

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

MARKET TEST OF EXPERIMENTAL PRODUCT-
GIFT CARDS

Docket No. MT2011-2

REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE
(February 15, 2011)

On January 5, 2011, the Postal Service filed notice of its intent to conduct a market test of an experimental product, Gift Cards, pursuant to 39 U.S.C. 3641. In Order No. 647, the Commission established this docket and gave parties an opportunity to provide comments on the test. Three parties, Pitney Bowes (“Pitney”), the American Bankers Association (“ABA”), and the Public Representative (“PR”), filed comments. The Postal Service hereby files its reply comments.

A. Pitney Bowes Presents No Legitimate Basis to Cancel or Delay this Market Test

Pitney argues that the test should be cancelled because gift cards are not a “postal service” within the meaning of section 102(5). Pitney Comments at 2-5. Pitney first argues that “[t]he Commission has already considered and rejected the sale of gift cards as a nonpostal service,” through its review of “stored value cards” in Docket No. MC2008-1. Id. at 2-3. Pitney then claims that it is improper to consider gift cards a “postal service” on the basis that they bear a close nexus to the use of the mails. Id. at 3-5. Finally, in a footnote, Pitney argues that “further inquiry” as to whether this test is consistent with section 3641(b)(2) is

warranted. Id. at 3 n.9. None of these arguments provide any basis for cancelling this test, or delaying its implementation.

1. The nonpostal decision does not foreclose this market test

Despite Pitney's claims to the contrary, Order No. 154 did not resolve the issue as to whether gift cards are a "postal service" or a "nonpostal service." The Commission considered gift cards in the nonpostal proceeding under its broader review of generic "stored value cards," of which gift cards were one example. The Postal Service did not attempt in that proceeding to demonstrate that gift cards, standing alone, may be considered a "postal service" because of their close association with the use of the mail for gifting purposes. Therefore, the Commission never addressed that question; rather, it specifically noted that the record was not developed on this point, and expressly reserved the possibility that it would consider a particular "stored value card" to be a "postal service" upon the presentation of a proper case. Order No. 154 at 48-49 n.90. Thus, Order No. 154 is simply not a bar to the Commission finding gift cards to be a "postal service." In doing so, the relevant question is not what may have occurred in Docket No. MC2008-1, but whether the Postal Service has, in this proceeding, sufficiently demonstrated a connection between gift cards and the use of the mail.

Pitney's attempt to interject Docket No. MC2008-1 into this proceeding by claiming that gift cards "are even further removed from the mail than the stored value cards previously rejected by the Commission in Docket No. MC2008-1" (Pitney Comments at 3) is unavailing. It bases its position on two claims: 1) while

the “stored value cards” were described in Docket No. MC2008-1 as a means of purchasing Postal Service products and services, no such representation is made here; and 2) while the Postal Service discussed its intent to package “stored value cards” as a mailable item, the Postal Service expresses no such intent with respect to these gift cards. Pitney’s first assertion is based on a mischaracterization of the record in the nonpostal docket.¹ More importantly, the ability to purchase Postal Service goods and services is not a dispositive aspect of determining whether gift cards are a “postal service.”² Even if it were, Pitney fails to recognize that open loop gift cards may be used to purchase Postal Service goods and services, since the Postal Service accepts all major credit card brands.

In addition, while it is true that witness Lance discussed the possibility that stored value cards might be packaged as a mailable item, this does not mean that pre-packaging as a single mailable item is required for gift cards to be considered a “postal service.” Certainly, the legal status of gift cards does not turn on the mere fact that a customer may in certain situations also need to purchase a greeting card with its associated envelope, or a ReadyPost envelope, to mail a gift card. In many instances, customers will already have a mailpiece

¹ The Postal Service did not limit the stored value cards category it proposed in Docket No. MC2008-1 to cards that could be used to purchase Postal Service products and services. The quotation from witness Lance’s statement that Pitney relies on (Pitney Comments at 3) was simply a description of *one specific example* of stored value cards previously offered by the Postal Service—the Liberty Card. Nothing in witness Lance’s statement, or in the Mail Classification Schedule language proposed for the stored value cards category, indicated that they were limited to cards that could only be used to purchase Postal Service goods and services. See also Order No. 154 at 47. Pitney’s claim is particularly nonsensical considering the Postal Service wanted the proposed category to include phone cards.

² As discussed below, the relevant test to determining whether gift cards are a “postal service” is whether those cards, when purchased from the Postal Service, are likely to be sent through the mail. See supra, pages 4-8, 13.

when they come to the Post Office, in which they will insert the gift card in order to enhance that mailing. Finally, gift card customers would also have access to free Express Mail and Priority Mail packaging, including, in many locations, the Priority Mail Flat Rate Gift Card Mailer.

2. Pitney provides no basis for the Commission to abandon the long-standing approach of considering certain products to be “postal” based on the likelihood that their purchase will culminate in the use of the mails

The Postal Service’s Notice demonstrated the correlation between the purchase of gift cards from the Postal Service and the use of the mail. Notice at 6-8. Importantly, Pitney does not challenge the commonsensical points that gift cards are commonly sent through the mail, and that gift cards purchased from the Postal Service are likely to be mailed. Rather, it claims that interpreting the statutory definition of “postal service” to apply to products simply because of their association with the mail is “untenable.” Pitney Comments at 3-4.

Pitney is arguing that the Commission should abandon its long-standing approach of considering certain products to be “postal” based on their correlation to the use of the mail. This approach had its genesis in two court decisions that found “money orders” to be a postal service based on the likelihood that they will be mailed when purchased from the Postal Service. See Associated Third Class Mail Users v. U.S. Postal Service, 405 F. Supp. 1109, 1115 (D.D.C. 1975), aff’d NAGCP v. U.S. Postal Service, 569 F.2d 570, 596 (D.C. Cir. 1976), vacated in part on other grounds, 434 U.S. 884 (1977).³ The Commission subsequently

³ Pitney fails to note that the ATCMU district court decision cited by the Commission in Order No. 154 was affirmed by the D.C. Circuit in NAGCP I. Furthermore, Pitney’s insinuation that these decisions are irrelevant because they were vacated by the Supreme Court is baseless. The

applied this test under the Postal Reorganization Act (PRA) to products and services other than money orders whose purchase culminates in the use of the mail. See Order No. 1475 at 7-10; Order No. 1145 at 16-17; Order No. 1128 at 10.⁴ While Pitney suggests that the Postal Accountability and Enhancement Act (PAEA) changes things, such that these prior judicial and regulatory decisions are not relevant precedent today, it does not explain how that is the case. Certainly, there is nothing in the plain language of the PAEA definition of “postal service” that suggests this long-standing approach is no longer valid, because it is perfectly logical to characterize a product as being “ancillary” to the mail when that product bears a close relationship to the use of the mail for particular purposes. In addition, Congress, by codifying all special services, including money orders, as market dominant products under section 3621, indicated its acceptance of this approach.

The Commission has also noted that precedent under the PRA, including the ATCMU decision, “provide useful guideposts to apply the PAEA’s definition as well.” See Order No. 154 at 31. Consistent with this view, the Commission has affirmed the continuing validity of the ATCMU approach in the new PAEA

decisions in ATCMU and NAGCP I involved not only the determination of whether certain special services, including money orders, were “postal services,” but also whether the Postal Service had properly implemented temporary rates under then-section 3641. As the Circuit Court noted on remand, the Postal Service did not seek Supreme Court review of the decision regarding special services; as such, the remand did not apply to that aspect of the decision. Associated Third Class Mail Users v. U.S. Postal Service, 662 F.2d 767, 768 n.4 (D.C. Cir. 1980). Furthermore, the continued validity of these decisions regarding money orders is indicated by the fact that money orders continued to be regulated, and the Commission continued to cite those decisions as authority for determining the “postal” character of products and services. This reflects the fact that these decisions retained precedential effect, because they were not vacated on the merits of the holding that money orders were “postal services.” See, e.g., Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan, 930 F.2d 77, 83-84 (D.C. Cir. 1991).

⁴ In Order No. 1145, at 17, the Commission went so far as to say that the correlation between purchase of the service at issue in that proceeding and use of the mail established a “dispositive tendency” towards finding it as being “postal.”

environment. It has discussed how “money orders have long been classified as a postal service,” in approving International Money Transfer Services as a postal product. Id. at 38. Its approval of greeting cards, another previously unregulated service, was predicated on the fact that greeting cards are commonly mailed and help to foster the use of the mail as a means of personal correspondence. Id. at 34-35. Finally, it approved Shipping and Mailing Supplies as a “postal service” in part by noting that these products are likely to be mailed. Id. at 33. Thus, to the extent the Commission has “re-evaluated” the “distinctions previously drawn under the PRA,” it has been to *broaden* the products that fall within the definition of “postal service” under this approach, rather than to suggest that the test should be abandoned. Gift cards fit comfortably within this framework of allowable retail products.

Pitney’s attempt to distinguish between the sale of greeting cards, and the sale of gift cards, is also unavailing. Pitney Comments at 4. The Postal Service noted the clear *complementary* relationship between these two products, in that senders of greeting cards often include a gift card. In addition, a gift card standing alone can itself be “correspondence” because the card often contains a message such as “Happy Birthday,” “Congratulations,” or “Thank You.”⁵ Even if gift cards themselves do not amount to “correspondence,” they typically accompany correspondence (whether in the form of a greeting card, a note on

⁵ See, e.g., https://www232.americanexpress.com/BOLWeb/bolfeOrder.do?request_type=orderProduct&promotion=ACP&program=ACPWEB&selleracctnbr=64300989991&banner=118&source=search_ne&ne_ppc_id=839&ne_key_id=10835824&ne_sadid=6011967892&filter=&gclid=CLe7wcLwgKcCFUdrKgod5ibgfQ#3.

stationery, or some other means of conveying sentiments on the occasion that has precipitated the gift). Either way, they are clearly related to the use of the mail for social purposes. As such, the same reason that led the Commission to approve the sale of greeting cards—fostering the use of the mail for social purposes—should also lead to the approval of gift cards.

Pitney also notes that whereas the Postal Service presented evidence, prior to greeting cards being approved as a “postal service,” that the majority of greeting cards are mailed, no such evidence was provided here regarding gift cards. Pitney Comments at 4 n.11. Pitney does not actually contest the Postal Service’s position that gift cards are likely to be mailed, but suggests that the lack of empirical evidence on this point is fatal to approving this test. As a general matter, however, an agency need not have empirical evidence to make an intuitive determination within its area of expertise. See, e.g., Melcher v. F.C.C., 134 F.3d 1143, 1158 (D.C. Cir. 1998) (noting that agencies are entitled to draw a “reasonable inference from its general knowledge”). Here, it is well-understood that gift cards are commonly used as a means of sending a gift through the mail; as such, there is every reason to assume that gift cards sold by the Postal Service are likely to be mailed. In addition, neither the courts nor the Commission have ever intimated that empirical evidence is essential to making this finding. For instance, the decisions in ATCMU and NAGCP I were not based on empirical evidence regarding money orders. See also Order No. 1145 at 16-17 (determining that a service would likely culminate in the use of the mail by looking to “common-sense” and a “judgmental answer” from the Postal Service).

Finally, Pitney's claim that approving this test would license the Postal Service to sell a "limitless range of other products" (Pitney Comments at 3-4) is a crude mischaracterization of both precedent and the Postal Service's Notice. This is a simple case, limited to a product with a logical, common-sense relationship to the mail, and which is complementary to other products sold by the Postal Service. Certainly, recognition that this product is an appropriate and measured addition to the Postal Service's retail offerings would not open a flood gate of "limitless" additional products that the Commission would be powerless to stop. To the extent that Pitney is claiming that the ATCMU approach, as applied by the courts and the Commission, allows the Postal Service to sell any product that can be sent through the mail, that clearly is not, and has never been, the case. Rather, the "nexus" test is what it has always been: whether one would legitimately expect that the purchase of a product or service from the Postal Service would likely culminate in the use of the mail.⁶

3. Pitney's rote recitation of competitive harms provide no basis for delaying the test

In addition to its arguments concerning whether gift cards are a "postal service," Pitney also asserts that "further inquiry regarding market distortion and small business concerns are warranted" before this test should go forward. Id. at 3 n.9. The only basis for this assertion, however, is Pitney's claim that "any

⁶ Nor is the Postal Service claiming, as Pitney baselessly asserts (Pitney Comments at 4), that because any item sold on USPS.com will by necessity be mailed by the Postal Service for fulfillment purposes, it is by definition a "postal service." The Postal Service has never argued that USPS.com may be used to sell items that could not be sold at a Post Office or other retail location, simply because USPS.com fulfillment occurs through the mail.

market share acquired by the Postal Service will be at the expense of an existing private market participant.” Id.

Initially, it is not inevitable that the sale of a gift card by the Postal Service will “be at the expense” of a private sector alternative. Gift cards will be sold as a convenience item that is intended to be placed into a mailpiece, and in many instances a customer who purchases a gift card will be someone who has come to the Post Office to mail a greeting card or another gift item that they have purchased elsewhere, and decides to enhance the mailing with the purchase of a gift card. In such instances, no private sector alternative is losing a sale.

More fundamentally, even if some customers may choose to purchase gift cards from the Postal Service rather than an alternative retailer, that fact alone cannot be a legitimate basis for cancelling a market test. Pitney suggests that the Postal Service can only offer a “new product in the market,” but does not point to any statutory language in support of this assertion. Rather, the statute is clear that that the Postal Service can offer new “competitive products,” and thus contemplates that the Postal Service may take market share away from another participant in the market. Therefore, to conduct a competitive market test, the product must be “new” to the Postal Service (in terms of not having been offered in the previous two years), but not necessarily to the market in general. Indeed, under Pitney’s approach, the Postal Service would seemingly be precluded from offering retail products such as greeting cards, Shipping and Mailing Supplies, or money orders, contrary to Commission precedent.

Rather than purporting to prevent all competition or the Postal Service from gaining market share, the statute only seeks to prevent the Postal Service from gaining market share through an “unfair or otherwise inappropriate competitive advantage.” 39 U.S.C. 3641(b)(2). Pitney does not even attempt to demonstrate that gift cards would have an unfair advantage. In particular, Pitney does not attempt to rebut the Postal Service’s discussion in its Notice (at 8-10) as to why this test will not have an unfair advantage over other retailers of gift cards, including small businesses.

At most, Pitney’s musings on this issue may have been relevant if this case was being considered under the standards of section 404(e), concerning nonpostal services. But, those standards are not applicable to the review of a product that fits within the statutory definition of “postal service,” either as a market test under section 3641 or a permanent product under section 3642. See Order No. 452 at 8 (noting that limitations imposed by the nonpostal provision are “inapplicable” to postal products); Order No. 392 at 17 (noting that “the Commission’s responsibilities when deciding whether to authorize postal, vis-à-vis nonpostal services, differ significantly”).⁷ Pitney simply presents no reasonable basis to believe that this test may violate section 3641(b). Therefore, there is no need at this time to make any “further inquiry” into this issue.

⁷ For this reason, Pitney’s discussion about why gift cards do not satisfy section 404(e) (Pitney Comments at 5-6) is simply irrelevant to this proceeding.

II. The American Banker's Association Concerns About this Market Test Constituting a Basis for the Postal Service to Provide Widespread Banking Services is Unfounded

While ABA expresses concern about this market test, its concern seems to lie not with the sale of gift cards by the Postal Service, but by the precedent that might be set by approval of this market test. ABA specifically notes that “it does not object to the USPS selling gift cards.” ABA Comments at 3. Rather, it asserts that the Commission’s approval of gift cards is troublesome because it could set a precedent for the Postal Service entering into a wide array of banking services. Id. Its motion for late acceptance confirms this, by noting “the importance” of this proceeding “in that a decision by the Commission could establish precedent for future cases in which new services are proposed by the USPS.”

Of course, despite ABA’s apparent confusion to the contrary, the Postal Service is requesting that “the Commission approve the selling of gift cards pursuant to sections 102(5) and 102(6) of the PAEA.” Greeting cards and money orders are relevant to this analysis, and are therefore discussed by the Postal Service in its Notice, because the same basic principles that have led to their treatment as “postal services” under these provisions justifies the similar treatment of gift cards.

To address ABA’s concerns, it is simply not true that approval of gift cards as a market test would constitute a precedent for the Postal Service’s expansion into widespread “banking” activities. This is a straightforward case, in which the Postal Service is proposing to sell as part of its array of retail products a product that is commonly sent through the mail, and that complements other products

sold by the Postal Service. As the Notice indicates, the Postal Service would simply be acting as a sales channel, and would not be engaged in any activities, such as maintenance of customer accounts, that might be considered “banking.” Notice at 2-3. As such, approval of this case would not constitute relevant precedent for any case that might consider the Postal Service’s authority to engage in “banking”; such a case would be considered on its own merits, without regard to this market test.

Because of the limited nature of this case, there is simply no need for the Commission to make any broad-based determinations about the Postal Service’s “banking” authority in order to render a decision on this market test. Instead, the Commission can easily allay ABA’s concerns by issuing an order that approves this test, while making it clear that its decision should not be interpreted as intimating any view as to the Postal Service’s authority to engage in “banking” activities.

III. While the Postal Service Welcomes the Public Representative’s Endorsement of the Sale of Open Loop Cards, It Opposes the Limitation of this Test to Open Loop Cards Only

The PR supports the sale of open loop gift cards, but expresses concern about the Postal Service using this market test to sell closed loop gift cards, or to sell any gift cards on USPS.com. It therefore suggests that the Commission only approve the sale of open loop cards in Postal Service retail facilities at this time, therefore requiring that the Postal Service file affirmative notice of any extension of the test to include closed loop cards, or the use of USPS.com.

While the Postal Service does not oppose limiting the scope of this test to retail facilities only, the Public Representative’s other proposed limitation is

wholly illogical and should be rejected. The PR argues that while open loop cards are acceptable because they are a “logical outgrowth” of money orders in that they can be used “at a wide variety of retailers,” closed loop cards are not permissible because they can only be used at a “particular merchant.” PR Comments at 3, 5-6. But, application of the ATCMU approach, discussed above, does not consider whether a particular product is “functionally equivalent” to an existing product, but whether that product has a sufficient connection to the use of the mails. Indeed, the approach has been used to authorize the sale of numerous products without any connection to money orders. Closed loop gift cards sold at Postal Service retail locations are just as likely to be sent through the mail for gifting purposes as are open loop cards, meaning there is no rational basis for finding the latter to be a “postal service” when sold in such circumstances, but not the former.

The PR also argues that selling closed loop cards would be the equivalent of selling the goods of the merchant who issues the gift cards. Id. at 6. But, again, this attempt to distinguish between open loop and closed loop cards fails to reflect the essential nature of the ATCMU test: whether a product is likely to be sent through the mail. This case has nothing to do with selling electronics, or any other product that might ultimately be purchased by the recipient of a closed loop (or, for that matter, open loop) gift card; rather, it involves the sale of a product—the gift card itself—with a close correlation to the use of the mail.⁸

⁸ Furthermore, the passage from the Postal Service's Notice that the PR cites (Comments at 6 n.7) does not support the PR's attempt to distinguish between open loop and closed loop gift cards. The Postal Service was making the simple point that *all forms of gift cards* are often seen

IV. Conclusion

Neither Pitney Bowes nor the ABA presents any basis for cancelling or delaying this market test. In addition, while the Postal Service does not oppose the limitation of this market test to retail facilities at this time, the PR fails to provide any relevant distinction between closed loop and open loop gift cards, such that the test should be limited to only the latter. The Commission should therefore approve the sale of both open loop and closed loop gift cards in Postal Service retail facilities as a market test.

Respectfully submitted,

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as more convenient than purchasing an article of merchandise as a gift. Certainly, the most likely alternative to sending any type of gift card to a gift recipient is to send an article of merchandise.