

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Modification of the Mail)
Classification Schedule) Docket No. MC2009-19
Product Lists)

COMMENTS OF THE PUBLIC REPRESENTATIVE ON THE
POSTAL SERVICE'S LEGAL AUTHORITY TO SET FEES FOR POSTAL SERVICES
WITHOUT COMMISSION APPROVAL

(June 9, 2009)

I. OVERVIEW

On May 29, 2009, the Postal Service filed a response to Chairman's Information Request No. 1.¹ As part of that response, the Postal Service set out its legal theory as to how it can set fees for certain "postal services" without Commission oversight.² These Comments address the flaws in the Postal Service's analysis. For the reasons set forth below, the Postal Accountability and Enhancement Act does not allow the Postal Service to set rates or fees for activities that fall within the definition of "postal services" under 39 U.S.C. 102(5) without Commission oversight.

¹ Responses of the United States Postal Service to Chairman's Information Request No. 1, May 29, 2009 (CHIR).

² *Id.* at Response to Question 2(c).

II. COMMENTS

A. General Concerns

The Postal Service's response to the CHIR could lead one to believe that the Postal Service is currently offering "postal services" not approved by the Commission or listed on the Mail Classification Schedule. *Id.* Moreover, the scope of these "postal service" offerings not approved by the Commission may be broader than those identified in this proceeding.³ This appears to violate 39 U.S.C. 3622(a) (Commission's responsibility to regulate market dominant *rates*), 3632-33 (Commission responsibility to regulate competitive *rates*), 3642(e) (requires postal services to be listed on product list), and the Commission's implementing regulations.⁴ In an attempt to circumvent these legal requirements, the Postal Service suggests that "[t]here is simply no need, however, to characterize these activities as also being 'products,' and thus subject to regulation." CHIR at Response to Question 2(c). To determine the scope of these violations and the appropriate way to deal with this development, the Commission should order the Postal Service to provide a full accounting of all "postal services" not listed on the draft Mail Classification Schedule.

B. Legal Authority for the Postal Service to Offer "postal services"

The Postal Service suggests that it has the authority to offer "postal services" that are not subject to any Commission oversight. With respect to those particular "postal service" offerings raised in this case, the Postal Service appears to be arguing that it has the authority to set rates or fees for postal services without Commission approval

³ For example, it is unclear if the Postal Service considers its participation in the Mastercard Easy Savings Program, where small business cardholders are provided an additional 5 percent rebate for all shipping services purchased online at the Postal Service website, a "postal service" not subject to Commission jurisdiction. See PRN Newswire, "U.S. Postal Service and Dunkin' Donuts Join MasterCard Easy Savings Program," April 29, 2009, *available at*, <http://sev.prnewswire.com/banking-financial-services/20090429/MN0732629042009-1.html>

⁴ (Emphasis added). The definition of the term "rates" includes "fees." See 39 U.S.C. 102(7).

when those “service offerings are designed in such a way as to minimize, rather than maximize, the amount of revenue they generate.” *Id.* at 3.⁵ The Postal Service explains that certain “postal service” offerings are “not intentionally designed to generate revenue....Rather, the fees exist to ... help[] minimize the cost” to the Postal Service and lead to secondary benefits such as increased efficiency. *Id.* at Response to Question 2(b). The Postal Service analogizes its fees for these “postal services” as simply charging for the test and study materials as with commercial SAT test preparation companies such as Kaplan and The Princeton Review.⁶ It also attempts to draw on the Commission’s definition of nonpostal services in Order No. 154 to define the limits of what the Commission regulates as “postal services.” *Id.* at Response to Question 2(c).

The Public Representative submits that the Postal Service does not have the authority to offer any “postal services” not subject to Commission approval and oversight. All “postal services” must be listed on the Mail Classification Schedule under a particular product. The statutory scheme does not envision certain “postal service” offerings that are in “no man’s land” – “postal service” offerings that are not classified as part of a product or subject to Commission oversight.

Title 39 U.S.C. 102(6) defines the term “product” as “*a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied.*” (Emphasis added). Thus, a product is a grouping of “postal services.” If certain “postal services” do not share the same cost or market characteristics, they must be placed within different products, or an entirely new product must be created.⁷

⁵ The Public Representative suggests that if the Postal Service truly wishes to “minimize” revenue for certain services, it should offer those services for free.

⁶ The Public Representative questions the Postal Service’s assumption that commercial test preparation companies do not profit off their textbooks and other study aids. Similar to law firms that charge their clients \$0.25 per page of photocopying, these companies typically markup all products and services.

⁷ If, for example, the Postal Service does not believe that the proposed Address Management Service is an appropriate place to classify PAGE System Certification, it can always create a new product entitled “PAGE Certification” whereby the only postal service offering within that product is PAGE System Certification.

The Postal Service's motive in offering "postal services" is immaterial in determining whether the Commission has authority to regulate such "postal services." It does not matter whether the Postal Service is offering a particular "postal service" for the purpose of financial gain or to help charitable organizations. If the Postal Service offers a "postal service," it must be listed under a particular product on the mail classification schedule and the rates or fees must be approved by the Commission.

Contrary to the Postal Service's assertion, in addition to products, the Commission regulates rates and fees. As demonstrated recently, the Commission may reject particular rates or fees for "postal services" below the product level.⁸

Additionally, the Postal Service's attempt to use the Commission's definition of "service" to define the limits of the statutory term "postal services" is inappropriate.⁹ In Order No. 154, the Commission rejected the Public Representative's assertion that the definition of "service" was in any way related to the definition of "postal service." Instead, the Commission found that "[d]efining 'service' for the purposes of implementing section 404(e) does not affect the meaning of the term 'postal service,' which is defined by statute. Order No. 154 at 15, n.28.

III. CONCLUSION

For the reasons discussed above, all "postal services" are subject to Commission oversight, and the Commission should order the Postal Service to provide

⁸ See Docket No. R2009-2, Order No. 191, Order Reviewing Postal Service Market Dominant Price Adjustments, March 16, 2009, at 72 (finding that the mailing agent rate for certain Confirm services to be inconsistent with applicable law).

⁹ The Postal Service's response to the CHIR appears to misinterpret the Commission's finding with respect to sexually oriented advertising. In Order No. 154, the Commission found that this activity is not a "service." Order No. 154 at 83 ("none [of these activities] is a *service* subject to review under 39 U.S.C. 404(e))(emphasis added). The Order made no finding as to whether this activity was a "product."

a full accounting of all “postal services” not listed on the draft Mail Classification Schedule. The Public Representative respectfully submits the foregoing comments for the Commission’s consideration.

Respectfully submitted,

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