

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

Review of Nonpostal Services

Docket No. MC2008-1

**PITNEY BOWES INC. COMMENTS ON UNITED STATES POSTAL SERVICE
RESPONSE TO ORDER NO. 126 REGARDING LICENSING AGREEMENTS**

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I. INTRODUCTION

The instant pleadings were occasioned by the undisclosed introduction of a purportedly new nonpostal service – the sale of USPS-branded postage meter and printer ink cartridges into a mature, highly-competitive, commercial market.

The Postal Service has conceded that it was not offering USPS-branded imaging supplies as of January 1, 2006, and has not even attempted to argue that doing so is a variant of a nonpostal service offered prior to that date. Instead, the Postal Service’s position is that it may engage in this activity as part of an amorphous third category of revenue-generating activities which are neither postal nor nonpostal. But as the Commission correctly observed earlier in this proceeding, “[t]here is no provision for a third category of services which is neither ‘not postal’ nor ‘not nonpostal,’ or, as the Postal Service would have it, not services at all but merely sources of revenue.”¹

The adoption of the Postal Service’s position would thwart a primary purpose of the Postal Accountability and Enforcement Act (PAEA)² – that the Postal Service focus on its core postal business – “the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto[.]”³ Consistent with Congress’ intent to focus the Postal Service on its core postal business, under section 404(e) of the PAEA, the Postal Service is limited to offering only postal services or nonpostal services which were offered as of January 1, 2006, subject to Commission approval.

¹ PRC Order No. 74 (April 29, 2008) at 7.

² See Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006). The PAEA amends various sections of title 39 of the United States Code. Unless otherwise noted, section references in these comments are to sections of title 39.

³ 39 U.S.C. § 102(5).

The Postal Service has devoted many pages of argument to explain away the unambiguous language of the statute and the overwhelming legislative history in support of the Commission's interpretation. In its place, the Postal Service wishes to return to the time before postal reform, where the limitations on the Postal Service's authority to engage in non-core, nonpostal activities were less clear and the only check on the Postal Service's assertion of the scope of its own authority was protracted litigation or legislative action. While seeking to enhance its flexibility and operational freedom under the new law (goals *Pitney Bowes supports*), the Postal Service's legal position in support of a third category of revenue-generating activities (including licensing) which are neither postal nor nonpostal would effectively allow the Postal Service to engage in a virtually limitless range of activities, beyond the scope of the Commission's regulatory oversight.

The Commission should reject the Postal Service's strained interpretation of section 404(e) and reject the contention that the Postal Service can do indirectly via a contractual or licensing agreement that which the PAEA plainly prohibits the Postal Service from doing directly. To read the statute otherwise would allow the Postal Service to evade the statutory limits imposed by section 404(e) and would subvert the overriding policy goals of transparency and accountability and the clear Congressional intention to focus the Postal Service on its core postal business.

With respect to the Postal Service's attempt to offer a purportedly new nonpostal service – the sale of USPS-branded postage meter and printer ink cartridges – the Commission should direct the Postal Service to terminate the service as an unauthorized new nonpostal service under section 404(e)(2) or, alternatively, as a service that fails

under section 404(e)(3) because the Postal Service's attempt to inject government-sponsored competition into the commercial imaging supplies market is contrary to the Congressional intent of the PAEA and because the public need for such services is served by the private sector.

II. PROCEDURAL HISTORY

On October 15, 2008, Pitney Bowes Inc. (Pitney Bowes) filed a motion to compel the Postal Service to file a complete list and description of all of its existing and new nonpostal services.⁴ The motion was filed after Pitney Bowes discovered that the Postal Service had entered the imaging supplies business by offering a purportedly new nonpostal service that was not identified in any of the Postal Service's prior pleadings – USPS-branded replacement postage meter ink cartridges as substitute products for Pitney Bowes and other postage meter ink cartridges.⁵

By Order dated November 4, 2008, the Postal Regulatory Commission (Commission) granted, in part, Pitney Bowes's motion to compel.⁶ In its Order the Commission observed that the motion raised important questions regarding the Postal Service's commercial licensing practices which are "relevant to the issues before the Commission in this proceeding regarding the appropriate interpretation of 39 U.S.C. 404(e), particularly the meaning of the term "services" and the proper application of the tests provided for in that section."⁷

The Commission further noted the concerns raised by PostCom *et al.*, Hasler, Inc. and Neopost, Inc., and the Public Representative that the Postal Service's contention that

⁴ See Pitney Bowes Inc. Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, October 15, 2008 (PB Motion).

⁵ See PB Motion, at 1.

⁶ See PRC Order No. 126, November 4, 2008 (Order No. 126).

⁷ Order No. 126, at 4.

its licensing activities are unreviewable would “allow the Postal Service to evade those statutory limits and to engage in virtually any business activity in direct competition with private firms . . . simply by engaging in the activity through a licensing arrangement.”⁸

Accordingly, Order No. 126 directed the Postal Service to file supplemental materials regarding its licensing program in order to develop a more complete record. *See* Order No. 126, at 5-6. The Commission further stated that it had made no determination on the jurisdictional status of the Postal Service’s licensing agreements, and invited the Postal Service to “provide whatever additional information it deems appropriate, including addressing these licensed products (or services) to meet the standards of section 404(e)(3)” of the PAEA.⁹

On November 17, 2008, the Postal Service filed its response to Order No. 126. The response included a general discussion of the intellectual property being licensed, the method of calculating payments under the licensing agreements and the nature of the licensing agreements.¹⁰ The Postal Service also appended a spreadsheet providing dates and revenues for license agreements, by number.

The majority of the response, however, was dedicated to the Postal Service’s legal arguments as to why the Postal Service believes that its licensing activities are beyond the scope of section 404(e), are not properly construed as a “service” within the meaning of section 404(e) and, therefore, are unreviewable. For the reasons discussed below, these arguments are unsupported by the unambiguous language of section 404(e) and the pertinent legislative history, and are incorrect as a matter of well-established intellectual property law.

⁸ Order No. 126, at 2-3 (quoting PostCom *et al.* Statement, at 3).

⁹ Order No. 126, at 6.

¹⁰ *See* USPS Response, at 2-4.

III. DISCUSSION

The Postal Service bases its assertion that its commercial licensing activities, including its recent foray into the imaging supplies business, are beyond the scope of section 404(e) and are, thus, unreviewable on two grounds: (A) licensing activities are neither “postal services” nor “nonpostal services,” but rather constitute a third category of sources of revenue authorized by discrete statutory authority under section 401, and (B) licensing activities are not “services” at all within the meaning of section 404(e) because the Postal Service is not engaging in any activity or business, but is merely licensing its brand. For the reasons discussed below, neither argument withstands scrutiny.

A. There is No Third Category of Unreviewable Activities – the Authority of the Postal Service to Engage in Commercial Licensing Services is Reviewable under Section 404(e).

Under the PAEA, the Commission, not the Postal Service, is vested with the authority to determine which offerings are nonpostal services within the scope of section 404(e) and which of those offerings should continue. Section 404(e)(3) requires the Commission to “review each nonpostal service offered by the Postal Service . . . and determine whether that nonpostal service shall continue.”¹¹ Section 404(e)(2) limits the Postal Service’s authority to provide “nonpostal services” – defined, in section 404(e)(1), as “any service that is not a postal service defined under section 102(5)” – to those it offered as of January 1, 2006.¹² The purpose of the Commission’s review under section 404(e)(3) is 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. Any

¹¹ 39 U.S.C. § 404(e)(3).

¹² 39 U.S.C. § 404(e)(2).

nonpostal service that the Commission concludes should not continue shall terminate.¹³

Any nonpostal service that the Commission authorizes to continue “shall be regulated under this title as a market dominant product, a competitive product, or an experimental product.”¹⁴ Thus, the plain language of section 404(e) is unambiguous. Under the PAEA, the Postal Service is limited to offering either postal services *or* qualifying and approved nonpostal services. There is no third category of services or activities that are neither postal services nor nonpostal services.

Notwithstanding the plain language of section 404(e), and the express definition of “nonpostal services” as “any service that is not a postal service defined under section 102(5),”¹⁵ the Postal Service contends that the language is “vague”¹⁶ and proffers its own more limited definition based on a “totality of factors”¹⁷ derived from the Postal Service’s creative interpretation of the legislative history,¹⁸ its views on the structure of the PAEA,¹⁹ and an alleged “Constitutional concern.”²⁰

The Commission appropriately disposed of or anticipated these arguments in Order No. 74 when it noted that the Postal Service’s arguments fail to demonstrate that Congress meant something other than what it said and stating that the Commission would interpret section 404(e) in such a manner as to “give the words their ordinary meaning.”²¹

¹³ See 39 U.S.C. § 404(e)(4).

¹⁴ 39 U.S.C. § 404(e)(5).

¹⁵ 39 U.S.C. § 404(e)(1).

¹⁶ United States Postal Service Notice of Submission of Sworn Statement on “Nonpostal Services” Pursuant to 39 U.S.C. § 404(e), March 19, 2008, at 22 (USPS Notice).

¹⁷ Initial Brief of the United States Postal Service, September 10, 2008, at 14 (USPS Initial Brief).

¹⁸ See USPS Initial Brief, at 29-43.

¹⁹ See *id.*, at 19-25.

²⁰ See *id.*, at 25-29; Further Response of the United States Postal Service to Order No. 74, and Notice of Filing Sworn Statements, June 23, 2008, at 6, n.3.

²¹ Order No. 74, at 9.

The pertinent legislative history set forth in Appendix A also supports the Commission's interpretation. A detailed review of that 11-year history reveals a conscious Congressional purpose to limit the Postal Service to its core business. All leading postal reform bill considered from 1999 through enactment of the PAEA in 2006 sought to confine the Postal Service to its core mission and prohibit the introduction of new nonpostal services.²² The compromise that emerged in the final days before enactment of the 2006 reform bill (1) continued the prohibition on new nonpostal services, and (2) grandfathered existing nonpostal services *only if* the Commission reviewed and approved them based on the statutory criteria.

Nothing in the legislative history can be read to support – and the Postal Service cannot identify any affirmative statement which supports – the notion that Congress intended on one hand to focus the Postal Service's specific powers on its core business while simultaneously authorizing an expansive, contradictory authority for the Postal Service to engage in a virtually limitless range of activities in non-core, nonpostal commercial markets via contractual or licensing arrangements.

Affording the language of section 404(e) its plain and ordinary meaning and recognizing Congress' intent in crafting this language also harmonizes the statutory scheme, avoids any alleged structural conflict among different sections of title 39, and addresses the alleged Constitutional concern raised by the Postal Service in its initial filing and its subsequent pleadings.

²² See H.R. 22, 106th Cong. section 205 (1st Sess. 1999); H.R. 4970, 107th Cong. section 102 (2nd Sess. 2004); S. 1285, 108th Cong., section 102 (1st Sess. 2003); S. 2468, 108th Cong., section 102 (2nd Sess. 2004); H.R. 4341, 108th Cong. section 101 (2nd Sess. 2004); H.R. 22, 109th Cong. section 102 (1st Sess. 2005); S. 662, 109th Cong. section 102 (1st Sess. 2005); H.R. 6407, 109th Cong. (2nd Sess. 2006).

The amendments to section 404(e) restrict the specific powers of the Postal Service by limiting the Postal Service to offering only postal services or nonpostal services. While recognizing the need for the Postal Service to continue to exercise its general powers under section 401 and the need for the Postal Service to continue to cooperate with other government agencies pursuant to section 411, the law and the Commission's interpretation appropriately frame the scope of those general powers *within* the limitations on the specific powers of the Postal Service under section 404(e):

[S]ection 401(5) does not authorize revenue generating activities that are not outgrowths of 'its business' – providing postal services to the nation. . . . To assure compliance, Congress wanted an independent review of all of the Postal Service's nonpostal activities, and an evaluation of whether there was public need for continuing Postal Service participation in the market.²³

Thus, the services the Postal Service may engage in pursuant to its general powers under section 401 or the provisions of section 411 are necessarily limited to those services which constitute postal services, as defined under section 102(5), or nonpostal services offered as of January 1, 2006 for which there is a public need which is not being adequately served by the private sector. The alleged structural tension and Constitutional concerns only arise under the Postal Service's contention that there is some parallel authority for an amorphous third category of activities which are neither postal nor nonpostal or that the Postal Service can evade the regulatory oversight intended by Congress through the simple expedient of offering a service or product through a licensing or contractual agreement.

Because the Postal Service's position is inconsistent with the unambiguous language of section 404(e), is unsupported by the legislative history, and unnecessarily

²³ PRC Order No. 74, at 11.

creates tension among competing statutory provisions, the Commission should reaffirm that it has jurisdiction to review the Postal Service's licensing activities under section 404(e).

B. The Postal Service's Contention that Licensing Activities are Distinguishable from Services Reviewable under Section 404(e) is Without Merit.

The Postal Service argues that its commercial licensing program activities are not "services" under section 404(e), because the Postal Service has not "entered" into any market by offering USPS-branded merchandise, but rather has merely licensed its intellectual property. Further, the Postal Service asserts that the USPS-branded consumer goods are not "being sold on behalf of the Postal Service,"²⁴ and that the "Postal Service lacks the type of control necessary to consider the consumer goods to be products of the Postal Service."²⁵ Each of these claims is wrong as a matter of law and fact.

To begin with, the Commission has already correctly rejected the Postal Service's assertion that some sources of revenue are not "services" and, therefore, are not subject to section 404(e):

Every revenue-generating arrangement executed by the Postal Service entails either a postal service or nonpostal service. Regarding the latter, each such agreement necessarily involves a *quid pro quo* by the Postal Service. It agrees to provide a product or a service to a third party in return for a fee, the opportunity to earn revenues, or perhaps some other benefit. It is providing a service regardless whether, for example, it makes lobby space available or its brand available.²⁶

²⁴ USPS Response, at 3.

²⁵ *Id.*, at 6, n.7.

²⁶ PRC Order No. 74, at 11.

To say that the Postal Service has not entered the imaging supplies business when it now has a financial stake in USPS-branded substitute products is simply not credible.²⁷

In addition, the Postal Service is wrong as a matter of basic intellectual property law. By definition, a trademark, in this case the USPS corporate name and signature, serves to identify and distinguish the source of goods of one party from those of others.²⁸

The trademark indicates that the goods carrying a particular trademark are linked to a single, if anonymous source,²⁹ and that all goods sold under it are of equal quality.³⁰ For certain novelty and promotional items that bear a Postal Service logo, the trademark's function may serve primarily to indicate sponsorship or authorization.³¹ But for other USPS-branded products, such as imaging supplies, for which the purpose of the licensed intellectual property is commercial rather than promotional, the USPS-branded product signifies to the commercial market that the Postal Service stands behind the product.

That is the reason a commercial licensee is willing to share a percentage of the revenue of

²⁷ The Postal Service's position is also directly contradicted by its own marketing literature and product descriptions. See USPS Premium Imaging Supplies cut sheet, attached as Exhibit A to Pitney Bowes Inc. Response to Pinpoint LLC's Motion for Late Acceptance, October 31, 2008.

USPS replacement inkjet and postage meter cartridges deliver a level of quality and performance that meet the brand new cartridges from the original manufacturer. *Our products* benefit from decades of research, design and manufacturing experience. We use only the best components, testing every cartridge to ensure optimal quality and performance. And *we back all our imaging supplies* with a 100% money-back guarantee. (emphasis added).

²⁸ See 15 U.S.C. § 1127; see also U.S. Patent and Trademark Office, http://www.uspto.gov/web/offices/tac/doc/basic/trade_defin.htm; World Intellectual Property Organization, <http://www.wipo.int/trademarks/en/trademarks.html>: "A trademark is a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise. Its origin dates back to ancient times, when craftsmen reproduced their signatures, or "marks" on their artistic or utilitarian products. Over the years these marks evolved into today's system of trademark registration and protection. The system helps consumers identify and purchase a product or service because its nature and quality, indicated by its unique trademark, meets their needs."

²⁹ See *Processed Plastic Co. v. Warner Communications, Inc.*, 675 F.2d 852, 856, 216 U.S.P.Q. 1072 (7th Cir. 1982)(citations omitted).

³⁰ See *Polymer Technology Corp. v. Mimran*, 975 F.2d 58, 62, 24 U.S.P.Q.2d 1189 (2d Cir. 1992)(citations omitted).

³¹ See *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651, 658, 215 U.S.P.Q. 175 (W.D. Wash. 1982).

every item sold with the Postal Service – the licensee believes that consumers will be more inclined to purchase a USPS-branded product *because* the trademark communicates to the marketplace that *the Postal Service is standing behind the product*.³²

The statement that the “Postal Service lacks the type of control necessary to consider the consumer goods to be products of the Postal Service,”³³ is also wrong as a matter of law and fact. Intellectual property law imposes an affirmative “duty to control” quality on the Postal Service as a trademark owner.³⁴ And, notwithstanding the Postal Service’s attempt to distance itself from the operation of its brand in the market, the narrative discussion in the response and the sworn statement of Gary Thuro demonstrate that the Postal Service *actively manages* the USPS-branded products in commercial markets. The Postal Service requires licensees to obtain advance approval for USPS-branded products and related promotional materials, imposes product quality standards and quality review tests, and polices the product use and promotion.³⁵ The comprehensive nature of these activities is also evidence of the Postal Service’s substantial involvement with USPS-branded commercial products.³⁶

The Postal Service also has neither the authority nor the need to license nonpostal commercial products. With respect to the maintenance and protection of the Postal Service’s intellectual property, Pitney Bowes is mindful that the Postal Service must

³² See *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 389, 193 U.S.P.Q. 649, 665 (5th Cir. 1977).

³³ *Id.*, at 6, n.7.

³⁴ See *Gorenstein Enterprises, Inc. v. Uno-Ven Co.*, 314 F.3d 299, 300-301, 65 U.S.P.Q.2d 1312 (7th Cir. 2002)(“The owner of a trademark has a duty to ensure consistency of the trademarked good or service . . . for a trademark to remain enforceable . . . the owner must, through monitoring, testing and other means, maintain the quality and uniformity of the trademarked product.”)(citations omitted).

³⁵ USPS Response, at 3-5; Statement of Gary A. Thuro, November 17, 2008, at 5 (Thuro Decl.).

³⁶ In several places the Postal Service observes that it does not manufacture, sell or distribute the USPS-branded products. But that is not the test. The relevant consideration is whether the Postal Service’s licensing activities constitute a “service” under section 404(e), and that question must be answered in the affirmative. In simplest terms, the Postal Service is actively managing a product under a contractual revenue sharing arrangement.

utilize its trademarks or it will lose them. Pitney Bowes also recognizes the marketing value of the Postal Service brand and appreciates that certain promotional uses of the Postal Service’s intellectual property can enhance the brand relevance of the Postal Service in a way that inures to the benefit of the postal system as a whole. Mr. Thuro’s statement, however, goes too far when it talks about the perceived advantages of licensing in “unrelated” fields “outside the mail and delivery fields.”³⁷ First, the fact that the Postal Service maintains ownership rights in its intellectual property does not in and of itself convey any substantive authority to the Postal Service to engage in services beyond those recognized under section 404(e). The fact that the use of the mark in an “unrelated field” may help prevent dilution does not justify the use of the mark in an “unrelated field,” absent approval from the Commission. Second, there is no reason that the Postal Service cannot maintain its trademarks by using them in connection with authorized postal or grandfathered nonpostal services.

With respect to the Postal Service’s entry into the imaging supplies business, the Postal Service’s presence in the market is particularly improper not only because the market is a mature, highly-competitive commercial market, but because the Postal Service has established regulations governing the production and distribution of postage evidencing systems and maintains regulatory product approval.³⁸ Further, even if the Postal Service’s involvement constituted mere licensing as the Postal Service suggests, the potential for abuse in the market still remains. Courts have recognized that anticompetitive behavior in commercial markets affected through affiliate, contractual or

³⁷ Thuro Decl., at 4.

³⁸ See Declaration of Peter Wragg in Support of Pitney Bowes Inc.’s Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, October 15, 2008, at ¶¶ 4-5 (Wragg Decl.)

licensing arrangements is no less harmful than anticompetitive behavior undertaken directly.³⁹

Last, notwithstanding the surface comparisons to other federal agencies' practices regarding novelty and promotional items, the Postal Service's characterization of its own licensing authority is distinguishable in character and scope from the licensing programs engaged in by these other federal agencies. We are unaware of any other example of a federal agency licensing its brand for purely commercial purposes in competitive, commercial markets currently being served by the private sector, comparable to Postal Service's activities in the postage meter and laser toner cartridge markets. Nor are we aware of any other agency that has construed its licensing authority as broadly as the Postal Service has to enable it to engage in a virtually limitless range of activities unrelated to its core mission.

C. The Commission May Terminate Impermissible Licensing Arrangements Without Impairing the Legitimate Exercise of the Postal Service's Authority Under Section 401(5).

In response to the Commission's request for information as to whether specific licensing agreements were being offered as of January 1, 2006, the Postal Service contends that that any review of the propriety of an individual licensing agreement under section 404(e)(2) "requires two conclusions:" (1) "that Congress intended section 404(e) to eliminate the Postal Service's authority to license its intellectual property in the future,"⁴⁰ and (2) that if individual licensing agreements may be reviewed, so too may individual agreements regarding the disposition of real property.⁴¹

³⁹ See, e.g., *United States v. Western Electric Co. Inc.*, 12 F.3d 225, 232 (D.C. Cir. 1993).

⁴⁰ USPS Response, at 8.

⁴¹ See *id.*

In fact, the Commission *ought* to assess individual licensing agreements to assess whether the nature of the product or service that is the subject of the agreement is postal or nonpostal. For example, an individual assessment of the Postal Service's new purportedly nonpostal licensing agreement in connection with the sale of USPS-branded imaging supplies (postage meter and laser toner ink cartridges) would have revealed that this license agreement was qualitatively different from virtually all of the other licensing agreements insofar as the license agreement for USPS-branded imaging supplies is commercial in nature, not promotional in nature. This is a material distinction. Whatever the appropriateness of the Postal Service engaging in baked goods, hosiery, and dog biscuits for promotional purposes, there is no colorable authority under the PAEA for the Postal Service to enter into a commercial licensing agreement, as a purely commercial venture for the purpose of competing in a mature, highly-competitive, commercial market like the imaging supplies markets for postage meter ink cartridges and laser toner and inkjet cartridges.

Last, contrary to the Postal Service's incredulous reaction, there is nothing "absurd" about concluding that the Postal Service should not be permitted to engage in any new licensing (or leasing) arrangements that are nonpostal services.⁴² Such a conclusion is entirely consistent with the unambiguous language of the statute and the legislative history. As the Commission correctly observed in Order No. 74, "section

⁴² Even if the entire commercial licensing program were discontinued the revenue impact would be relatively insignificant; the program has generated only \$3,254,549 in the past two years. *See* Thuro Decl., at 3. This amount represents a miniscule percentage of the Postal Service's revenues (approximately \$150 billion) in Fiscal Years 2006 and 2007.

401(5) does not authorize revenue generating activities that are not outgrowths of ‘its business’ – providing postal services to the nation.”⁴³

D. The Postal Service has No Authority under the PAEA to Offer License Contract No. LICENS-07-C-1210 Concerning the Sale of USPS-Branded Imaging Supplies.

The PAEA limits the Postal Service to grandfathered nonpostal services which were offered as of January 1, 2006, and requires that all grandfathered nonpostal services be terminated or continued based on the public need for the service and the ability of the private sector to meet that need.⁴⁴ The Postal Service has conceded that it was not offering USPS-branded imaging supplies as of January 1, 2006, nor had the Postal Service entered into a licensing agreement concerning USPS-branded imaging supplies as of January 1, 2006.⁴⁵ Accordingly, the sale of USPS-branded imaging supplies and Postal Service License No. LICENS-07-1210 constitutes an unauthorized new nonpostal service in violation of section 404(e)(2).⁴⁶

Nor does the Postal Service attempt to argue that its USPS-branded imaging supplies business is a variation or innovation of a nonpostal product that was offered as of January 1, 2006 and, thus, subject to the grandfather authority. They could not do so: USPS-branded imaging supplies are materially different from any other existing nonpostal product. Furthermore, even assuming for the sake of argument that the meter

⁴³ PRC Order No. 74, at 11. Pitney Bowes shares the Commission’s view that the Postal Service should not be precluded from lease or licensing arrangements related to its core postal business. Pitney Bowes further recognizes that the Postal Service was engaged in various leasing arrangements as of January 1, 2006 and, therefore, it should be allowed to continue those arrangements (or substantially similar arrangements) subject to PRC review and approval under section 404(e)(3).

⁴⁴ See 39 U.S.C. § 404(e)(2)-(3).

⁴⁵ USPS Response, Addendum at 2; Response of the United States Postal Service to Pitney Bowes Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, October 22, 2008, at 2 (“In *November 2007*, the Postal Service entered into a non-exclusive licensing agreement . . . to place certain Postal Service intellectual property on, among other things, the remanufactured postage meter cartridges . . .”).

⁴⁶ See 39 U.S.C. § 404(e)(2).

supplies business could credibly be construed as an outgrowth of an existing nonpostal service subject to the grandfather authority – and it cannot be – the offering fails the test set out in section 404(e)(3),⁴⁷ because there is no evidence that the Postal Service’s entry into the mature, highly-competitive imaging supplies market would serve a public need that the private sector is not currently serving.⁴⁸ Pitney Bowes and other commenters have introduced evidence on the record to establish that the Postal Service’s entry into the competitive meter supplies space with USPS-branded replacement cartridges would inflict substantial commercial harm on private companies in the market who would be forced to compete against a government-sponsored entity operating in a commercial space, particularly one in which the same governmental entity also exercises regulatory authority.⁴⁹ Accordingly, the Postal Service has no authority to offer the USPS-branded imaging supplies as a nonpostal service.

IV. CONCLUSION

For all of these reasons and the reasons previously stated in PRC Order Nos. 74, Pitney Bowes respectfully requests that the Commission:

(1) Reject the Postal Service’s notion of a third category of unregulated revenue-producing activities;

(2) Reject the contention that the Postal Service’s licensing activities do not constitute “services” within the meaning of section 404(e); and

⁴⁷ See 39 U.S.C. § 404(e)(3).

⁴⁸ See Wragg Decl., at ¶3; Information Technology Industry Council (ITIC) Comments, November 21, at 1; U.S. Chamber of Commerce (COC) Comments, November 19, 2008, at 1.

⁴⁹ See Wragg Decl., at ¶ 11; ITIC Comments, at 1; COC Comments, at 1. The Commission understands that those outside the immediate mailing community may be affected by important policy issues that arise in Commission proceedings. Pitney Bowes has in the past, and will continue in the future, to raise these issues with other parties and industry trade associations. As evidenced by the number of comments submitted by parties who typically do not appear before the Commission, this proceeding raises important policy considerations beyond the mailing industry.

Appendix A

APPENDIX A

Enactment of postal reform legislation, through the Postal Accountability and Enhancement Act (PAEA),⁵⁰ was the culmination of an 11-year process.⁵¹ The legislative history from that period clearly shows Congress' intent to confine the United States Postal Service (Postal Service) to its "core mission" as part of a broader postal reform.

104th Congress

*H.R. 3717 – Postal Reform Act of 1996*⁵²

Representative McHugh introduced the first comprehensive postal reform bill, H.R. 3717, on June 25, 1996. Although H.R. 3717 did not address nonpostal services, the issue was raised in a September 26, 1996 hearing before the House Government Reform and Oversight Committee's Subcommittee on the Postal Service Subcommittee.⁵³ During the hearing, several mailing industry representatives challenged the Postal Service's recent forays into nonpostal products, including phone cards and money transfer services.⁵⁴

⁵⁰ Pub. L. 109–435, 120 Stat. 3198 (2006).

⁵¹ Hearings on postal reform began in February 1995, before the Subcommittee on Postal Service, Committee on Government Reform and Oversight, U.S. House of Representatives. *See* The U.S. Postal Service: Many Challenges in a Changing Environment, 104th Cong. (1995) (statement of Michael E. Motley, Associate Director, Government Business Operations Issues, United States General Accounting Office). The PAEA was enacted on December 20, 2006.

⁵² H.R. 3717, 104th Cong. (2nd Sess. 1996).

⁵³ The Subcommittee conducted earlier hearings on the bill on July 10, July 18, and September 17, 1996.

⁵⁴ *See, e.g., Postal Service Reform: Hearing of the Postal Service Subcomm. of the H. Govt. Reform Comm.*, 104th Cong. 16-17 (1996) (testimony of Charmaine Fennie).

105th Congress

*H.R. 22 – Postal Reform Act of 1997*⁵⁵

Representative McHugh reintroduced H.R. 22 on January 7, 1997. H.R. 22 was substantially identical to H.R. 3717 in the previous Congress. Additional Subcommittee hearings were held on April 16, 1997, and the Subcommittee approved the bill on September 24, 1998. No further action was taken on the bill.

In response to industry complaints regarding the Postal Service's nonpostal services, Representative McHugh asked the Government Accounting Office (GAO) to review the scope of the Postal Service's activities in areas beyond its core postal business. GAO issued its report on November 24, 1998. The report identified the statutory and regulatory authorities and constraints covering the development of new Postal Service products, and it noted the potential impact on such products that H.R. 22 and other proposed reform legislation would have. While the report did not take a position on the appropriateness of the Postal Service's nonpostal activities, GAO observed:

Some Members of Congress have said that the Service is unfairly expanding its product line to compete in nonpostal-related markets and have introduced legislation to curtail such activity. Some private sector companies have also complained about the Service's entry into nontraditional postal markets. They were concerned that the Postal Service could use its governmental status to an unfair advantage when introducing products that compete with private sector companies.⁵⁶

⁵⁵ H.R. 22, 105th Cong. (1st Sess. 1997).

⁵⁶ U.S. GEN. ACCOUNTING OFFICE, U.S. POSTAL SERVICE: DEVELOPMENT AND INVENTORY OF NEW PRODUCTS, 3-4 (1998).

106th Congress

*H.R. 22 – Postal Modernization Act of 1999*⁵⁷

On January 6, 1999, Representative McHugh again introduced postal reform legislation. That bill, H.R. 22, the Postal Modernization Act of 1999, directly addressed the core mission issue. Section 205 of the bill defined, for the first time, the terms “postal product” and “nonpostal product.”⁵⁸ Section 205 provided the term “postal product” referred to “any service that provides for the physical delivery of letters, printed matter, or packages weighing up to 70 pounds, including physical acceptance, collection, sorting, or transportation services ancillary thereto.”⁵⁹ Alternatively, the term “nonpostal product” referred to “any product or service offered by the Postal Service (or that could have been offered by the Postal Service under section 404(a)(6), as last in effect before the date of the enactment of the Postal Modernization Act of 1999) that is not a postal product.”⁶⁰

Section 205 also included a “grandfather clause” which would have allowed the Postal Service to continue to provide any nonpostal services that had been in place before January 1, 1994. Section 205 further provided that although future nonpostal services could not be offered by the Postal Service itself, they could be offered by a private law corporation to be established by the bill.⁶¹

Hearings were held in the House Subcommittee on February 11, 1999, and March 4, 1999. At the February 1999 hearing, Postal Rate Commission Chairman Gleiman testified:

⁵⁷ HR. 22, 106th Cong. (1st Sess. 1999).

⁵⁸ H.R. 22, 106th Cong. section 205 (1st Sess. 1999).

⁵⁹ H.R. 22, 106th Cong. section 205 (1st Sess. 1999).

⁶⁰ H.R. 22, 106th Cong. section 205 (1st Sess. 1999).

⁶¹ H.R. 22, 106th Cong. section 205 (1st Sess. 1999).

As I recall, when we first started talking about postal reform, and this may have been before you arrived on the scene, although it was mostly talk and no action before you arrived on the scene, there were a couple of problems and concerns that people had.

One of the concerns was expressed by the private sector, which felt that the Postal Service was embarking on non-postal activities and was using monopoly moneys to underwrite their forays into these new non-postal areas. Some of these activities had no nexus whatsoever to anything postal. So the question was: How do you make sure that there is a level playing field and that a monopoly is not there as the underwriter?⁶²

The March 1999 subcommittee hearing examined, among other topics, the provisions in H.R.22 that would establish a private law corporation that could provide nonpostal services. While some witnesses supported the move to create such a “nonpostal corporation” as the first step toward the privatization of all postal services, others objected to the Postal Service being allowed to provide nonpostal services at all.⁶³

On April 29, 1999, the Subcommittee marked-up and approved the bill. There was no further action on the bill that Congress.

107th Congress

*H.R. 4970 – Postal Accountability and Enhancement Act*⁶⁴

On June 20, 2002, Representative McHugh introduced his next postal reform bill, H.R. 4970. The new bill included a slightly modified version of H.R. 22’s definition of “postal service,” defining the term as the “the physical delivery of letters, printed matter, or packages weighing up to 70 pounds, including physical acceptance, collection, sorting, transportation, or other services ancillary thereto.”⁶⁵ Evidencing an intent to focus the

⁶² See, e.g., *H.R. 22, The Postal Modernization Act of 1999: Hearing of the Postal Service Subcomm. of the H. Govt. Reform Comm.*, 107th Cong. 106-16 (1999) (testimony of Edward J. Gleiman).

⁶³ See, e.g., *H.R. 22, The Postal Modernization Act of 1999: Hearing of the Postal Service Subcomm. of the H. Govt. Reform Comm.*, 107th Cong. 106-16 (1999) (testimony of Frederick W. Smith and James Kelly).

⁶⁴ H.R. 4970, 107th Cong. (2nd Sess. 2002).

⁶⁵ H.R. 4970, 107th Cong. section 102 (2nd Sess. 2002).

Postal Service on its core postal business, H.R. 4970 omitted any definition of the term “nonpostal service.” It also repealed 39 U.S.C. § 404(a)(6) (an authority the Postal Service had historically relied upon as its authority for providing nonpostal services), amended 39 U.S.C. § 404 to provide that “[n]othing in this title [title 39, United States Code] shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services,”⁶⁶ and, unlike a predecessor bill, did not include any grandfather authority for existing nonpostal services.

The postal / nonpostal formulation of H.R. 4970, thus, did four things: (1) it defined “postal service”; (2) it directly repealed an authority the Postal Service had previously cited for engaging in nonpostal activities (39 U.S.C. 404(a)(6)); (3) it indirectly repealed, or superseded, other provisions of law that previously might have been cited to authorize nonpostal activities by the Postal Service; and (4) through its lack of any grandfather authority, it terminated existing nonpostal services.

H.R. 4970 was referred to the Committee on Government Reform but there was no further action on the bill.

108th Congress

*S. 1285 / S. 2468 / H.R. 4341 – Postal Accountability and Enhancement Act*⁶⁷

On June 18, 2003, Senator Carper introduced S. 1285, a bill that included postal / nonpostal language identical to that in H.R. 4970 from the preceding Congress.⁶⁸ S. 1285 provided that the term “‘postal service’ refers to the physical delivery of letters, printed

⁶⁶ H.R. 4970, 107th Cong. section 102 (2nd Sess. 2002).

⁶⁷ S. 1285, 108th Cong. (1st Sess. 2003); S. 2468, 108th Cong. (2nd Sess. 2004); H.R. 4341, 108th Cong. (2nd Sess. 2004).

⁶⁸ See S. 1285, 108th Cong., section 102 (1st Sess. 2003).

matter, or packages weighing up to 70 pounds, including physical acceptance, collection, sorting, transportation, or other services ancillary thereto.”⁶⁹

On May 20, 2004, Senator Collins, the Chairman of the Senate committee of jurisdiction⁷⁰ also introduced a bill with an identical definition, S. 2468.⁷¹ Senator Collins’ bill was ordered reported by the Committee on Governmental Affairs on June 2, 2004, and the report on the bill was filed on August 25, 2004.

In the report on S. 2468, Congress made clear that a primary purpose of postal reform is to define the core mission of the Postal Service, and confine it to that mission:

In this legislation, the Committee reaffirms the core mission of the Postal Service and limits the Postal Service to providing postal services which comprise the physical delivery of letters, printed matter or packages weighing up to seventy pounds and other ancillary services. By focusing on the business of processing, transporting and delivering physical mail pieces, the Postal Service will avoid the distractions and the associated financial costs that have arisen when the Postal Service has ventured away from its core business. To further this focus on core mail products, the Postal Service will not be permitted to offer nonpostal products except in cooperation with other government agencies, for example, sale of federal migratory bird hunting and conservation stamps or acceptance of passport applications.⁷²

Neither S.1285 nor S. 2468 contained a “grandfather” provision.

On May 12, 2004, Representative McHugh introduced H.R. 4341. H.R. 4341 defined “postal service” as “the carriage of letters, printed matter, or mailable packages, including acceptance, collection, processing, delivery, or other services supportive or ancillary thereto.”⁷³ Similar to earlier bills, H.R. 4341 prohibited future nonpostal services, but included a grandfather provision for existing nonpostal services. H.R. 4341

⁶⁹ S. 1285, 108th Cong., section 102 (1st Sess. 2003).

⁷⁰ Senate Committee on Governmental Affairs.

⁷¹ S. 2468, 108th Cong., section 102 (2nd Sess. 2004).

⁷² S. Rept. 108-318, August 25, 2004, at 5-6.

⁷³ H.R. 4341, 108th Cong. section 101 (2nd Sess. 2004).

provided that “[n]othing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services, except that nothing in this subsection shall prevent the Postal Service from providing any special nonpostal or similar services provided by the Postal Service as of May 12, 2004.”⁷⁴

H.R. 4341 was ordered reported by the Committee on Government Reform on the day it was introduced, and it was reported by the Committee on September 8, 2004. The Committee’s report makes clear its intent to confine the Postal Service to its core mission:

Section 101 of the bill proposes, for the first time, a clear definition of “postal services” as the carriage of letters, printed matter, or mailable packages, including acceptance, collection, processing, delivery, or other services supportive or ancillary thereto. The definition is modeled after language proposed by the Postal Rate Commission earlier this year. (See Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure, Order No. 1389, Docket No. RM 2004–1 (Jan. 16, 2004).) The definition of “postal service” is used to clarify the jurisdiction of the Postal Rate Commission (renamed in the bill the “Postal Regulatory Commission”) and the scope of commercial activities that the Postal Service is authorized to pursue.

* * *

Section 102 declares that the Postal Service’s authority to offer products and services is limited to postal services. Current law is unclear in this respect. The section strikes a provision that gave the Postal Service the specific power “to provide, establish, change, or abolish special nonpostal or similar services.” If the Service unlawfully offers a nonpostal service or product, the Postal Regulatory Commission may order that the Postal Service cease providing the product under the complaint procedures outlined in section 202 of the bill. An exception is made for “special nonpostal or similar services” provided as of May 12, 2004. The changes made by this section should not be interpreted to impact the Postal Service’s ability to furnish government services to the public, such as acceptance of passport applications and sale of duck stamps, in accordance with section 411 of title 39.⁷⁵

⁷⁴ See H.R. 4341, 108th Cong. section 102 (2nd Sess. 2004).

⁷⁵ H. Rept 108-672, September 8, 2004 at 4-5.

The bill was sequentially referred to the Judiciary Committee and reported by that committee on September 23, 2004. There was no further action on the bill.

109th Congress

*H.R. 22 / S. 662 / H.R. 6407 – Postal Accountability and Enhancement Act*⁷⁶

On Jan. 4, 2005, Representative McHugh introduced H.R. 22. H.R. 22 defined the term “postal service” as “the carriage of letters, printed matter, or mailable packages, including acceptance, collection, processing, delivery, or other services supportive or ancillary thereto.”⁷⁷ Similar to earlier bills, H.R. 22 prohibited future nonpostal services, but included a limited grandfather provision for existing nonpostal services. It provided that “[n]othing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services, except that nothing in this subsection shall prevent the Postal Service from providing any special nonpostal or similar services provided by the Postal Service as of January 4, 2005.”⁷⁸

H.R. 22 was considered, amended and ordered reported by the Committee on Government Reform on April 13, 2005. The report was filed on April 28, 2005. The Committee amendments included a modified definition of the term “postal service.” The bill as reported out of Committee defined the term “postal service” as “the carriage of letters, printed matter, or mailable packages, including acceptance, collection, processing, delivery, or other functions supportive or ancillary thereto.”⁷⁹

⁷⁶ H.R. 22, 109th Cong. (1st Sess. 2005); S. 662, 109th Cong. (1st Sess. 2005); H.R. 6407, 109th Cong. (2nd Sess. 2006).

⁷⁷ H.R. 22, 109th Cong. section 101 (1st Sess. 2005).

⁷⁸ H.R. 22, 109th Cong. section 102 (1st Sess. 2005).

⁷⁹ H.R. 22, 109th Cong. section 101 (as reported by H. Comm. on Govt. Reform, April 28, 2005).

As it did in the previous Congress, the Government Reform and Oversight Committee's report clearly stated its intent to confine the Postal Service to its core mission:

Section 101 of the bill proposes, for the first time, a clear definition of "postal services" as the carriage of letters, printed matter, or mailable packages, including acceptance, collection, processing, delivery, or other functions supportive or ancillary thereto. The definition of "postal service" will clarify the scope of activities that the Postal Service is authorized to pursue.

* * *

Section 102 declares that the Postal Service's authority to offer products and services is limited to postal services. Current law is unclear in this respect. The section strikes a provision that gave the Postal Service the specific power "to provide, establish, change, or abolish special nonpostal or similar services." If the Service unlawfully offers a nonpostal service or product, the Postal Regulatory Commission may order that the Postal Service cease providing the product under the complaint procedures outlined in section 202 of the bill. An exception is made for "special nonpostal or similar services" provided as of January 4, 2005. The changes made by this section should not be interpreted to limit the Postal Service's ability to furnish government services to the public, such as acceptance of passport applications and sale of duck stamps, in accordance with section 411 of title 39.⁸⁰

H.R. 22 was again sequentially referred to the Judiciary Committee and the bill was discharged from the Committee on May 27, 2005. On July 25, 2005, the House adopted a rule for consideration of H.R. 22, and on July 26, 2005, the House adopted an amendment in the nature of a substitute and passed H.R. 22 by a vote of 410 to 20.

On March 17, 2005, Senator Collins, Chairman of the Homeland Security and Government Affairs Committee, introduced S. 662. Like H.R. 22, the Senate bill included a broad prohibition on the offering of future nonpostal services. S. 62 did not contain a "grandfather" provision, but did include an exception to allow interagency services authorized under section 411 to continue. The Senate drafters appear to have

⁸⁰ H. Rept. 109-66, April 28, 2005 at 45

recognized that the broad prohibition on nonpostal services superseded all other provisions of title 39 (“nothing in this title”), including section 411 which authorized interagency nonpostal services:

“(c) Except as provided in section 411, nothing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services.”⁸¹

Following an April 15, 2005, hearing before the Senate Committee on Homeland Security & Government Affairs on S. 662, the bill was considered and ordered reported by the Committee on July 14, 2005.

On February 9, 2006, the Senate took up the House-passed postal reform bill, H.R. 22, substituted the language of S. 662 as an amendment and approved the measure by unanimous consent. The Senate subsequently insisted on its amendment and sought a conference.

No formal conference committee was ever convened. Instead the lead sponsors of the House and Senate bills informally resolved the differences between the House and Senate versions. This resolution resulted in H.R. 6407,⁸² which was introduced by Representative Davis on December 7, 2006. H.R. 6407 passed the House by voice vote on the suspension calendar the next day, and it passed in the Senate by unanimous consent the day after that (the final day of the 109th Congress).

Although the postal / nonpostal provisions in Section 102 of H.R. 6407 differed from the earlier postal reform bills in several respects, the provisions represent a logical

⁸¹ S. 662, 109th Cong. (1st Sess. 2005). Section 411 provides that “Executive agencies within the meaning of section 105 of title 5 and the Government Printing Office are authorized to furnish property, both real and personal, and personal and nonpersonal services to the Postal Service, and the Postal Service is authorized to furnish property and services to them. The furnishing of property and service under this section shall be under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.” 39 U.S.C. § 411.

⁸² H.R. 6407, 109th Cong. (2nd Sess. 2006).

outgrowth of previous proposals and a continuation of Congress' intent to focus the Postal Service on its core postal mission.

First, section 101 of H.R. 6407 amends title 39 to define “postal service” as “the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto” – narrowly focusing the definition of the services to be provided by the Postal Service to those that serve its core mission.

Second, section 102 of H.R. 6407 amends title 39 to specifically define the term “nonpostal service” as “any service that is not a postal service as defined under section 102(5)” –reinforcing the notion that Congress intended that there be only two categories of activities: postal services and all other (nonpostal) services.

Third, the prior language concerning “permitting or requiring” nonpostal services is changed to read “[n]othing 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.” This change serves three purposes: (1) it directs the provision to section 404 in title 39 that affords to the Postal Service the “specific powers” necessary to perform its core mission while at the same time ensuring that the Postal Service could not abuse those powers by engaging in nonpostal services; (2) it removes the House reference to “special nonpostal or similar services,” making clear that the prohibition on future nonpostal services is broader than just those services previously offered under the authority of section 404(a)(6); and (3) it eliminates the need to except interagency activities performed under section 411. That exception was deleted.

Fourth, the change provided a grandfather provision in order to allow the Postal Service to continue to provide those nonpostal services that it had been offering as of January 1, 2006.

Finally, section 102 of H.R. 6407 included language that provides for the Postal Regulatory Commission's current review of all nonpostal services provided by the Postal Service – an effort intended to allow for the careful scrutiny of the Postal Service's nonpostal products and to further tailor its offerings to those that serve its core mission.

That provision states:

“(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.”⁸³

As a result of the unusual, last minute procedure employed to enact H.R. 6407, there are no contemporaneous committee or conference reports that accompany that bill. The House and Senate reports filed during that Congress discussed above, however, again reinforce the importance postal reform authors placed on confining the Postal Service to its core mission – “postal services” as defined by Congress.

⁸³ H.R. 6407, 109th Cong. section 102 (2nd Sess. 2006).