

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

Review of Nonpostal Services

Docket No. MC2008-1

**REPLY BRIEF OF
AMERICAN POSTAL WORKERS UNION, AFL-CIO
(September 30, 2008)**

American Postal Workers Union, AFL-CIO (“APWU”) submits this Reply Brief in support of the United States Postal Service (“USPS” or “Postal Service”) position that the term “nonpostal services” does not encompass all revenue generating activities that are not “postal services” as defined by 39 U.S.C. 102(5). Specifically, the activities identified by the Postal Service that are independently authorized by the Postal Accountability and Enhancement Act (“PAEA” or “the Act”) or authorized by other Federal laws (See Attachment B to USPS Initial Brief, September 10, 2008) are exempt from review by the Commission under Section 404(e) of the PAEA.

Pursuant to 39 U.S.C. § 404(e)(3), the Commission initiated the present docket on December 20, 2007, to “determine which nonpostal services should continue, taking into account the public need for the service and the private sector’s ability to meet that need.”¹ Nonpostal service is defined in the Act as “any service that is not a postal service defined under section 102(5).”² We agree with the Postal Service that nonpostal services refer to those activities previously authorized under Section 404(A)(6) of the Postal Regulatory Act and specifically excludes those

¹ Order No. 50 at page 1.

² 39 U.S.C. § 404(e)(1).

activities authorized by other provisions of the law.³ The Public Representative's contention that nonpostal service encompasses all activities preformed by the Postal Service that are not "postal services" is untenable and should be rejected by the Commission as contrary to the PAEA.

At the outset of its Initial Brief, the Public Representative overstates the scope of the current docket by claiming that "'nonpostal' activities of the Postal Service that fall under § 404(e) are subject to the Commission's review."⁴ Section 404(e) does not mandate review of all nonpostal "activities." Instead, Section 404(e) requires the Commission review nonpostal services. The Public Representative further contends that nonpostal services "are clearly defined in § 404(e) as all services that are not postal services."⁵ The Public Representative ignores the fact that "services" is not clearly defined in the statute and therefore, the inquiry is not at its end and in fact, there is a "need to look further into the legislative history or other canons of interpretation"⁶ as the Postal Service has done in its filings with the Commission. The Postal Service's Initial Brief presents a comprehensive account of the legislative history of Section 102 which demonstrates "that Congress was motivated by a desire to eliminate the Postal Service's authority to offer commercial, nonpostal services pursuant to the ambiguous grant of authority found in former section 404(a)(6)."⁷

As the Postal Service noted in its Initial Brief, "the Postal Service derives revenues from a large number of sources in the normal course of operating a nationwide hardcopy distribution network on a judicious, business-like basis. Many

³ Initial Brief of USPS at p. 51-73 (September 10, 2008).

⁴ Initial Brief of Public Representative at p. 5 (September 10, 2008) (*emphasis added*).

⁵ *Id.* at p. 9.

⁶ *Id.*

⁷ Initial Brief of USPS at p. 29-40.

of these activities necessarily generate revenue, such a when the Postal Service sells or leases excess real property, equipment, or vehicles.”⁸ The mere fact that revenues are generated does not mean that the Postal Service is engaging in an activity that should fall under the purview of the Commission. Many of these activities, like selling and leasing excess real property, are explicitly authorized by the PAEA, and are preformed as necessary business activities incidental to the Postal Service’s core mission; not in neglect of it. The Commission should avoid an overly broad reading of Section 404(e) and refrain from attempting to regulate the authorized business activities of the Postal Service.

An expansive reading of Section 404(e) would require the Commission to regulate many activities that cannot be reasonable categorized as a service. Contrary to the submission of PostCom, et al, the Commission’s task is not limited simply to “determin[ing] whether the non-postal services should be continued and designat[ing] the category in which each permitted non-postal service is to be placed.”⁹ The PAEA specifically requires that the Commission designate whether the nonpostal service is to “*be regulated as a market dominant product, a competitive product, or an experimental product.*”¹⁰ Thus, if the Commission were to reject the position of the Postal Service and evaluate all revenue generating activities, it would also be required to establish a system under which it could *regulate* these activities as *products*. Accordingly, as noted by the Postal Service, these activities would be subject to the pricing and classification regulatory

⁸ Initial Brief of USPS at p. 44

⁹ Initial Brief of PostCom et al at p. 4 (September 10, 2008).

¹⁰ 39 U.S.C. 404(e)(5) (*emphasis added*).

framework.¹¹ But many of these activities, including but not limited to, recovering fines, forfeitures, and insurance payouts, do not fit into the regulatory framework in any conceivable manner. The Commission should avoid unnecessarily trying to make square pegs fit into round holes. Particularly when such a requirement is clearly not intended by the PAEA.

Instead, the Commission should adopt the framework proposed by the Postal Service. Those activities that are independently authorized by other Sections of the PAEA or other Federal law should not be regulated as either a postal service or nonpostal service.

Respectfully submitted,

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¹¹ Initial Brief of USPS at p. 60.