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Before The

UNITED STATES OF AMERICA

POSTAL REGULATORY COMMISSION

WASHINGTON, DC 20268-0001

In Re: Report on Universal Postal Service and the Postal Monopoly	Docket No. PI2008-3, Order No. 71

COMMENTS OF FEDERAL EXPRESS CORPORATION

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Federal Express Corporation (FedEx) appreciates the opportunity to comment upon the Notice and Discussion Memorandum placed in this docket on April 18, 2008. As a leading a customer, competitor and service provider to the U.S. Postal Service (USPS), FedEx has a particularly strong stake in the preparation of a thorough, balanced, and objective report on the topics addressed in the present study and is pleased to provide its initial comments below. We have not commented on all topics, but have selected those on which we believe our views would be most useful to the Commission. Our comments identify those topics selected at the start of each discussion item, below.

At the outset, however, FedEx would like to confirm its longstanding support for efficient universal service suited to the needs of the American people. Our chairman, Frederick W. Smith, has testified on postal reform a number of times before the U.S. Congress, and has expressed our support for basic postal services to be provided to all points in the U.S in the following terms:

> Let me be clear. I support universal postal service. Every citizen in every part of the Nation should have access to basic, affordable postal service. I do not want to see stamp prices increased unnecessarily. I recognize and respect the spirit of public service that motivates men and women in the Postal Service. "Should the United States assure universal postal service?" is not an issue so far as I am concerned. But "What is the most efficient way for the United States to guarantee a level of universal postal service

> consistent with our national needs?" is a legitimate question that proponents of universal postal service must address seriously and quantitatively, with more than knee-jerk calls for monopoly and postal privilege.[1]

FedEx therefore welcomes this inquiry into the nature, scope and necessity for a U.S. universal service definition and the instigation of a national discussion about how best to supply such universal services to the residents and businesses of the United States.

Topic No. 1: Scope of "Universal Postal Service" and "Universal Service Obligation"

Universal service is a timely and critical topic, which is currently under consideration in a variety of countries, both developed and developing. No one policy will fit all nations. Each nation must form its own answer, based on the needs of its citizens and businesses and on the state of services already being provided in the marketplace. In the United States, as electronic substitutes change the way Americans conduct their businesses and their daily lives, the future role of hard copy mail in our society must be examined and the appropriateness of governmental participation in supplying mail services should be analyzed.

The successful development of private delivery services, for everything from documents to parcels, also must be considered and weighed in the mix. Here in the U.S., the market has been significantly affected by the broadly drawn monopoly on letters. Other delivery sectors, such as parcels and express items, have been able to develop outside the range of this monopoly and pursuant to certain "exceptions" to and "suspensions" of the monopoly that have been set out in regulations by USPS.

As the Commission has noted, there is no specific statutory definition of universal service in the U.S. This omission contrasts with Europe, where the European Union has set a minimum floor for each Member State in its directives on postal services (as noted in the Discussion Memorandum, at 4). Each Member State is free to impose a universal service obligation (USO) on its designated operator or operators above that floor.

We agree with the Commission's listing of the six factors for analyzing universal service: (1) geographic scope; (2) range of product offerings; (3) access to postal facilities and services, (4) frequency of delivery; (5) rates and affordability; and (6) quality of service. We do not believe that all requirements imposed on USPS – such as the distribution of

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[1] Statement of Frederick W. Smith, Chairman, President, and CEO, FDX Corporation, in *H.R. 22, The Postal Modernization Act of 1999: Hearings before the Subcommittee on the Postal Service of the House Committee on Government Reform And Oversight,* 106th Cong., 1st Sess., Ser. No. 106-16 (1999) at 340 (hereinafter, "1999 Testimony").

contracts and the worker conditions set forth in Section 101 of the PAEA[2] – are part of "universal service." Just as the other "public service" obligations mentioned in the Discussion Memorandum (at 5), such as the obligation to provide passport services, they are independent public obligations imposed on USPS as a government-owned corporation. As the Discussion Memorandum states, at 9, "They would remain even if the Postal Service were not obliged to provide universal services."

"Universal postal services" refers to a group of services that the government chooses to ensure to all residents. Universal service represents a social and economic policy decision, which should focus on the needs of the service recipients, not the providers. If the recipients are adequately served to the extent deemed appropriate by policy makers, then universal service has been provided. And if this can be achieved without imposing any obligation on any one provider, because the services are already in the marketplace, then no further governmental action is required. However, given the varying levels of development in different locations, there may be gaps in the provision of services by market. To fill those gaps, a nation can impose a legal obligation on a provider or group of providers to provide necessary services – and then the policy makers can determine how to finance that provision. Such a needs-based approach is, indeed, how national postal service was developed. As Chairman Smith has recalled,

> In the beginning of the Republic, the Post Office Department was established on exactly this basis. Given the undeveloped state of the national transportation system and financial markets, only the federal government could establish a national Post Office for distribution of letters and newspapers. In the early 1900s, the Post Office's mission was expanded to provide a rural parcel service that the private market was unable to provide.[3]

Today, USPS provides far more than such "gap" services. We do not challenge that: indeed, we welcome its role as a participant in the broader commercial marketplace, (provided that its competitive services are provided in a fair manner, without taking advantage of governmental benefits). However, we would note that the scope of "universal service" presently provided cannot be equated to a proper definition of a USO. Many of the services that may fall within stated requirements of U.S. shippers are already provided in the marketplace without the imposition of an "obligation" on any particular carrier. Competitive conditions have made such range or scope of services necessary for commercial providers. For example, FedEx and its sister companies today provide delivery to every address in the United States with a variety of service options. Both FedEx and FedEx Home Delivery services (a division of FedEx Ground) offer delivery services to every residential address in the U.S.[4] Like USPS, FedEx maintains a

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[2] Fair conditions of employment (Section 101 (c) and (g)) and distribution of contracts (Section 101 (f)).

[3] 1999 testimony, at 338.

[4] FedEx Home Delivery Services are described at the FedEx Corporation Website, http://www.fedex.com/us/services/us/homedelivery/index.html

nationwide system of retail offices and drop boxes for the regular collection of items to be shipped. Collection from shipper's premises is different, largely because of the volume of mail made possible by the postal monopoly and the convenience of access to USPS protected by the mailbox monopoly. FedEx provides pick-up that is scheduled (on-call or standing order), while USPS can provide collection of certain mail items from mailboxes without any pre-arrangement.

Some economists have suggested that there does not need to be a universal service obligation for business mail, only for single-piece or "social" mail.[5] That would be sufficient to ensure the traditional role of the government-owned postal service. A network that could provide services for single piece mail to all residents would certainly be formed in a way that also provides services to the larger markets of business mail, without the need for governmental support for the latter. We would suggest that drawing the definition of the USO in such a careful manner is one that the Commission should consider.

Moreover, quality of service is an intrinsic element of the nature of universal service. As FedEx's chairman said in his Congressional testimony: "The proper question is not whether postage rates are high or low, but whether the mailer is getting good value for his money."[6] A consideration of quality of service raises questions of efficiency, which may be undermined by the monopoly. We applaud the Commission for its prompt move to implement service standards by which service quality can be measured, as an important tool in ensuring this aspect of "universal service."

While post offices around the world argue that the USO is a burden, and some are demanding that their competitors finance this burden through special fees, FedEx would contend that it is also a benefit. Today, as noted, FedEx (and its competitor United Parcel Service) serve every address in the U.S. This meets or exceeds the geographic coverage of USPS – but we do not go to each address regularly. Regular service (and it need not be six days a week) may give USPS a competitive edge in terms of being well-known and convenient. Furthermore, the power of the USO is reinforced by the mandatory use of mail for many everyday transactions, where deposit of an item in the mail creates a presumption of receipt. The mere fact of universal service creates a powerful brand, unique to USPS – that of the trusted postal carrier, stopping by your house and providing you with a link to your community and the rest of the world.

No one knows for sure what services might be offered in the marketplace if there was no monopoly on letters, or if there was access to PO boxes by commercial providers, or if there was no mailbox monopoly. However, any evaluation of the need for imposition of a legal obligation to achieve full provision of the designated "universal services" must

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[5] See, e.g., Finger, Matthias, Ismail Alynak and Pierre Rossel, "The Universal Postal Service in the Communications Era: Adapting to Changing Markets and Customer Behavior," College of management and Technology, École Polytechnique Fédérale de Lausanne (2005) ("Finger 2005").

[6] 1999 testimony at 341.

consider the potential innovations that would flow from competition. We certainly have seen in other countries that letter delivery operations can become more competitive if there is true full market opening (FMO), where all barriers are removed. However, the Commission should keep in mind that there are more barriers to competition beyond the monopoly law – see, for example, the fight over the German minimum wage and the VAT exemptions, where competitors argue that monopoly barriers have been replaced by other governmental restraints on new entrants.

Topic No. 4: Universal Service: Range of Product Offerings

The definition of universal services should be carefully drawn. "Universal service" must not be defined as "services that would be nice to have." It should instead be focused on "basic, affordable postal services"[7] that are common and necessary. The European Union, for example, has excluded express services and parcel services for shipments weighing more than 20 kilograms. While these are important services – we at FedEx certainly believe that! – they are not so essential that, in their absence, a provider must be mandated by law to fill that service range gap.

Express services should not be part of the universal service range because they are value-added services. The European Union recognized this in 1997, when it concluded that express services should not be part of universal postal services:

> [T]he essential difference between express mail and universal postal services lies in the value added (whatever form it takes) provided by express services and perceived by customers, the most effective way of determining the extra value perceived is to consider the extra price that customers are prepared to pay...[8]

Speed, reliability, pick-up from origin, tracking and tracing, insurance etc. are examples of value-added features which customers are willing to pay for and which serve to distinguish express business from the universal service.

A broad definition of universal service leads to a broad, often unsustainable, USO. The most efficient network for standard letters is not the most efficient network for express delivery, and the best manner of handling parcels is not the same as for documents. To have a high expectation for universal service frequently leads to requiring the USO provider to be all things to all people. A single provider would have to have many different networks or it would not be able to provide the necessary quality for each product. We believe that the range of desired services will be supplied naturally from a variety of providers, which can and do develop in an open marketplace. Drawing the definition of universal service narrowly leads to the probability that the services required

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[7] 1999 Testimony at 340.

[8] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, clause (18). *Official Journal L 015 , 21/01/1998 p. 0014 – 0025.*

under a USO will be those that can be supplied by one or two network types, such as letters and small parcels.

A "gold-plated" definition of universal service invites governmental intervention in markets that will function better over the long run if left alone. In many countries, competition within the universal service is viewed as harmful to the universal service provider -- which then leads to governmental actions to protect such provider, such as a broader monopoly or imposition of a compensation fund on competitors. These are not governmental actions that encourage the offering of services by the most efficient provider.

Topic No. 5: Universal Service: Access to Postal Facilities and Services

FedEx would like to address two subjects in this area: access to the individual mailbox and access to PO boxes.

The monopoly on access to homeowners' mailboxes rule was enacted in 1934 and is a criminal statute punishable by fine but not imprisonment.[9] It is further broadened by USPS' own regulations.[10] No other country has such a monopoly. There is no economic evidence that a mailbox access restriction is necessary to maintain universal postal service. However, USPS has argued that the mailbox restriction is important for the police functions assigned to the postal inspectors and to reduce mail theft. In 1996 and 1997, the General Accounting Office (GAO) did two studies of the mailbox rule,[11] and came to the conclusion that while the rule did not necessarily help the goal of universal service, some Americans supported the rule for reasons of convenience or security. A clear majority (58 percent) of the GAO survey group, however, favored allowing "express companies like Federal Express or UPS" to leave packages in their mailboxes.

Maintaining appropriate control over the mailbox system is achievable without resort to a complete monopoly (and especially without resort to a criminalized restriction, which surely is overkill).[12] In his dissent in the Supreme Court case majority finding the

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[9] 18 U.S.C. §1725.

[10] *See, e.g.,* USPS, Domestic Mail Manual 508, Sections 2.0 and 3.0.

[11] U.S. General Accounting Office, "U.S. Postal Service: Information about Restrictions on Mailbox Access,", May 1997, GAO/GGD-97-85 and "Postal Service Reform: Issues Relevant to Changing Restrictions on Private Letter Delivery" (GAO/GGD-96-129A/B, Sept, 1996).

[12] Some countries have an informal system where a sticker ("Stop pub") on a home mailbox requests that unaddressed advertising not be deposited in the box. See, e.g., "France Cracks Down on Junk Mail," Expatica magazine, at http://www.expatica.com/actual/article.asp?channel_id=3&story_id=8599. But this is a far cry from the U.S. system, which criminalizes the use of the homeowners' mailbox -- which each home is required by law to maintain -- by anyone other than the USPS. As an aside, a French association representing those who deliver such "junk mail" has complained about the stickers, saying that the stickers would harm their livelihood. The stickers in France are being promoted by the Environmental Ministry.

mailbox rule constitutional (on First Amendment grounds), Justice John Paul Stevens laid out a practical solution:[13]

> If a private party - by using volunteer workers or by operating more efficiently - can deliver written communications for less than the cost of postage, the public interest would be well served by transferring that portion of the mail delivery business out of the public domain. I see no reason to prohibit competition simply to prevent any reduction in the size of a subsidized monopoly. In my opinion, that purpose cannot justify any restriction on the interests in free communication that are protected by the First Amendment...
>
> Mailboxes cluttered with large quantities of written matter would impede the efficient performance of the mail carrier's duties. Sorting through papers for mail to be picked up or having no space in which to leave mail that should be delivered can unquestionably consume valuable time. Without the statute that has been in place for decades, what may now appear to be merely a minor or occasional problem might grow like the proverbial beanstalk. Rather than take that risk, Congress has decided that the wiser course is a total prohibition that will protect the free flow of mail.
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> But as Justice Marshall has noted, the problem is susceptible of a much less drastic solution. . . . There are probably many overstuffed mailboxes now - and if this statute were repealed there would be many more - but the record indicates that the relatively empty boxes far outnumber the crowded ones. If the statute allowed the homeowner to decide whether or not to receive unstamped communications - and to have his option plainly indicated on the exterior of the mailbox - a simple requirement that overstuffed boxes be replaced with larger ones should provide the answer to most of the Government's concern."

Despite this simple suggestion by a noted Justice, and despite the same suggestions being echoed by competitors over the years, the law and supporting regulations remain in effect.

The economic importance of the mailbox access rule has escalated since it was originally adopted. In the mid-1960s, the Post Office announced it would henceforth deliver only to curbside boxes in new residential areas, citing studies showing that curbside delivery was half as expensive as delivery to the door. Today, about 87 percent of households use curbside mailboxes, cluster boxes, apartment boxes, and similar USPS-only receptacles. We have not, as a company, studied the economic impact of this rule and so cannot provide the Commission cost-based guidance on it. However, it is instructive to note that FedEx does impose a residential charge, of which some portion reflects the inconvenience of going all the way to a home doorstep.

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[13] U.S. Postal Service v. Greenburgh Civic Assns., 453 U.S. 114 (1981), at 153-154.

The nation's system of mailboxes was built and paid for by householders. The mailbox network provides a uniquely simple and inexpensive means for delivering letters and small parcels to America. The mailbox access rule is not necessary to protect the security of mailboxes, since criminal and civil laws punish theft and trespass. There is no moral or economic reason why access to this network of mailboxes should be reserved for the exclusive use of the USPS.

Another, less well-known monopoly exists on access to PO boxes. This is created by USPS's refusal to accept documents transmitted by private carrier and delivered to a post office for placement in a PO box located at that post office. The effect is to create a separate, government-only system that is in common use by many consumers (for example, to send their payments to their creditors, if they have not already switched to electronic payments.) If, as today, USPS denies private operators access to PO boxes, then access should also be denied to postal services in the competitive category. Alternatively, if USPS wishes to continue to use post office boxes to deliver its competitive services, then it should make delivery to post office boxes a service available to all carriers, subject to a reasonable fee.

Topic No. 10: The Implications of the Universal Service Obligation for the Postal Monopoly

In 2004, looking at the transformation of his own company from a single service business, offering overnight express, to a multi modal global transportation system, Mr. Smith spoke in terms of the prevailing cultural event, the JRR Tolkien movies, about "The Curse of the Postal Monopoly":

> The postal monopoly law lingers like an ancient curse on Middle Earth. The postal monopoly was originally granted by Congress to help the Post Office establish a national postal system that would enlighten and civilize the far reaches of the new democracy. Over the centuries, however, an evil wizard has seemingly taken control of the postal monopoly and distorted its application way beyond its original purpose. Today the postal monopoly, far from empowering the Postal Service, serves to enervate and demoralize good men and women while isolating the institution from the world of normal commerce behind a high hedge of tangled regulatory briars. If the hobbits can save Middle Earth (and win most of the Oscars in the process), surely Congress can break the spell of the postal monopoly.[14]

[14] Statement of Frederick W. Smith, Chairman, President, and CEO, FedEx Corporation, in *Postal Reform: Sustaining the 9 Million Jobs in the $900 Billion Mailing Industry: Hearings Before the Committee on Government Affairs of the United States Senate*, 108th Cong., 1st Sess., Ser. No. 108-508 (2004), p. 138 et seq.

And while Congress, through the 2006 statute, did bend the monopoly into a straighter, more understandable shape, it did not break it. Today, the monopoly survives, albeit significantly limited by the weight and rate rules now included in 39 U.S.C. 601(b)(1) and (2). Elsewhere in the world, it is on its last legs.

As Mr. Smith concluded in 2004 after reviewing arguments connecting the monopoly to the viability of universal service, "The truth is that we have universal postal service in the United States in spite of the postal monopoly not because of it."[15]

The legal effect of the PAEA on the postal monopoly may be profound. What is commonly perceived as "the postal monopoly law" is in fact a set of regulations adopted by USPS in 1974 with scant (to say the least) statutory authority. The legal lynchpin of these regulations was the USPS claim of authority to "suspend" the postal monopoly under former 39 USC. §601(b), a claim flatly contrary to the statutory history of this provision. The PAEA repealed former §601(b) and USPS's authority to adopt regulations implementing the postal monopoly. At the same time, the PAEA grandfathered those postal monopoly regulations purporting to suspend the postal monopoly and authorized the Commission to adopt such regulations as may be required to implement the revised law. Since the Commission is no longer required to give deference to USPS regulations based on a repealed statutory provision, we would argue that the Commission must go back to the underlying postal monopoly statutes, statutes which date from 1872 and whose current meaning is far from clear.

We would urge the Commission to carefully scrutinize arguments linking the existing monopoly to universal service. The basic principle should be that the postal monopoly should be no more extensive than necessary to finance universal service. However, that can go two ways. With a broadly described universal service, a extensive monopoly may be sought. A carefully and narrowly drawn universal service will help to manage any requirement for financial support for any such services that are not already provided in the marketplace. FedEx has, in the recent past,[16] suggested a phase-out of the monopoly, especially given the developments in other major markets such as the European Union. Like these other nations, we need to gather all of the facts necessary to evaluate if it is appropriate to phase out the postal monopoly. This would be the single most important step that could be taken towards structural transformation and modernization of USPS. The transition period must be long enough to give USPS time to prepare for increased competition, but short enough so that it cannot afford to put off the start of those preparations.

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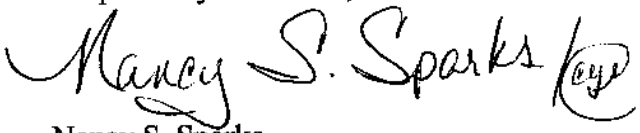
[15] Ibid.

[16] Statement of Frederick W. Smith, Chairman, President, and CEO, FedEx Corporation, in *Postal Reform: Sustaining the 9 Million Jobs in the $900 Billion Mailing Industry: Hearings Before the Committee on Government Affairs of the United States Senate*, 108th Cong., 1st Sess., Ser. No. 108-508 (2004), p. 138 et seq.

Ultimately, whether or not universal service should be funded in part by a postal monopoly is a decision for Congress to make, much like a decision on tax policy. But this decision can and should be informed by this undertaking of the Commission, as the impartial and expert regulator charged with advising on this subject by statute. Congress has already taken the first step by imposing the limitations of 38 USC 601 (b). Whether a continued phase-out would harm the appropriate level of universal service, is for the Commission's consideration.

Respectfully submitted,



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