for delivery standards for forwarded mail in the MTAC Group #114 report. (See, *Final Recommendations Report*, September 20, 2007 at 26, Appendix 4, Tables 2 and 3.) Nevertheless, the Postal Service did not establish a delivery performance standard for forwarded mail: “The Postal Service does not consider ...forwarding market-dominant mail...a distinct market-dominant product for...the establishment of a service standard.” *USPS, Modern Service Standards for Market-Dominant Products; Final Rule*, 72 Fed. Reg. 72221 (to be codified at 39 CFR Parts 121 and 122), December 19, 2007. Similarly, forwarding service is omitted from the discussion in the Postal Service’s *Service Performance Measurement, November 2007*, attached to Order No. 48, Docket No. PI2008-1, December 4, 2007.

delayed. Change of Address during the first two quarters of FY 2005 was the source of one-fifth (263,125) of all of the complaints received by the Postal Service.¹⁴

The Postal Service does not claim that any of these three options is a substitute for PFS and rightly so. The Commission reached the same conclusion when it approved PFS as an experimental service noting, "PFS will supplement, rather than alter, current available forwarding and mail holding options."¹⁵ Thus, temporary change of address service differs so significantly from PFS that it is not a reasonable substitute for PFS service.

Realistically, a potential PFS customer does not have access to any other product like PFS. The Commission already reached this conclusion in its opinion approving the experimental PFS. The Commission cited Postal Service witness Koroma for the conclusion that "PFS is not expected to compete directly with private sector alternatives...."¹⁶ Nevertheless, the Postal Service ignores that earlier testimony and suggests that four different types of competitors exist in the same market as PFS.

Defining the market is of primary importance. Once the market is defined, the participants may be discerned and their participation in the market weighed. The PFS market consists of individuals who desire to purchase a mail forwarding service which will temporarily forward all of their mail for a particular period of time. The mail must first be collected and then forwarded. In order to participate in this market, a competitor of

¹⁴ Docket No. R2005-1, DFC/USPS-3, Attachment at 13-18. See "Public Representative Initial Comments in Response to Notice of Request for Comments on Service Performance Measurement Systems for Market-Dominant products," Docket No. PI2008-1, January 18, 2008 at 10.

¹⁵ *Experimental Premium Forwarding Service*, Opinion and Recommended Decision Approving Stipulation and Agreement, Docket No. MC2005-1, April 15, 2005 at 21.

¹⁶ *Ibid*, citing Tr. 359-60: "The effect of the proposed prices on other private sector enterprises was also considered; PFS is not expected to compete directly with private sector alternatives (Criterion 4)."

PFS must have access to all of the mail received by the recipient in order to provide the market with the correct product. Thus, a true competitor for the PFS service, in order to provide the correct product to the relevant market, must have access to all of the mail that would be forwarded by PFS and be able to forward the mail at prices and on terms that would mitigate the market power of the Postal Service to raise prices or reduce service or output.

The Postal Service has misidentified the market in which the PFS functions. It includes as competitors within the market firms which do not provide (or which have not been demonstrated to provide) the product provided by PFS. As noted above, the Postal Service singles out four groups of competitors in the PFS market. Unfortunately, the Postal Service has provided only gross generalizations regarding these potential competitors, has not provided specific details, and ignores crucial characteristics that a competitor for PFS must have.

One group of service providers identified by the Postal Service as being competitors in the PFS market offering “mail receipt and forwarding service” is identified as “commercial services.” The Postal Service official apparently located these “competitors” using a Google search on the term “mail forwarding” and located “many private firms.”¹⁷ These services are not further identified. There is no explanation as to how these services function, whether they forward all mail or are even able to forward temporarily all mail, their availability nationwide, nor even their ability to collect the mail of potential PFS subscribers. They may, in fact, be in the business of forwarding commercial or business mail. Without more, the Commission cannot begin to assess

¹⁷ Statement at 3, note 2.

whether these “commercial mailers” operate in the PFS market in nationwide competition with PSF.

The second type of competition for PFS service that the Postal Service cites as preventing it from asserting market power in the PFS market are “informal arrangements with friends, neighbors, or family members, to retrieve and prepare their mail for forwarding.” This suggestion approaches the specious. Absolutely no factual support for this suggestion is offered. Not only are those in this group not “firms offering similar products” (section 3020.52(d)), there is no study offered to indicate that potential PFS users do or might turn to these types of arrangements as sources of alternative mail forwarding to any significant degree. If PFS service was devalued significantly by the Postal Service, or even if PFS was not available at all, would a significant proportion of those persons using PFS have all of their mail forwarded to a temporary address by a friend, neighbor, or family member?

The Postal Service has not attempted to quantify the level of competition these folks might represent. In many cases, this is clearly not a realistic option for the vast majority of cases. If all household mail is being forwarded, then those using PFS have moved their entire household to another location on a temporary basis and do not have a family member in the home who may pick up their mail or may not even have access to their mail if it is deposited in a mail slot inside a locked home.¹⁸ Also, many people may be reluctant to provide anybody (including a friend, relative, or even a family member) access to their locked home, locked mailbox, or even unlocked mailbox to gather mail they receive over a lengthy period of time. The degree that such persons

¹⁸ It was recognized that many of the users of PFS are “snowbirds” who close up their homes for extended periods of time while away.

offer meaningful competition to PFS appears very low and is not demonstrated by the Postal Service's Statement. The Postal Service has provided neither a sound basis nor data to support its conclusion that this group prevents the Postal Service from exercising market power in the PFS market.

The third group of potential competitors cited by the Postal Service as potential competitors is Commercial Mail Receiving Agencies (CMRAs). Although these entities may be competitors of the Postal Service in certain product markets, they could not be significant competitors for the PFS market. In the first place, to be a competitor, a CMRA must be available. The Postal Service has not demonstrated CMRAs exist in substantially all areas where potential PFS customers reside to the degree that they could significantly reduce the level of PFS business. As a potential competitor, logic suggests a CMRA should be in the vicinity of the customer's residence if it is to compete successfully for forwarding service. In rural areas, CMRAs may not be available to compete for PFS business. The Postal Service has provided no data to support its conclusion that CMRAs are proximate enough to potential PFS customers to limit the Postal Service's market power for PFS.

In addition, and more importantly, a critical aspect of the PFS service is the temporary collection of all classes of a subscriber's mail. If mail is being delivered by the Postal Service to a permanent address (either a residence or a post office box), the CMRA is not a potential competitor for PFS mail. The potential user of PSF benefits from having *all* mail forwarded, including standard mail and periodicals (for a period beyond 60 days). If the permanent address is temporarily changed at the Post Office to the CMRA, the Postal Service would not forward all mail addressed to the customer to

the CMRA and, consequently, the CMRA could not receive as much mail for forwarding as the amount of mail that is forwarded with PFS. A CMRA could not obtain access to all of the mail of a potential PFS subscriber unless the subscriber changed his or her permanent address to the CMRA. This would require notification to all mailers to send all mail in the future to the CMRA. Not only is there several weeks delay before mail is delivered to a new permanent address, that process would defeat the purpose of the PFS, a temporary service.

The only factual situation whereby a CMRA might be a direct competitor for PFS with respect to the classes of mail forwarded could occur if a customer is deciding, initially, whether to select, as a *permanent* delivery address, either a Post Office box or a CMRA.¹⁹ Only then might the potential cost and service of their respective forwarding services compete with each other. However, the percentage of potential PFS customers whose permanent address is a Post Office box, compared to those with other types of delivery addresses, is likely to be minimal. In any event, the Postal Service, again, has not provided information that would support its conclusion that CMRAs compete significantly with PFS service. Thus, the Postal Service has failed to demonstrate that it lacks market power vis-à-vis CMRAs in the specific market niche occupied by PFS: a service providing the unusual and significant feature that includes the forwarding of all mail.²⁰

¹⁹ PFS forwarding is available to Post Office box customers. See DMCS, 937.11. *Premium Forwarding Service*, Opinion and Recommended Decision, MC2007-1, January 7, 2008 at 8.

²⁰ CMRAs do not even compete where the frequency that mail is forwarded is more important to the subscriber than the classes of mail that are forwarded. A temporary change of address to a CMRA would gain nothing because additional delays would be incurred due to intermediate forwarding from the Postal Service to the CMRA. A potential CMRA user would more logically simply have mail forwarded by the Postal Service to the temporary address.

The fourth competitive entities cited by the Postal Service are “private sector firms” offering “similar services to specialized groups.” These groups are noted as including Escapes RV Club, Access USA, Voyagers Mail Forwarding Service, and USA2ME. Without more, the Postal Service states its conclusion that these “alternatives constrain the Postal Service from exercising sufficient market power to raise prices, etc., without losing business.” First, the test of the rules is not whether raising prices, etc. will lose business, but whether there is a risk of “losing a *significant level* of business to other firms offering similar products.” (Section 3020.52(d).) The Postal Service has not quantified the significance of the competition offered by these groups nor has it demonstrated these groups offer products similar enough to PFS as to compete with PFS.

Conclusion

If, upon review, the Commission finds there is substantial likelihood that the modification is inconsistent with statutory policies or the Commission’s rules, the Commission rules provide that it shall institute further proceedings. (Section 3020.34.) Because there is a substantial likelihood the request is inconsistent with statutory policy and Commission rules, further proceedings should be instituted.

The Public Representative respectfully submits the foregoing Comments for the Commission's consideration.

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