

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

Review of Nonpostal Services

)

Docket No. MC2008-1

INITIAL BRIEF

OF

VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.

William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102-3860
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc. and
Valpak Dealers' Association, Inc.

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STATEMENT OF THE CASE

Postal Accountability and Enhancement Act

On December 20, 2006, the Postal Accountability and Enhancement Act ("PAEA") was signed into law as Public Law 109-435. Section 102 of PAEA eliminated the specific power which allowed the Postal Service "to provide, establish, change, or abolish special nonpostal or similar services," previously set forth in 39 U.S.C. section 404(a)(6).

In its place, PAEA section 102 added 39 U.S.C. section 404(e):

(e)(1) In this subsection, the term "**nonpostal service**" means any service that is not a **postal service** defined under section 102(5).

(2) Nothing in this section shall be considered to permit or require that the Postal Service provide any nonpostal service, except that the Postal Service may provide nonpostal services which were offered as of January 1, 2006, as provided under this subsection.

(3) Not later than 2 years after the date of enactment of the Postal Accountability and Enhancement Act, the Postal Regulatory Commission shall review each nonpostal service offered by the Postal Service on the date of enactment of that act and determine whether that nonpostal service shall continue, taking into account —

- (A) the **public need for the service**; and
- (B) the ability of the private sector to meet the **public need for the service**.

(4) Any nonpostal service not determined to be continued by the Postal Regulatory Commission under paragraph (3) shall terminate.

(5) If the Postal Regulatory Commission authorizes the Postal Service to continue a nonpostal service under this subsection, the Postal Regulatory Commission shall designate whether the service shall be regulated under this title as a **market dominant product**, a **competitive product**, or an **experimental product**. [Emphasis added.]

The PAEA definition of “**nonpostal service**” is keyed to the definition of “**postal service**,” which is defined as “the delivery of letters, printed matter, or mailable packages, collection, sorting, transportation, or other functions ancillary thereto.” 39 U.S.C. § 102(5). In its evaluation of a particular nonpostal service, the Commission is to take into account at least: (i) “the public need for the service”; and (ii) “the ability of the private sector to meet the public need for the service.” The Commission’s determination is to take place not later than two years from the date of PAEA’s enactment, *i.e.*, by December 19, 2008. 39 U.S.C. § 404(e)(3).

On December 20, 2007, the Commission issued Order No. 50, opening this docket and setting forth an initial procedural schedule to conduct its review of nonpostal services as required by 39 U.S.C. section 404(e)(3). The Commission set March 19, 2008 as the deadline for the Postal Service to file its “complete description of each nonpostal service offered by the Postal Service on the date of enactment of the PAEA.” Order No. 50, p. 2.

On March 19, 2008, the Postal Service filed a Notice of Submission of Sworn Statement on “Nonpostal Services” Pursuant to 39 U.S.C. § 404(e) (“USPS March 19

Notice”), and filed the Statement of Tina M. Lance. The Postal Service’s Notice recognized and discussed some of the difficulty in applying an overly simplistic view to section 404(e)’s definition of “nonpostal services.” The Postal Service’s view is that three categories of services are provided to the public by the Postal Service:

1. “postal services,” as defined by 39 U.S.C. section 102(5);
2. “nonpostal services,” as defined by 39 U.S.C. section 404(e) and contemplated by former 39 U.S.C. section 404(a)(6); and
3. services that are not postal services, but are discreet, statutorily authorized services.

The Public Representative filed on March 25, 2008, a motion to compel the Postal Service to file a complete list of nonpostal services. On April 1, 2008, the Postal Service filed a response to the Public Representative’s motion. The Commission granted the motion on April 29, 2008 by Order No. 74, requiring the Postal Service to file “a complete listing and comprehensive description of each nonpostal service ... including all existing agreements (contracts, arrangements, or however characterized) that generate revenues....” Order No. 74, p. 14.

The Postal Service filed a motion on May 12, 2008, requesting clarification of Order No. 74. The Commission issued Order No. 77 on May 28, 2008, granting the Postal Service’s motion and clarifying that the Commission’s views expressed in Order No. 74 were only preliminary.

On June 9, 2008, the Postal Service filed an initial, partial response to Order No. 74, along with a Motion for Partial Extension of Time to Response to Order No. 74, which was granted (*see* Commission Order No. 82). On June 23, 2008, the Postal Service filed a Further

Response to Order No. 74, and also filed five sworn statements by, respectively, Patrick R. Donahoe, Thomas J. Foti, Margot A. Myers, Pranab M. Shah, and Alice Vangorder.

On July 30, 2008, initial sworn statements were filed by Stamps.com Inc., DigiStamp Inc., ASC, Inc., and Epostmarks, Inc. After an extension of time granted by the Commission (Order No. 93) on August 20, 2008, responsive statements were filed by Microsoft Corporation, DigiStamp, Inc., and Epostmarks, Inc. On August 26, 2008, Delegate Jeannie Haddaway-Riccio, Maryland House of Delegates, submitted a letter to the Commission.

Commission Order No. 93 also set September 10, 2008 as the deadline for initial briefs and September 23, 2008 as the deadline for reply briefs.

Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. (hereinafter "Valpak") submit this Initial Brief in response to Order No. 50.

ARGUMENT

I. **PAEA's Definition of "Nonpostal Service" Includes Only Retail Services Regularly Offered to the Public.**

Under the Postal Reorganization Act of 1970 ("PRA"), 39 U.S.C. section 404(a)(6) authorized the Postal Service "to provide, establish, change, or abolish special **nonpostal** or similar **services**." (Emphasis added.) However, PRA did not define "nonpostal services."

Under PAEA, the Postal Service may not continue offering "nonpostal services" unless (i) the nonpostal service was being offered on January 1, 2006, and (ii) the Commission reviews it and allows it to continue. Unlike PRA, PAEA does define "nonpostal service" — as "any service that is not a postal service." 39 U.S.C. § 404(e)(1). The Postal Service

characterizes this provision as a “vague and superficially expansive definition.” USPS March 19 Notice, p. 22. On the other hand, the Commission views it as a “clear definition.” Order No. 74, p. 11. However, it may be that neither the Commission nor the Postal Services has correctly defined the term “nonpostal service.”¹

Commission Order No. 74 is predicated on the legal assumption that “[e]very revenue generating arrangement executed by the Postal Service entails either a postal service or a nonpostal service.” *Id.*, p. 11 (emphasis added). But PAEA does not use the term “revenue generating” in defining nonpostal services — almost the broadest classification that one could conceive. On the other hand, the Postal Service claims that certain services are neither postal nor nonpostal, but instead “are authorized by a discrete grant of authority in title 39, such as government services and philatelic services.” USPS March 19 Notice, p. 3. But 39 U.S.C. section 404(e)(1) provides for only two categories of services, not three. Neither the Commission’s position nor that of the Postal Service seems entirely consistent with the language of PAEA.

¹ For purposes of understanding the scope of 39 U.S.C. section 404(e) — and ultimately the Commission’s review in this docket — it is important to review the changes wrought by PAEA in context. By way of background, the limitations on nonpostal services imposed by PAEA appear to have been an outgrowth of a report of the Government Accountability Office and recommendations of the President’s Commission on the U.S. Postal Service regarding the Postal Service’s losses in connection with certain non-core services and products that it was offering to the public. Prior to passage of PAEA, the present issue between the Postal Service and the Commission regarding the scope of the Commission’s determination in this docket appears to be a continuation of a disagreement that was manifested in Docket No. RM2004-1 (“Proposed Amendment to the Commission’s Rules”). *See, e.g.*, Postal Rate Commission Order No. 1449 (January 4, 2006).

Central to section 404(e)'s definition of "nonpostal service" is that it must be a **service**. Indeed, it does not say that a nonpostal service is any **arrangement or activity — revenue-generating or otherwise** — but it says "any **service** that is not a postal service." (Emphasis added.) Therefore, the first step in defining "nonpostal service" is understanding the nature of a "service" in the context of the various activities engaged in by the Postal Service.

Because PAEA does not contain any definition of "service," the word is "normally construe[d] in accord with its ordinary or natural meaning." Smith v. United States, 508 U.S. 223, 228 (1993). Indeed, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979). The most relevant dictionary definition of "service" would appear to be "the **supplying** ... of utilities or commodities ... **required or demanded by the public**." Webster's Encyclopedic Unabridged Dictionary of the English Language (Gramercy Books, 1989) (emphasis added). This meaning is reinforced by both of the specific criteria by which the Commission determines whether a nonpostal service shall continue: "the **public** need for the service" and "the ability of the private sector to meet [that] **public** need." As the Supreme Court has ruled, "[t]he plainness of ambiguity of statutory language is determined by reference [not only], to the language itself, [but] the specific **context** in which that language is used, and the **broader context** of the statute as a whole." Robinson v. Shell Oil Company, 519 U.S. 337, 341 (1997). According to these standard rules of statutory construction, then, only those activities of the Postal Service that are **regularly** made available to the **public** should be considered **services**.

Thus, the term “service,” as employed in 39 U.S.C. sections 102(5) and 404(e), would not include buying and selling real estate upon which to operate postal operations (and even renting excess space) which is not offered to the public and therefore is not a service, even if regular. It (i) might produce revenue, and (ii) might not be considered a “postal service” by the 39 U.S.C. section 102(5) definition, but it (iii) is not a “nonpostal service” encompassed by section 404(e). Further, the Postal Service engaging a company to provide vending machines to Postal Service employees in processing plants is a service to employees, but it is not offered to the public and should not be considered a “nonpostal service” encompassed by section 404(e) merely because it generates revenue. The sale of an old desk likewise generates revenue and is nonpostal, but is neither regular nor offered to the public, hence it is not a nonpostal service. To be a “nonpostal service,” it first must be a service that is regularly offered to the public and the above illustrations fail the threshold test.

Further, if the Commission were to make a determination that an activity is a nonpostal service, then for any such nonpostal service not discontinued, the Commission would be required by PAEA section 404(e)(5) to decide to treat it as either a market-dominant product, a competitive product, or an experimental product, all subject to the rate-setting regulations under 39 U.S.C. sections 3622 or 3633, the complaint remedy of section 3662, and the additional reporting requirements of regulations under section 3652. These statutory provisions and the regulations promulgated (or to be promulgated) thereunder were designed with **regularly**-offered, **publicly**-available retail products in mind, and are not tailored for incidental business services that happen to be considered revenue-generating activities. To read nonpostal service expansively, so as to include all of the Postal Services revenue-

generating activities, whether regularly offered to the public or not, would require the Commission to categorize each “nonpostal service” as market-dominant, competitive, or experimental products. Such categorization would appear to make sense, however, only if applied to services offered to the general public. To construe the statutory definition of nonpostal services to include all of the Postal Service’s revenue-generating activities, as the Commission has proposed, would be tantamount to conferring upon the Commission powers, the exercise of which would either be a practical impossibility or nonsensical, and hence, inconsistent with the rule of construction that a statute should not be interpreted to require a practical impossibility² or absurd action.³

Lastly, Commission regulation of numerous, but collectively relatively minor, activities that fall within the Commission’s broad definition of “nonpostal services” would seem at total variance with the light-handed regulation of the Postal Service supposedly envisioned by PAEA. Under PAEA, the Postal Service must retain the authority to manage itself. The Commission should not construe the scope of its review under section 404(e) to impede the everyday decision-making by Postal Service management. PAEA did not change the fact that the Postal Service must operate in a business-like manner under the control of its Board of Governors in order to provide efficiently core postal services. *See* 39 U.S.C. §§ 202(a)(1) and 401.

² *See United States v. Louisiana*, 290 U.S. 70, 76 (1933).

³ *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

II. The Commission's Review under 39 U.S.C. Section 404(e) Is Limited to Nonpostal Services.

Order No. 74 describes the Postal Service's response to the Public Representative's motion to compel as being:

predicated on the unsustainable theory that the Postal Service, not the Commission, is authorized to determine which services, that are *not* postal services, offered by the Postal Service on December 20, 2006 constitute nonpostal services that, under the PAEA, are subject to the Commission's authority to terminate or continue. [*Id.*, p. 6 (italics original).]

Thus, the Commission views the Postal Service as claiming the right to decide what is a "nonpostal service" while the Commission believes that it alone has this responsibility under PAEA. However, the statute does not expressly assign final responsibility over this issue to either the Commission or the Postal Service. Although it may seem "unsustainable" to the Commission that the Postal Service could be allowed to **limit** the scope of the Commission's jurisdiction unilaterally, to the Postal Service it is equally "unsustainable" for the Commission to **expand** the scope of the Commission's jurisdiction unilaterally over areas where it has no statutory authority. In such a situation, it is necessary to examine the words of the statute carefully. And PAEA does not empower the Commission to review all revenue-generating activities of the Postal Service to determine whether they are "nonpostal services." The Commission should only consider those "nonpostal services" that the Postal Service would like to continue offering regularly to the public.

CONCLUSION

Although Valpak takes no position on the sufficiency of the Postal Service's sworn statements,⁴ the Postal Service appears to be attempting to comply in good faith with Commission Order No. 74 in this docket. Particularly in such a circumstance, it is important that the Commission narrow its focus to review only "nonpostal services," excluding activities which are not "services" at all — because they are neither being regularly offered, nor offered to the public.

Respectfully submitted,

William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102-3860
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc. and
Valpak Dealers' Association, Inc.

⁴ Commission Order No. 74 (April 29, 2008) demonstrates that the Postal Service's initial filing on March 19, 2008 did not include all nonpostal services that should have been included (as further evidenced by the Postal Service's subsequent filings — *see* the Postal Service's filings of June 9 and 23, 2008).