

Before the  
POSTAL REGULATORY COMMISSION  
Washington, DC 20268-0001

Report to Congress and the President :  
on Universal Postal Service and the : Docket No. PI2009-1  
Postal Monopoly :

REPLY COMMENTS OF THE GREETING CARD ASSOCIATION

The Greeting Card Association (GCA) files these Reply Comments pursuant to the Commission's Order No. 152. In them we respond to certain arguments made by Federal Express Corporation (FedEx) regarding the mailbox rule. GCA has supported retention of the present rule of exclusive mailbox access for the Postal Service, an indispensable protection for households and other recipients and senders of mail.

We note at the outset that FedEx appears to hold the view that the *only* statutory basis for the mailbox rule and the Service's implementing regulations is 18 U.S.C. § 1725, the provision criminalizing certain non-postal uses of the mailbox. For example, this premise seems to underpin FedEx's argument that "[t]he Commission may not, consistent with due process, adopt a highly questionable interpretations [sic] of the scope of *criminal laws* without, at a minimum, giving affected parties due notice and a full opportunity for comment."<sup>1</sup> FedEx does not take into consideration the other basis of the current mailbox rule: non-criminal provisions of Title 39, and specifically § 403(b)(1).

The consequences of this omission for FedEx's position are rather serious. Not only is the omission surprising, in view of the Commission's remarks

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<sup>1</sup> FedEx Comments, p. 2 (italics added).

in its *Report to Congress and the President on Universal Postal Service and the Postal Monopoly* (“PRC Report”) and the discussion in Appendix C thereto<sup>2</sup>; it also makes much of the related argument untenable.

For example, with respect to the proper scope of the mailbox rule, FedEx raises this objection:

. . . As of the same date<sup>3</sup>, Postal Service regulations declared that “no part of a mail receptacle may be used to deliver any matter not bearing postage, including items or matter placed upon, supported by, attached to, hung from, or inserted into a mail receptacle.” The mailbox monopoly law itself, however, refers only to any person who “deposits any mailable matter . . . in any letter box . . . with intent to avoid payment of lawful postage thereon.”<sup>4</sup>

FedEx’s evident grievance is that the Service’s reading of the statutory mailbox rule is overbroad. It observes that “[o]ne does not have to be a lawyer to appreciate that . . . Postal Service regulations purporting to ‘interpret’ 18 U.S.C. §§ 1696 and 1725 adopted what is, to say the least, a broad view of the law.”<sup>5</sup>

FedEx, however, does not discuss the effect on this question of *Rockville Reminder, Inc. v. U. S. Postal Service*, 480 F.2d 4 (2d Cir. 1973), although that case is a key to understanding the basis of the mailbox rule. The appellant Rockville Reminder, a privately-delivered news and advertising circular, argued that only depositing mailable matter *in* a mailbox was prohibited by Postal Service regulations (as they then stood).<sup>6</sup> The Court of Appeals, however, pointed

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<sup>2</sup> PRC Report, Appendix C, *Postal Monopoly Laws: History and Development of the Monopoly on the Carriage of Mail and the Monopoly on Access to Mailboxes* (James I. Campbell, Jr.), pp. 225-227.

<sup>3</sup> December 19, 2006.

<sup>4</sup> FedEx Comments, pp. 4-5.

<sup>5</sup> *Id.*, p. 5.

<sup>6</sup> Polybagged copies of the Rockville Reminder were delivered by hanging the bag from a metal hook attached to the lower flange of the mailbox. Since Postal Service regulations now “cover the waterfront” with respect to components of the mailbox, FedEx’s argument does not exactly

to the Postal Service's responsibility for maintaining "an efficient system of collection, sorting, and delivery of the mail nationwide"<sup>7</sup> and held that the Service's interpretation prohibiting other uses of the mailbox for non-postage-paid matter reasonably implemented this mandate.

Justification of the Service's present regulations, therefore, depends not merely on the language of § 1725, but also on whether those regulations are needed to satisfy the "efficient system of . . . delivery" requirement of § 403(b)(1). *Rockville Reminder* demonstrates clearly that they are, and the Commission took the same view.<sup>8</sup> Since FedEx disregards § 403(b)(1), its argument fails to show that the Service's rules are overly broad. In other words: the Postal Service mailbox regulations do more than "interpret" 18 U.S.C. § 1725; they also implement the unambiguous mandate of both the 1970 and 2006 postal statutes that delivery be conducted efficiently.

Similarly, when FedEx challenges the propriety of the Commission's interpreting the mailbox rule, it focuses solely on the criminal statute:

It is not apparent to us whether the Commission is in fact authorized to adopt legal conclusions with respect to the scope of provisions of the criminal law such as 18 U.S.C. §§ 1696 and 1725. The Commission's jurisdiction seems at first blush to be limited authority to implement the *exceptions* to the criminal law set out in 39 U.S.C. § 601.<sup>9</sup>

First, it is not easy to see how the Commission could carry out the mandate of § 702(a) and (b) of PAEA without enunciating at least some "legal conclusions"; those provisions authorize and instruct the Commission to report on, and suggest

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parallel the Reminder's; it relies on wording of the criminal statute and not on that of DMM provisions. The basic point, however, is the same.

<sup>7</sup> 39 U.S.C. § 403(b)(1), unchanged in the Postal Accountability and Enhancement Act of 2006 (PAEA).

<sup>8</sup> PRC Report, p. 37 (citing *Rockville Reminder* in fn. 23).

<sup>9</sup> FedEx Comments, p. 6.

possible changes to, “the postal monopoly” – which explicitly<sup>10</sup> includes “access to mailboxes.” Second, 39 U.S.C. § 601 deals only with private carriage of mail, and not with mailbox access. Hence § 601(c), the source of the Commission rulemaking jurisdiction to which FedEx refers, has no bearing on the implementation of the mailbox rule or the Commission’s expression of opinions thereon. For both reasons, the Commission is clearly within bounds. But even more clearly, it is acting properly in expressing views on what mailbox rule is needed to insure an efficient delivery system *in accordance with § 403(b)(1)*.

As a competitor, FedEx may be legitimately concerned about any advantage the mailbox rule might confer on the Postal Service.<sup>11</sup> But the issue here is a much broader one than competitive parity, or disparity, as between competing carriers of “non-monopoly items.”<sup>12</sup> The mailbox rule affects not just competitive products, but also that (much larger) part of the mailstream for which the Postal Service – whether by statute or because of market forces – is solely responsible. Not only the efficiency but also the reliability<sup>13</sup> of its delivery system is implicated, since the mailbox rule is vital to the security of mail that has been delivered or left for pickup by the carrier.<sup>14</sup>

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<sup>10</sup> Section 702(a)(1).

<sup>11</sup> The Commission acknowledged that such an advantage was possible. PRC Report, p. 190. GCA expressed the view that the Commission’s observation was probably right, but raised questions about the practical importance of the advantage. Initial Comments of the Greeting Card Association, p. 15.

<sup>12</sup> FedEx’s term; see FedEx Comments, p. 3, where its specific competitive concerns are clearly summarized.

<sup>13</sup> A requirement – alongside promptness and efficiency – of 39 U.S.C § 101(a).

<sup>14</sup> FedEx notes that because of the mailbox rule, “[s]mall packages that could be delivered to the security of the mailbox must often be left in a more exposed position at the addressee’s door.” *Ibid.* If the mailbox rule were abrogated, however, would there be much left of the “security of the mailbox?” See Initial Comments of the United States Postal Service on the Commission Report, pp. 7-9.

GCA suggests, accordingly, that FedEx has not shown sufficient reason to disturb the Commission's original finding that no change to the mailbox rule is needed.

March 17, 2009

Respectfully submitted,

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