

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

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1

**INITIAL BRIEF OF THE ASSOCIATION FOR POSTAL COMMERCE, DIRECT
MARKETING ASSOCIATION AND MAIL ORDER ASSOCIATION OF
AMERICA (“POSTCOM ET AL”) ON NON-POSTAL SERVICES**

The Association for Postal Commerce, Direct Marketing Association and Mail Order Association of America (“PostCom, et al.”) submit this Initial Brief to address what we believe to be two fundamental issues concerning the Commission’s oversight and classification of the Postal Service’s provision of non-postal services as defined in the Postal Accountability and Enhancement Act (“PAEA”).

SUMMARY OF POSITION

Both the Postal Service and the Commission seriously misread the operative provisions of the PAEA in application to non-postal services. Our position may be summarized as follows:

First, the Commission’s tentative assertion that it has plenary jurisdiction over the terms and conditions and the revenues and prices that the Postal Service is entitled to charge for non-postal services and the cost it incurs in providing these services is without merit. We submit and will show in this Initial Brief that, once the Commission has determined that the Postal Service may lawfully continue to provide a non-postal service, these matters – revenues, costs and other terms of service – are remitted to the authority of the Postal Service and its Board of Governors, subject only to judicial review in the

federal district courts and possibly, in some cases, by the Commission under the complaint provisions of the PAEA.

Second, the Postal Service's claim that certain non-postal services do not admit of classification as market dominant or competitive and are therefore unreviewable is equally without merit. While the Act does not specify the standard the Commission is to apply, all non-postal services are to be classified and the scope of review in court or upon complaint is determined by the classification assigned..

For the reasons set forth more fully below, PostCom et al., submits that neither the statute nor its legislative history permits the Commission to convert non-postal into postal products and to thereby confer upon the Commission plenary and exclusive jurisdiction over these services.

Third, Address Management Services and other services as to which the Postal Service claims exclusive ownership of intellectual property and licenses such information to third parties must be classified as market dominant non-postal services.

I. THE REVENUES AND COSTS OF OTHERWISE LAWFUL NON-POSTAL SERVICES ARE REVIEWABLE, BUT NOT THROUGH THE ANNUAL COMPLIANCE PROCESS.

The Commission's tentative conclusion, in Order No. 74, that Section 404(e) of the PAEA confers on it the authority to review each and every non-postal service offered by the Postal Service on the date of enactment and to determine whether that product should be "terminated or continued based on the public need for the service and the ability of the private sector to meet that need" (Order No. 74 at 7) is sound. It follows the plain language of Section 404(e)(3). This conclusion was all that was necessary and sufficient to determine the scope of this Docket.

Unfortunately, the Commission did not stop at this point. Rather, the Commission goes on to state that “revenues and costs” associated with non-postal services permitted to be continued will be “included in periodic reports filed with the Commission.” Order No. 74 at 10. The Commission does not specify exactly which of the reports the Postal Service is required to submit to the Commission under the PAEA might contain this information (or the form in which the data is to be submitted). However, the clear import of this reference, as well as the Commission’s general discussion of revenue-generating arrangements (Order No. 74 at 11) is that the Commission expects this information to be submitted in connection with the annual compliance report under Section 3652 and is therefore subject to the Commission’s annual compliance review under Section 3653.

In this respect, the Commission has misread the scope of its authority under the PAEA: matters of terms and conditions of service and revenues and costs of non-postal services are uniquely managerial in nature. Issues as to whether any alteration of a grandfathered non-postal service is ultra vires or otherwise unlawful are, under well settled law, justiciable in court and in complaint proceedings under Section 3662 – when the issue is one within the Commission’s expertise.

A. Section 404(e) Does Not Empower the Commission to Conduct Compliance Reviews of Otherwise Lawful Non-postal Services.

Our conclusion that the Commission lacks plenary authority over the prices, other terms and conditions and costs of otherwise lawful non-postal services stems directly from the plain language of the statute and its legislative history. Section 404(e) makes clear that (i) the Postal Service “may *provide* non-postal services which were offered as of January 1, 2006, (ii) the Commission “shall *review* each non-postal service ... and

determine whether that non-postal service shall continue” and (iii) the Commission shall “*designate* whether the service shall be regulated under this title... as a market dominant product, a competitive product or an experimental product.” The words “determine” and “designate” are not interchangeable. Thus, Section 404(e) does not expressly empower the Commission to do anything other than determine whether non-postal services should be continued and to designate the category in which each permitted non-postal service is to be placed. The Commission’s tentative conclusion reads too much in the language and purpose of Section 404(e).

B. The Reporting Requirements of the PAEA Do Not Empower the Commission to Conduct Compliance Reviews of the Prices Charged, Costs Incurred or Other Terms of An Otherwise Lawful Non-Postal Service.

1. Non-Postal Services Are Distinct From Postal Products. It is true that Section 3652 requires an annual compliance report from the Postal Service to the Commission with respect to all “products.” However, Section 102(b) of the Act makes clear that the term “product” “means a *postal service* ... for which a rate or rates ... apply.” (emphasis supplied). Section 102(7) similarly makes clear that the term ‘rates’ includes fees for “postal services.” As the Commission itself has acknowledged, the “quid pro quo” for some non-postal services is not monetary (Order 74 at 11) and even where there is a fee, it is not assessed for functions that comprise the definition of postal services.

Further, Sections 102 and 404(e) categorically exclude “non-postal services” from the definition of “postal services.” Since, therefore, 3652 and 3653 apply to – and only to – “products” and since non-postal services are categorically excluded from the term

“product,” these sections do not apply to non-postal services approved by the Commission under 404(e)(5).

There is nothing in the Act that either expressly or by implication empowers the Commission to re-classify a “non-postal service” and convert it into a “postal product.” Non-postal services are by definition non-postal and remain so despite designation by the Commission under 404(e)(5). As a result, these services lie outside the reach of Section 3652 and 3653, as well as any regulations the Commission may promulgate under those sections. Information as to revenues, costs and similar matters concerning non-postal products will, in some form, enter into the financial reporting requirements of Section 3654. The Commission does not have jurisdiction under that section to conduct any review of those reports other than to adopt regulations to improve the quality, accuracy or completeness of the Postal Service data.

2. Sections 3652 and 3653 Do Not Reach Non-Postal Services. The conclusion that the Commission does not have plenary jurisdiction over issues affecting the Postal Service’s management of grandfathered non-postal products is underscored by the precise terms of Section 3652 and 3653 and their purposes. The purpose of the Annual Compliance Report required by Section 3652 is to lay the foundation for the annual determination of compliance under Section 3653. The first sentence of Section 3653(a) makes this clear. However, neither the report nor the annual determination of compliance fits with the very nature of non-postal products. The Annual Report shall “analyze costs, revenues, *rates* and quality of service,” shall include “product information, including mail volumes,” and information as to “workshare discounts.”

Section 3652(a); Section 3652(b). Section 3653(b) requires a written determination by the Commission as to

Whether any rates or fees in effect during such year ... were not in compliance with applicable provisions of *this chapter*.

(emphasis added)

The first problem is that – with the exception of Section 3662 – Chapter 36 does not address non-postal services; and, as we have narrated, any attempt by the Commission to bring non-postal services under the chapter amounts to an impermissible conversion of a non-postal service into a postal product. More fundamentally, terms such as “rates or fees,” and “workshare discounts” have no meaningful application to non-postal services. As the Commission itself has pointed out in Order 74, in many cases, non-postal services do not involve a “rate” or a “fee.” Nor is there any means to meaningfully fashion service standards for many, if not all, of the activities that fall within the definition of non-postal.

In addition, there is no rational way to integrate the revenues and costs of non-postal products into the 3652 report and the resultant annual compliance determination. The costs of postal products and the revenues the Postal Service receives from mailers are incurred in the provision of “postal service” as defined in the PAEA. These revenues and costs can therefore, with some measure of precision, be assigned to the classes of mail that are subject to the price cap or to the competitive product basket. That is an essential task in the determination of compliance under Section 3653(b). However, how is that to be done in the case, for example, of the sale or rental of a postal facility or, in the case of other non-postal services such as Address Management Services, which

arguably are used by or benefit all classes of mail in some degree? While it is certainly the case that arbitrary accounting type allocations might be made, that sort of an approach undercuts the whole purpose of the PAEA. Moreover, there are some types of non-postal services – e.g., philately, passport service, etc. – which have nothing to do with mail and are used by consumers who may or may not be postal rate payers, and therefore, any allocation of the costs and revenues to classes of mail would be purely arbitrary.

3. Non-Postal Services Are Below the Line.

It is classic utility law that certain activities engaged in by a regulated utility are non-utility in nature. Non-utility operating income and expenses are outside the scope of the plenary jurisdiction of the regulator. See *Board of Public Utility Commissioners v. New York Telephone Company*, 271 U.S. 23, 32 (1926). The rationale for this separate treatment of non-utility functions and properties is that the basic purpose of the regulator is to protect the interests of ratepayers and ratepayers have no interest, legal or equitable, in non-utility operating income and deductions; these are to be treated “below the line.” See *Washington Public Interest Organization v. Public Service Commission*, 393 A 2d 71, 72 (D.C. 1978). Non-postal products are the equivalent of non-utility activities and therefore are “below the line” for ratemaking and related purposes.

C. Disputes Regarding Non-Postal Products Are Reviewable In Federal District Courts and, In Appropriate Cases, Under the Complaint Provisions of the PAEA.

While the Postal Service does not say so explicitly, the essential thrust of its argument – that some (or perhaps all) non-postal services that do not lend themselves to designation as market dominant or competitive – is that such services are essentially unreviewable. The Commission was entirely correct to categorically reject this

contention. However, both the Commission and the Postal Service seem to have overlooked the fact that there is a venue outside of the Postal Regulatory Commission through which abuses of the Postal Service's authority to continue to provide certain non-postal services can be regulated. There is well-established precedent that if the Postal Service engages in actions which are ultra vires or otherwise violate provisions of the PAEA, injured parties can seek relief in the courts.

That there is a need for some venue to review claims of misconduct for the Postal Service's provision of approved non-postal products is clear. It is unrealistic to assume (and Congress did not do so) that Commission-approved non-postal services will remain in precisely the form they were offered on January 1, 2006. These services are not set in concrete. Some modification of non-postal services over time is to be expected. Some of these alterations may be benign, but others may not because the modification result in a service that exceeds the Postal Service's powers under the Act. See, e.g., *Aid Association for Lutherans v. USPS*, 321 F.3d 1166 (D.C. Cir. 2003).

The courts have made it abundantly clear that certain actions taken by the Postal Service are not reviewable in any forum other than Congress. Others although remitted generally to the managerial discretion of the Postal Service, are nonetheless subject to judicial examination and remediation. The appointment and removal of a Postmaster General is not reviewable because, as the court made clear, there is no law to apply – the matter is entirely discretionary. See *Carlin v. McKean*, 823 F.2d 620, 623 (D.C. Cir. 1987). However, these “strictures do not apply in all cases.” *Aid Association for Lutherans v. USPS*, 321 F.3d, 1166, 1172 (D.C. Cir. 2003). Rather, it is “clear that judicial review is available when an agency acts ultra vires” and that this principle applies to the Postal Service no less than other agencies. See *Aid Association for*

Lutherans, at 1172-1173;¹ see also *UPS Worldwide Forwarding v. USPS*, 66 F.3d 621 (3rd Cir. 1995) (claims of violation of 403(c) may be heard by the federal courts with respect to unregulated postal products).

We maintain that both the Postal Service and the Commission misread Section 404(e)(5). The Postal Service asserts that this section represents a “compromise” which would allow certain non-postal services to be exempted from designation under that subsection, and therefore unreviewable. That position is plainly untenable in light of the unequivocal language of Section 404(e)(5). The Commission, on the other hand, truncates (e)(5) on the apparent theory that since that subsection specifically requires it to define the status of each permitted non-postal service, it must be the exclusive entity that is to “regulate” the service and it is to do so in the same manner that it regulates postal products. That view is equally incorrect.

First, that is not what the statute says. While the statute unquestionably requires the Commission to “designate” the category, it expressly provides that, after designation, non-postal products “shall be regulated *under this title*.” 39 U.S.C. 404(e)(5). (Emphasis supplied.) That language does not convey plenary jurisdiction on the Commission. Rather, where Congress intended to confer exclusive jurisdiction on the Commission, it did so explicitly. For example, section 404(b) provides that the Governors are authorized to establish reasonable and equitable classes of mail for postal services “in accordance with the provisions of Chapter 36” – i.e., subject to Commission review. And, in dealing with matters that go beyond postal products, Congress was even more explicit. For example, Section 404(d) allows the Postal Service to make a determination to close or consolidate a post office, but specifically provides that any such determination may be appealed “to the Postal Regulatory Commission.” By contrast, the “title” of the PAEA (referenced in Section 404(e)(5)) does not mention either the Commission or Chapter 36; however, the title expressly

¹ Indeed, in its brief in the *Lutheran* case, the Postal Service conceded as much. *Id.* at 1172.

provide for lawsuits in the federal courts against the Postal Service. The cases we cite show unmistakably that when the Postal Service exceeds its authority under the Act or otherwise engages in unlawful activity the federal courts can act.

Second, allowing affected parties recourse to the courts is supported by general considerations of judicial efficiency. The merits of a claim that the Postal Service has exceeded its statutory authority is a matter of law. See, e.g., *Aid Association for Lutherans* at 1175 (defining of the merits issue as the “Statutory Question”). The Commission’s expertise in postal operations and in costing and ratemaking matters does not enter into the kinds of issues that are likely to arise with respect to non-postal services in many and perhaps most cases. This is particularly true in the context of non-postal services which are very far removed from the work that the Commission has traditionally carried out under the Postal Reorganization Act and as to which it has even greater responsibilities under Chapter 36 of the PAEA. For example, there is nothing in the Commission’s experience or expertise that would enable it to bring insight and administrative efficiency to determinations with respect to the Postal Service’s philately program. Even with respect to non-postal products that bear a closer relationship to the regulation of postal products – such as Address Management Services (discussed below) – there are issues under patent law, copyrights and trademarks and of privacy that are far better left to the federal courts which deal with these issues with some frequency. See, generally, *Brown v. MCI Network Servs. Corp.*, 277 F.3d 1166, 1172-73 (9th Cir. 2001) (and cases cited therein). And, unlike the Commission and the courts have power to grant temporary interlocutory relief.

Third, the conclusion that the courts are an appropriate venue, outside the Postal Regulatory Commission, does not repeal Section 3662 of the Act. That section expressly empowers the Commission to entertain complaints under Section 401(2) and 403(c). Parties

claiming injury resulting from the Postal Service's management and evolution of non-postal services thus have a choice, in certain cases, whether to proceed in court or before the Commission under the complaint provision of Section 3662. It is not unheard of for injured parties to be given a choice of proceeding before an administrative agency or in court. See 47 USC § 207. While it is true that, in its enactment of the PAEA, Congress did not expressly provide for alternative venues – as does the Communications Act – it is equally true that Section 3662(a) does not, by its terms, grant the Commission exclusive or original jurisdiction to enforce the provisions of the PAEA with respect to non-postal products. The only available conclusion that the Commission can properly reach in this Docket is that the courts are a venue, as an alternative to the complaint process, for dealing with the potential for misconduct on the part of the Postal Service in its administration of grandfathered non-postal products.

Fourth, the conclusion that issues regarding the evolution or devolution of non-postal services belongs to the federal courts does not, in any respect, detract from the importance of the designations that the Commission is to make under Section 404(e)(5). As the court in the *Lutheran* case makes clear, there is a significant issue as to the scope of judicial review of Postal Service actions. The Commission is plainly empowered by Section 404(e)(5) to make the designations and – assuming the Commission's decision is not “utterly unreasonable and thus impermissible” *Lutheran at 1174*, (and we are confident that it will not be) – those designations are entitled to deference under the Chevron Doctrine and therefore will significantly inform the outcome of the issues which the federal courts are empowered and well situated to decide.

Fifth, our conclusion accords with the broader purposes of the PAEA. The fundamental purposes of Section 102 and 404(e) was to eliminate a provision under former law which allowed the Postal Service to provide, establish, change or abolish

special non-postal or similar services without any review whatsoever. That power has been taken away from the Postal Service under the PAEA. The PAEA otherwise is basically designed to provide the Postal Service with the flexibility that it lacked under former law, to manage its own affairs and organize its business activities with minimal regulatory oversight. See, e.g., Section 403(a) et seq. And this is especially true in the context of non-postal services. That overarching objective can be achieved only if both the Postal Service and the Commission respect and accept the limitations on their respective jurisdiction over non-postal services as detailed above.

For these reasons, we submit that the Commission does not have plenary jurisdiction over such non-postal services upon the completion of the determinations and designations it is to make under Section 404(e). The terms and conditions of permitted non-postal services, the revenues that the Postal Service receives from such permitted services, and the cost it incurs in providing them are reviewable only by a federal court or – in appropriate cases – under the complaint process of the PAEA.

II. NON-POSTAL SERVICES SUCH AS ADDRESS MANAGEMENT MUST BE CLASSIFIED AS MARKET DOMINANT.

Although Section 404(e)(5) requires the Commission to designate those non-postal services that are to be continued as either market dominant, competitive or experimental, neither Section 404 nor any other provision of the statute establishes the standard the Commission is to apply in making the designations. The designations are nonetheless important because – as we have stated in Part I (and elaborate below) they significantly affect the nature of the determination the federal courts are to make in the context of a complaint involving a claim the Postal Service has altered the nature of an otherwise permitted non-postal service as to render it unlawful.

A. All Services Must Be Classified.

Despite the lack of an explicit standard for the designation of permitted non-postal services, there are certain general principles that broadly underpin the PAEA and that can be used by analogy to perform the designations required by Section 404(5). In general terms, the PAEA bases its overall regulatory structure on the degree of market power the Postal Service possesses, either as a legal or practical matter; and, where market power is found or stipulated to exist, the scope of review differs from cases in which the Postal Services faces direct competition. This general principle can be used to make the determinations mandated by section 404(e)(5).²

In our view, most of the non-postal services identified by the Postal Service in its initial and supplemental responses to Order No. 74 should be treated as competitive. This is because the same service (or a closely comparable substitute) is being provided in the private sector. This designation applies regardless of whether the Postal Service has specific statutory authority for the offering. Thus, we submit that where there is a private sector alternative or a private sector close substitute, non-postal services permitted by the Commission to continue should be designated as competitive.

There are, however, certain non-postal services that must be classified as market dominant. This is particularly true when the Postal Service claims an exclusive proprietary interest in the information and exercises unilateral control of the terms on which its intellectual property may be used and the purposes for which the information may be put. Foremost among these intellectual property categories are the products

² Read literally, Section 404(e)(5) contemplates the possibility that some non-postal services might be categorized as “experimental.” We have doubts, however, as to whether any such non-postal service exists or could be permitted to continue since, by definition, the only non-postal services that the Postal Service is allowed to provide are those which were in effect on or before January 1, 2006.

which the Postal Service has, in its Initial Response of the Postal Service to Order 74 (“Initial Response”), designated under the heading “Address Management” and includes, for example, NCOA link, AEC, AECII, DVP, etc. Initial Response at 32.

These services are market dominant, not because the Postal Service has obtained trademarks on the names it has applied to the various data sets. They are market dominant because the Postal Service asserts complete ownership and control of the intellectual property – the address information, the algorithms that are used to access it, etc. – that comprise these various data sets. Given the Postal Service’s assertion of complete intellectual property rights, it is immaterial whether the service or closely comparable services are or could be offered by the private sector; any private sector concern wishing to utilize the data can do so only under license or pursuant to authorization of the Postal Service. Its assertion of control is, therefore, absolute.³

B. The Designation of Address Management (and Similar Intellectual Property-Based Non-Postal Services) as Market Dominant Determines the Scope of Judicial Review.

As we have pointed out, the Commission’s designation of non-postal services as either market dominant or competitive would be entitled to deference in federal court litigation involving changes in the scope of non-postal services approved under 404(e). These designations will affect the scope of judicial review or the scope of review upon a complaint laid under Section 3662. For non-postal services, properly classified as competitive, the issue is whether the modification or alteration of the service has unfair

³ The argument could be made that, in fact, the very nature of the address management data bases and the uses to which they are permitted to be put are ancillary to the delivery of mail and should therefore be treated as a postal service. However, given the long history of the current structure of the address management systems, potential privacy and other security concerns, we do not oppose the classification of address management as non-postal, so long as the designation of these services is correct.

competitive effects on private sector concerns offering the same or a comparable service. Cf. 404a. For market dominant non-postal services such, as Address Management, the issue is quite different – it involves the question of whether the Postal Service is seeking to extract monopoly rents or otherwise abuse the powers that it has by reason of its exclusive proprietary interest in the intellectual property. Cf. 403(c).

There are compelling reasons of public policy for the Postal Service to set its prices for market dominant non-postal services, such as Address Management at levels that are no greater than, and possibly below, its cost in administering these data bases. Particularly given the fact that Move Update, largely based on these data bases, will soon be mandatory for both First-Class and Standard Mail, it is imperative that the Postal Service maintain the basic structure and constrain the fees it charges licensees for this non-postal service in order to enable the Postal Service to more efficiently perform delivery functions in the provision of postal products. Public policy considerations might well dictate the opposite result in the case of non-postal services designated as competitive.

For these reasons, PostCom urges the Commission to designate Address Management Services (and similar services where the Postal Service claims exclusive ownership of the intellectual property) as market dominant.

CONCLUSION

For these reasons, the Commission should reconsider and revise its tentative conclusion that it has plenary jurisdiction over non-postal products. It should, separately, determine that Address Management and similar services are market dominant non-postal products.

Respectfully submitted,

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