

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Addition of Gift Cards Price Category to
Greeting Cards and Stationery Product

Docket No. MC2014-26

PUBLIC REPRESENTATIVE COMMENTS ON THE POSTAL SERVICE'S
REQUEST TO ADD GIFT CARDS TO THE
COMPETITIVE PRODUCT LIST

(July 3, 2014)

The Public Representative hereby provides comments pursuant to Order No. 2091.¹ In that Order, the Commission established the above referenced docket to receive comments from interested persons, including the undersigned Public Representative, on a Postal Service Request filed pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to modify the Mail Classification Schedule (MCS) by adding Gift Cards to the competitive product list as a new price category within the Greeting Cards and Stationery product.² The Request also proposes to change the name of the product to Greeting Cards, Gift Cards, and Stationery in the competitive product list. Request at 1.

As part of the Request, the Postal Service asks the Commission to issue an interim order before June 27, 2014 (the termination of the ongoing Gift Card market test) given the possibility that the Commission may not complete its review before June 27, 2014. *Id.* at 2. The interim order would allow the Postal Service to continue selling gift cards currently available at post offices until a final order is issued in this proceeding. *Id.*

¹ Notice and Order of Filing Request to Add Gift Cards to the Competitive Product List and Conditionally Authorizing the Sale of Gift Cards Pending Conclusion of Proceeding, June 13, 2014 (Order No. 2091).

² Request of United States Postal Service to Add Gift Cards as a New Price Category in the Greeting Cards and Stationery Product, June 9, 2014 (Request).

Included as Attachment A to the Request is a copy of the Governors' Decision of June 5, 2014, which authorizes the Postal Service's Request. Attachment B is the Statement of Supporting Justification required by 39 CFR 3020.32. Proposed changes to the MCS are presented in Attachment C. In a separate notice, the Postal Service filed a non-public library reference containing revenue and cost information with estimated cost coverage calculations in an Excel workbook file.³

I. INTRODUCTION

The Postal Service previously sold American Express "open loop" gift cards at about 5,000 post offices pursuant to a Commission-authorized market test that expired June 27, 2014.⁴ It seeks to continue selling open loop Gift Cards as a permanent service offering by establishing Gift Cards as a competitive product price category. Request, Attachment B, at 1. Assuming approval of its Request, the Postal Service also plans to sell "closed loop" Gift Cards.⁵

The Postal Service reports that "Gift cards have become highly popular gifts in recent years." *Id.* at 6 [citation omitted]. More importantly, the Postal Service states that selling gift cards at post offices will foster use of the mails because it believes that a majority of gift cards purchased at post offices will be mailed. *Id.* at 7. This belief follows from the Postal Service's experience selling greeting cards and stationery. *Id.*

³ Notice of Filing of Nonpublic Library Reference USPS-LR-MC2014-26/NP1, June 9, 2014.

⁴ See Docket No. MT2011-2, Order Authorizing Gift Card Market Test, April 28, 2011 (Order No. 721); see also Docket No. MT2011-2, Order Granting Extension of Gift Card Market Test, July 19, 2013 (Order No. 1781). Market tests are limited to 24 month's duration with a possible extension not to exceed an additional 12 months. 39 U.S.C. 3641(d).

Open loop gift cards are branded cards available from a Retail Electronic Payments Network (e.g., American Express, Discover, MasterCard or Visa) and can be used at any merchant that accepts cards administered by that Network. Request, Attachment B at 2. Such cards are sold at face value or the amount of money loaded onto the card plus an activation fee. *Id.*, Attachment B at 3.

⁵ Request, Attachment B at 3. Closed loop gift cards are specific to a particular merchant, and are sold at face value, *i.e.*, without an activation fee. *Id.*

The Postal Service also cites survey data from the market test to support its claim that offering gift cards at post offices will increase use of the mails. In a survey of gift card purchasers, the Postal Service found 52 percent of purchased gift cards were, or were expected to be, mailed, and that 46 percent of purchased gift cards would generate a mailed thank you card. *Id.* at 8. Moreover, gift cards used to make online purchases would generate some additional package volumes for the Postal Service. The Postal Service concludes that every gift card purchased can be expected to generate more than 98 pieces of mail. *Id.*

The Postal Service claims gift cards qualify as a “postal service,” defined in 39 U.S.C. §102(5), and cites the Commission for the proposition that their sale is consistent with the statutory definition. *Id.* at 7 [citation omitted]. The Postal Service also asserts that the Gift Cards price category meets all the criteria of 39 U.S.C. 3642 for adding a new product to the competitive product list. Request at 1, *n.* 1. As required by 39 CFR 3020.32(c), the Postal Service maintains the Gift Cards price category complies within 39 U.S.C. 3633. Request, Attachment B, at 1-2.

With respect to the Postal Service’s request for an interim order, the Commission states it “will conditionally approve” the addition of Gift Cards to the competitive product list as a price category of the Greeting Card, Gift Cards, and Stationery product to avoid disruption of the service and inconvenience to gift card customers. Order No. 2091 at 4. The Commission adds that this “interim [o]rder merely preserves the status quo pending completion of this proceeding” while providing ample opportunity for comments on the Request. *Id.*

To clarify the Request, Chairman’s Information Request (CHIR) No. 1 sought additional information about revenues, costs and specific features of the Gift Card service.⁶ The Postal Service provided its response to CHIR No. 1 on June 27, 2014.⁷

⁶ Chairman’s Information Request No. 1, June 20, 2014.

⁷ Response of United States Postal Service to Chairman’s Information Request No. 1, June 27, 2014 (CHIR Response).

II. COMMENTS

After review of the relevant documents, the Public Representative concludes that the Postal Service's Request is consistent with 39 U.S.C. 3642 and complies with the requirements of 39 CFR 3020.30 *et seq.* The Commission should reiterate its approval of the Request in its final order. Nevertheless, as explained below, the Request is deficient in other respects; namely, it is not timely and therefore continues a pattern of filings in this and other dockets that are inconsistent with 39 U.S.C. 3642 and the requirements of 39 CFR 3020.30 *et seq.* concerning due process with respect to public notice and comment, and Commission review in a reasonable period *prior to* a Commission decision on whether or not to add proposed new products to a product list.

A. 39 U.S.C. 3642 and 39 CFR 3020.30.

When considering a request to add new products to the MCS, section 3642(b)(3) of Title 39 requires the Commission to give due regard to three “additional considerations.” Section 3020.32 of the Commission's Rules requires the Statement of Supporting Justification (Attachment B to the Request) to address those considerations. Among other things, Attachment B describes the availability and nature of enterprises in the private sector engaged in the delivery of the product. It notes that gift cards are widely available from well-known and successful private firms. *Id.* at 4. Elsewhere, it observes that many of these firms are larger retail chains, such as grocery, pharmacy and convenience stores, which makes the gift card marketplace a highly competitive one for the Postal Service. *Id.* at 5.

Attachment B further provides information on the views of those who use the product on the appropriateness of the modification. A survey during the market test revealed that offering gift cards makes customers feel that the Postal Service is trying to be customer-oriented and innovative, and the post office is more like a one-stop location for sending gifts. *Id.* at 4-5. Customers also agreed the open loop gift cards

sold at post offices were a good value. *Id.* at 5. However, some customers expressed concern that selling gift cards could create longer lines at post offices. *Id.*

Attachment B also describes the likely impact of the modification on small business concerns. It notes as a general matter that small businesses are a very small part of the overall gift card market and therefore Postal Service gift cards would result in minimal competition with such businesses. *Id.* [citation omitted]. And some small businesses would benefit from having the Postal Service as another option to purchase gift cards. *Id.* at 6.

In these respects, the Postal Service meets the requirements of 39 U.S.C. 3642 and the Commission's Rules.

B. Postal Service Request for an Interim Order

By design or poor planning, the Postal Service request for Commission approval of an "interim order" to allow the continued sale of gift cards is necessitated by the fact that its Request to establish Gift Cards as a permanent service offering was not timely. The Postal Service acknowledges its Request was not filed sufficiently in advance of the termination date of the market test to permit Commission review.⁸ Another significant legal ramification is the filing did not permit public notice and deprived the general public and interested persons of providing comment prior to Commission's initial review.

Were this the first time the Postal Service made an untimely request for approval of a new product, the Public Representative would be less concerned. However, the Postal Service's Request in this proceeding represents a continuing pattern of requests for extraordinary relief to extend market tests beyond their statutory deadlines because it is unable to make its filings in a timely fashion. Notably, two of these requests for extraordinary relief involve the Gift Card market test, the instant Request for an interim order filed 18 days before the market test termination date, and its motion to extend the

⁸ Request at 2.

duration of the market test for an additional year until June 27, 2014, filed 9 days before the end of first year of the Gift Card market test.⁹ The Postal Service also moved for extraordinary relief to extend the duration of the Collaborative Logistics market test, which was filed 10 days before the market test termination date of May 6, 2011.¹⁰

The Commission's decision to "conditionally approve" the addition of Greeting Cards as a competitive product price category rewards the Postal Service for its untimely filing in this proceeding and encourages such filings in future proceedings. Moreover, there is no legal distinction between a product that is "conditionally" approved and one that is approved. The Commission does not cite a statute as a basis for the presumed distinction or as support for its decision to conditionally approve the Gift Card product price category. Thus, it could be argued that the decision to conditionally approve the Postal Service's Request is, *ipso facto*, an approval of the Request on its merits. In this proceeding, that approval was premature.

The Commission's approval was made without a substantive review of the Request. The Commission's subsequent issuance of CHIR No. 1 indicates some of the technical (Questions 6 and 7), policy (Questions 2 and 3), and legal (Question 8) issues it still had to ponder and respective responses it had yet to consider, prior to an informed approval. In addition, the Commission's approval was made without any public input, depriving interested persons of their due process right to be heard prior to approval. The Commission later explains it will provide such persons the chance to

⁹ See Request at 2; see *also* Motion of the United States Postal Service for Temporary Extension of Gift Cards Market Test, Docket No. MT2011-2, June 18, 2013.

¹⁰ See Motion of the United States Postal Service for Temporary Extension of Collaborative Logistics Market Test, Docket No. MT2009-1, April 26, 2011. The Commission approved a one-month extension of the market test to June 6, 2011. See Order No. 720, Notice and Order Granting Temporary Extension of Collaborative Logistics Market Test, April 28, 2011. In response to Order No. 720, the Postal Service requested that the Commission extend the market test "for a few additional months." Response of the United States Postal Service to Commission Order No. 720, Docket No. MT2009-1, May 5, 2011, at 3. The Commission subsequently extended the market test until September 30, 2011. Order No. 742, Order Granting in Part Temporary Extension of Collaborative Logistics Market Test, June 3, 2011.

comment during the subsequent scheduled review.¹¹ Unfortunately, the benefit of due process is lost when applied retroactively.

The Postal Service's justifies its request for the interim order as a means to avoid harm to gift card customers and inefficiency to the Postal Service. It is not clear from the Postal Service's Request what type of harm potential gift card customers would endure since such cards are widely available at grocery, pharmacy and convenience stores. Request, Attachment B at 4. Nor is it clear what inefficiencies would be incurred by the Postal Service, other than possibly removing cards from, or covering, retail displays. To the extent such harms and inefficiencies would have a material effect on the Postal Service, it seems reasonable to expect the Postal Service would have made a timely filing. As the Commission notes, these risks are "unnecessary and can be easily cured by a timelier filing." Order No. 2091 at 4, *n.* 6.

The Public Representative submits that no harm would have befallen either gift card customers or the Postal Service if the request for the interim order had been denied. A review of the financial estimates accompanying the Postal Service's Request and data filed in response to CHIR No. 1 confirms that doing so would have had no material effect on the Postal Service's finances, given the limited time that gift cards sales would have been precluded between the termination of the market test and issuance of a final order in this proceeding.¹²

The Public Representative submits that denying the request for the interim order would have: improved the likelihood that future requests by the Postal Service would be timely; avoided the conflicting message sent by the Commission when it continues to

¹¹ Order No. 2091 at 4.

¹² Notice of Filing of Nonpublic Library Reference USPS-LR-MC2014-26/NP1, June 9, 2014; and Response of United States Postal Service to Chairman's Information Request No. 1, June 27, 2014.

chastise only to later accept the Postal Service's behavior; and preserved the due process rights of the general public and interested persons.

III. CONCLUSION

Pursuant to the Commission's notice and order requesting comment and upon review of the documents filed by the Postal Service in this proceeding, the Public Representative respectfully submits the foregoing comments.

Respectfully submitted,

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