

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Inquiry Concerning Scope of Public
Service or Activity Cost Reporting

Docket No. PI2014-1

PUBLIC REPRESENTATIVE COMMENTS CONCERNING THE SCOPE OF PUBLIC
SERVICE OR ACTIVITY COST REPORTING UNDER 39 U.S.C. § 3651(b)(1)(C)

(September 17, 2014)

I. INTRODUCTION

On August 20, 2014, the Commission invited comments concerning the scope of public service or activity cost reporting in its Annual Report to the President and Congress.¹ Specifically, it seeks comments on the universe of “other public services or activities” mentioned under 39 U.S.C. § 3651(b)(1)(C). Previously, the Postal Service provided the Commission with its Analysis of Additional Postal Service Activities that Could Qualify for Reporting Under 39 U.S.C. § 3651(b)(1)(C) (Postal Service Analysis).² The Public Representative respectfully submits the following comments for consideration.

¹ Notice Establishing Docket Concerning the Scope of Public Service or Activity Cost Reporting Under 39 U.S.C. 3651(b)(1)(C), August 20, 2014 (Order No. 2163). The Commission most recently discusses the scope of public service or activity cost reporting in its Fiscal Year 2013, Annual Report to the President and Congress (Annual Report).

² See Notice of Filing Library Reference PRC-LR-PI2014-1/1, August 22, 2014.

II. STATUTORY CONSIDERATIONS

A. Statutory requirements

Within the Commission's Annual Report to the President and Congress, the Commission is required to provide an estimate of the costs incurred by the Postal Service in providing:

(A) postal services to areas of the Nation where, in the judgment of the Postal Regulatory Commission, the Postal Service either would not provide services at all or would not provide such services in accordance with the requirements of this title if the Postal Service were not required to provide prompt, reliable, and efficient services to patrons in all areas and all communities, including as required under the first sentence of section 101 (b);

(B) free or reduced rates for postal services as required by this title; and

(C) other public services or activities which, in the judgment of the Postal Regulatory Commission, would not otherwise have been provided by the Postal Service but for the requirements of law.

39 U.S.C. § 3651(b)(1).

B. House Report guidance

The House Report associated with these statutory requirements provides the following guidance:

As part of this report, the Commission is directed to prepare an estimate of public service costs borne by the Postal Service including universal service costs, revenue-forgone costs, and other costs (e.g., law enforcement activities).

H.R. Rep. No. 109-66, part 1, at 50 (2005).

C. Task assigned by the Commission

The Commission asks commenters to consider the breadth of "other public services or activities" appearing in 39 U.S.C. § 3651(b)(1)(C). The Commission previously stated:

The current interpretation of section 3651(b)[1](C) of the PAEA may be narrow. A broader interpretation could include the net cost of activities such as the Inspection Service or the Postal Service Office of Inspector General. It could also include cost estimates of services such as the addressing system or emergency response.[footnote omitted]

Annual Report at 31.

D. Postal Service Analysis

The Postal Service contends that the “other public services or activities” section of 39 U.S.C. § 3651(b)(1)(C) should be afforded a broad interpretation. It argues that other “public services” are separate and different, to a certain extent, from other “activities.” Stated another way, the Postal Service would prefer that the word “public” only modify the word “services,” and not the word “activities.” The Postal Service states:

The statute in question deals with “public services or activities [that the Postal Service would not provide] but for the requirements of law.” The Postal Service interprets this provision as requiring the Commission to discuss (1) services provided to the public that are not encompassed by 39 U.S.C. § 3651 (b)(1)(A) and (B), and (2) any Postal Service activities that are the result of legal mandates beyond what the Postal Service might otherwise do. “Activities” is a term with a broad meaning under title 39, and refers to Postal Service operations generally. See, e.g., 39 U.S.C. §§ 409(h), 2009, 3634. Even if “public” were interpreted to modify “activities” as well as “services,” an “activity” that is mandated by law necessarily reflects Congress’s determination that it provides some level of “public” benefit, either direct or indirect. Therefore, for present purposes, we will construe the statutory provision to encompass all legally-mandated services or activities.

Postal Service Analysis at 2.

E. Public Representative’s position

The Public Representative believes that “other public services or activities” appearing in 39 U.S.C. § 3651(b)(1)(C) should be afforded a somewhat narrow interpretation. It should be limited to addressing services or activities that provide some

direct benefit to the public, *i.e.*, users of the mail. Contrary to the Postal Service's position, the Public Representative views the word "public" in section of 39 U.S.C. § 3651(b)(1)(C) as modifying both "services" and "activities."

The Public Representative finds support in this position by reading the entire section 3651(b)(1) in context. Both subpart (A) and (B) appear to only address benefits provided to the public. Subpart (C) starts with "other public" which strongly implies that subpart (C), like subparts (A) and (B), also should only address benefits provided to the public.

Additional support for this position is found in the House Report's description of section of 39 U.S.C. § 3651(b). The description prefaces all three subparts ((A), (B) and (C)) of section 3651(b)(1) by stating "the Commission is directed to prepare an estimate of public service costs borne by the Postal Service." The House Report then states that these public service costs may include "[A] universal service costs, [(B)] revenue-forgone costs, and [(C)] other costs (e.g., law enforcement activities)."

Section 3651(b)(1) provides two very specific categories ((A) and (B)), followed by what appears to be a "catchall" category (C). The catchall category could be for including future public services or activities that did not exist when the statute was written. It also could be to include items that the legislature could not adequately describe at the time with a delegation of authority to the Commission to fill in the blanks. Thus, either the items envisioned for (C) did not exist, or the legislature could not adequately describe items important enough to be included at the time of the legislation.

The Postal Service's approach of disassociating "activities" from those activities that directly benefit the public, allows for the consideration of countless activities undertaken by the Postal Service. It also would raise an issue of whether the Postal Service's activities should be compared against the private sector, or against other federal entities. Broadly benchmarking the Postal Service against the private sector would suggest a major undertaking requiring an analysis of all aspects of the Postal Service's business model, and essentially ask what, if any, benefit would there be to

taking the Postal Service private. If this were the intended task, Congress would have provided explicit directions. Such a major task would not be ambiguously included within section 3651(b)(1).

This leads the Public Representative to suggest a threshold to require any “other public services or activities” contemplated for inclusion in section 3651(b)(1)(C) to provide some direct benefit to the public.

III. SUGGESTIONS CONTAINED IN THE HOUSE REPORT AND THE COMMISSION’S ANNUAL REPORT

A. House Report

The House Report provides an example of “law enforcement activities” that might be included in section 3651(b)(1)(C). H.R. Rep. No. 109-66, part 1, at 50 (2005).

The Public Representative would only include the costs of law enforcement activities to the extent that the activities provide some direct benefit to the public.

The President’s Commission on the United States Postal Service expressed a similar view by differentiating activities that should be funded by the ratepayer, versus those that should be funded by the taxpayer.

The [President’s] Commission [on the United States Postal Service] recognizes that the Postal Inspection Service plays a vital law enforcement function. Only those activities of the Postal Inspection Service that directly support the safety and security of the nation’s mail and postal systems should be assumed by the ratepayers. The cost of law enforcement operations that track broader crimes committed through the mail should be borne by the taxpayers, generally.³

It appears that the President’s Commission was suggesting that taxpayer funded activities such as combating drug trafficking, child pornography, and credit card fraud should not be paid for by the Postal Service, but activities related to the general protection of the mail should be paid for by the Postal

³ Embracing the Future, Making the Tough Choices to Preserve Universal Mail Service, Report of the President’s Commission on the United States Postal Service, July 31, 2003 at 100.

Service. *Id.* at 99. The Public Representative agrees and would consider only including those (taxpayer) activities within section 3651(b)(1)(C).

B. Commission's Annual Report

The Commission states that it already "includes the estimated cost of delivering mail six days a week rather than five days a week, and the estimated lost revenue from unzoned rates in Package Services and First-Class Mail" within section 3651(b)(1)(C). Annual Report at 30. The Commission then suggests:

A broader interpretation could include the net cost of activities such as the Inspection Service or the Postal Service Office of Inspector General. It could also include cost estimates of services such as the addressing system or emergency response.[footnote omitted]

Id. at 31.

The Public Representative would not include costs associated with the Postal Service Office of Inspector General within section 3651(b)(1)(C).⁴ The Inspector General's office does not provide a direct benefit to the public. When compared to other federal entities, there is nothing unique in requiring the Postal Service to have an Office of Inspector General. When compared to a (typically larger) private company, there is nothing unique to having an office that preforms tasks similar to those performed by the Postal Service Office of Inspector General.

The Postal Service argues that the Postal Service funds the Postal Service Office of Inspector General whereas taxpayers may fund other Inspector General offices. Still, the Postal Service Office of Inspector General fails the threshold test for inclusion in 39 U.S.C. 3651(b)(1)(C) by not providing a direct benefit to the public. Furthermore, the source of funding owes itself to the Postal Service's business model which makes it somewhat independent from the rest of the federal government. The Postal Service

⁴ The Public Representative has addressed the inclusion of the Inspection Service immediately above.

claims that it does not rely upon taxpayer funding; a claim not typically made by other federal entities with Inspector General offices.⁵

The Public Representative is not clear what the Commission means by “services such as the addressing system.” It would appear that an addressing system would be essential to the Postal Service’s business, and thus not included within section 3651(b)(1)(C). The fact that others could also find use in the Postal Service’s addressing system is tangential to the addressing system’s intended use for the delivery of mail.

The Commission mentions “emergency response.” The Public Representative would support including programs, such as providing medicines through the mail in case of national medically related emergency, to the extent that they exist. This type of program would not be a service otherwise required of the Postal Service, and it would directly benefit the public. The cost of preparing for such events appears to be logical costs that might be included.

IV. POSTAL SERVICE PROPOSAL

The Postal Service compiled an extensive list of items that it would consider for inclusion within section 3651(b)(1)(C). The general subject matter of these items includes the following:

- Employee and retiree health benefits;
- Federal retirement benefits;
- Binding arbitration of labor issues;
- Postal Inspection Service;
- Office of the Inspector General;
- Merit Systems Protection Board and Equal Employment Opportunity Commission Appeals;
- [Federal] [w]orkers’ compensation [program];
- Postal Regulatory Commission funding;
- Certain aspects of service performance reporting;

⁵ Note that a parallel discussion could be had concerning the funding of the Postal Regulatory Commission.

- Emergency detection and response;
- [Federal] purchasing requirements;
- Compliance with Freedom of Information Act and Privacy Act, along with other laws such as the Randolph-Sheppard Act and OPM's reduction in force regulations; and
- Costs for delivering free and reduced-rate mail for which Congress has failed to compensate the Postal Service.

See Postal Service Analysis. The Public Representative's positions in regard to these costs are discussed below.

A. Employee related costs should not be included within section 3651(b)(1)(C)

The Postal Service would like to consider several employee related costs for inclusion within section 3651(b)(1)(C):

- Employee and retiree health benefits;⁶
- Federal retirement benefits;⁷
- Binding arbitration of labor issues;⁸
- Merit Systems Protection Board and Equal Employment Opportunity Commission Appeals;⁹
- [Federal] [w]orkers' compensation [program];¹⁰ and
- OPM's reduction in force regulations.¹¹

None of these programs provide a direct benefit to mailers. Most of the programs are a result of the Postal Service being part of the federal government, and being an entity that for the most part does not rely upon taxpayer dollars for its operations. The appropriate forum for the Postal Service to express its concerns in these areas is Congress. The Public Representative would not include any of these employee related costs within section 3651(b)(1)(C).

⁶ Postal Service Analysis at 4-7.

⁷ *Id.* at 8-10.

⁸ *Id.* at 10.

⁹ *Id.* at 11-12.

¹⁰ *Id.* at 12-14.

¹¹ *Id.* at 16.

- B. Costs associated with being part of the federal government should not be included within section 3651(b)(1)(C)

The Postal Service contends that complying with certain federal purchasing requirements add costs that it would not have to incur if it were not subject to the requirements, *i.e.*, not part of the federal government. Postal Service Analysis at 15-16. It also mentions that costs are imposed by complying with the Freedom of Information Act and Privacy Act, along with other laws such as the Randolph-Sheppard Act. *Id.* at 16.

None of these programs provide a direct benefit to mailers. Most of the programs are a result of the Postal Service being part of the federal government. The Public Representative would not include any of these costs within section 3651(b)(1)(C).

- C. Certain aspects of service performance reporting

The Postal Service asserts that it has modified its service performance measurement systems and processes as a result of Commission orders, and that it would not have voluntarily done so otherwise. *Id.* at 14-15. Thus, the Postal Service proposes to include these costs within section 3651(b)(1)(C).

Reporting on service performance is required by statute. The Postal Service had the freedom to propose whatever systems it wanted when measurement systems were under development. The Commission only asked for modifications where the Postal Service plans were found inadequate to meet statutory requirements. The Postal Service may at any time propose new measurement system if and when it develops less costly alternatives. To date, the Postal Service has not proposed any new less costly measurement systems.

Performance measurement systems form an integral part of ensuring that the Postal Service is not cutting costs by degrading service in order to live under the price cap system. Besides this regulatory function, most service businesses would have

system in place (with probably more extensive reporting than what is provided to the Commission) to measure the service that is being provided.

These systems provide no direct benefit to the public. Therefore, the Public Representative would not include any of these costs within section 3651(b)(1)(C).

- D. Costs associated with delivering free and reduced-rate mail for which Congress has failed to compensate the Postal Service should be considered for inclusion within section 3651(b)(1)(C)

The Postal Service alleges that recently Congress has not compensated it for delivering certain free and reduced-rate mail. *Id.* at 17.

These costs directly benefited a user of the mail, *i.e.*, Congress. Therefore, the Public Representative would support including these costs within section 3651(b)(1)(C).

- E. Item Previously Mentioned

The Postal Inspection Service, Office of the Inspector General, Postal Regulatory funding, and emergency detection and response were previously discussed in these comments. The comments are summarized below.

The Public Representative would only include the costs of Postal Inspection Service activities within section 3651(b)(1)(C) to the extent that the activities directly benefit the public, such as activities associated with combating drug trafficking, child pornography, and credit card fraud, *etc.* General protection of the mails and Postal Service facilities would not be included.

The Public Representative would not include costs associated with the Postal Service Office of Inspector General within section 3651(b)(1)(C). The Inspector General's office does not provide a direct benefit to the public. Furthermore, many federal and private entities have offices that provide similar services as those provided by the Postal Service Office of Inspector General.

The Public Representative would not include costs associated with the Postal Regulatory Commission within section 3651(b)(1)(C). The Postal Regulatory Commission plays a vital role in ensuring compliance with the pricing systems established by Congress. Most Postal Regulatory Commission activities are geared towards these regulatory responsibilities, and do not provide a direct benefit to the public.

The Public Representative would support inclusion of the costs for certain emergency detection and response within section 3651(b)(1)(C). Another example of what could be included would be the program to irradiate certain mail to protect against biological agents. This certainly benefits certain users of the mail.

V. CONCLUSION

The Public Representative would establish a threshold to require any “other public services or activities” contemplated for inclusion in section 3651(b)(1)(C) to provide some direct benefit to the public. Section 3651(b)(1)(C) was not intended to include costs for items that only provide tangential or indirect benefit to the public, such as employee expenses, a business’s internal controls,¹² or the regulatory scheme established by Congress.¹³

Respectfully submitted,

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¹² Cost for the Inspector General’s office and certain aspects of the Inspection Service.

¹³ Costs for the Postal Regulatory Commission, and service performance measurement systems.