

BEFORE THE
POSTAL REGULATORY COMMISSION

Inquiry Concerning Scope of
Public Service or Activity Cost
Reporting

DOCKET NO. PI2014-1

INITIAL COMMENTS OF UNITED PARCEL SERVICE
ON SCOPE OF PUBLIC SERVICE OR ACTIVITY COST
REPORTING UNDER 39 U.S.C. § 3651(b)(1)(C)
(September 17, 2014)

Pursuant to Commission Order No. 2163 (August 20, 2014), United Parcel Service (“UPS”) hereby comments on “the universe of ‘other public services or activities’ that the Commission should review under 39 U.S.C. § 3651(b)(1)(C).” Order No. 2163 at 4, ¶ 1.

INTRODUCTION

Since the passage of the Postal Accountability and Enhancement Act (“PAEA”), Congress has required the Postal Service to report to the Commission the costs of providing services to the general public that the Postal Service would not provide but for being required to do so by law. See 39 U.S.C. § 3651. PAEA expressly names a few of those services: providing service to areas of the country the Postal Service would not otherwise serve and providing free or reduced rates on services the Postal Service would not otherwise discount. See *id.* §§ 3651(b)(1)(A)-(B). The Commission, pursuant to section 3651(b)(1)(C),

has also included the costs of delivering mail six days a week instead of five days, and revenue lost from providing unzoned first-class mail and media mail rates. See Order No. 2163 at 2 (noting that these were the only costs considered under section 3651(b)(1)(C) in fiscal year 2013). Each of these costs is for direct services provided to the consuming public at large – services the Postal Service would apparently not provide to the public if not required to do so.

Now, in response to the Commission’s request that the Postal Service provide its views on any “other public services or activities” it believes the Commission should review under section 3651(b)(1)(C), the Postal Service has suggested a broad list of costs that are *categorically different* from the types of costs that have historically been counted under section 3651. As the Postal Service concedes, the costs it has identified relate to “Postal Service operations generally” and they “encompass all legally-mandated services or activities,” whether or not the Postal Service would otherwise have provided them. Docket No. PI2014-1, U.S. Postal Service, *Analysis of Additional Postal Service Activities That Could Qualify for Reporting Under 39 U.S.C. § 3651(b)(1)(C)* (the “Postal Analysis”) at 2. Put simply, inclusion of such costs in the section 3651 report is contrary to the plain meaning of this provision of PAEA.

Even assuming the costs identified by the Postal Service were for public services, the Postal Service also attempts to work around the requirement in section 3651(b)(1)(C) that the costs be for services that it would not have otherwise provided by arguing that “[p]rivate businesses are not subject to these mandates.” Postal Analysis at 3. But the Postal Service is incorrect. A number

of the costs enumerated by the Postal Service are also borne by private sector companies even though those companies may not be legally required to do so, while other costs are exclusively incurred by the Postal Service's private sector competitors due to legal requirements imposed on private carriers.

In addition, the Postal Service's cost estimates are too imprecise for inclusion. As well, the Commission's report cannot accurately inform Congress of the impact that legal requirements have on postal costs if it includes a list of legal requirements applicable to the Postal Service without also addressing many of the benefits conferred on the Postal Service by law, in addition to the Commission's estimated value of the letter and mailbox monopolies.

I. THE SCOPE OF "PUBLIC SERVICES OR ACTIVITIES" IN SECTION 3651(B)(1)(C) IS LIMITED TO SERVICES AND ACTIVITIES THAT DIRECTLY BENEFIT THE GENERAL PUBLIC.

The Postal Service has taken the position that "other public services or activities" in section 3651(b)(1)(C) extends to "Postal Service operations generally" and includes "all legally-mandated services or activities" such as employee and retiree health benefits, federal retirement benefits, and the federal workers' compensation program. Postal Analysis at 2. Section 3651, however, is not so broad.

In passing section 3651, Congress sought reporting on the costs incurred by the Postal Service in providing services to the general public that the Postal Service would not have provided if it were a private market actor. Among those costs expressly identified by Congress are providing "postal services to areas of

the Nation where . . . [it] would not provide services at all . . . were [it] not required” to do so by law, and the provision of “free or reduced rates for postal services as required” by law. 39 U.S.C. §§ 3651(b)(1)(A)-(B). Section 3651 also requires an accounting of “other public services or activities which . . . would not otherwise have been provided by the Postal Service but for the requirements of law.” *Id.* § 3651(b)(1)(C).

Historically, the Commission has construed section 3651(b)(1)(C) to include only the costs of delivering mail six days a week instead of five days, and revenue lost from unzoned first-class mail and library/media mail rates. Those services are for the general public and come within the scope of section 3651(b)(1)(C). But inclusion of much of what the Postal Service now proposes in the Commission’s report would be improper. Employee and retiree health benefits, federal retirement benefits, costs from labor arbitration, workers’ compensation programs, and certain regulatory costs may be operational costs that are required by law, but they are not services that directly benefit the general public. Thus, by its terms section 3651(b)(1)(C) does not include them.

The plain language of the provision confirms that the phrase “other public services or activities” refers to services that directly benefit the general public, not any activity that may have some marginal level of public benefit, even if indirect, as the Postal Service suggests. Postal Analysis at 2. The ordinary meaning of a “public service” is “[a] service provided or facilitated by the government for the general public’s convenience and benefit.” Black’s Law Dictionary (9th ed. 2009) at 1352. Similarly, as the term “activities” is modified by “public” in section

3651(b)(1)(C), activities must therefore be “[r]elating or belonging to an entire community, state, or nation,” or “[o]pen or available for all to use, share, or enjoy.” *Id.* at 1348. In other words, section 3651(b)(1)(C) applies only to services or activities that are provided by the Postal Service *directly for the public’s benefit*. The Postal Service’s suggestion that “activities” could encompass “Postal Service operations generally” or activities that may provide “some level of ‘public’ benefit, either direct or indirect” (Postal Analysis at 2), stretches the language of the section beyond a reasonable reading.

The Postal Service’s interpretation also improperly reads the phrase “public services and activities” in isolation. But “a word is known by the company it keeps . . . in order to avoid the giving of unintended breadth to the Acts of Congress.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (modification in original, citations omitted). The words “*other* public services and activities which . . . would not otherwise have been provided” (emphasis added) constitute a residual phrase, following, in the same sentence, explicit reference to providing service to “areas of the Nation” and “free or reduced rates” that the Postal Service would not otherwise provide. The Supreme Court has observed that a residual clause containing the word “other” should “be controlled and defined by reference to the enumerated categories . . . which are recited just before it.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). Congress, therefore, clearly intended that section 3651(b)(1)(C) encompass only public services and activities of the same type or class enumerated in sections 3651(b)(1)(A) and (B) – meaning services provided directly to the general public.

Most of the costs now identified by the Postal Service (except for the Postal Inspection Service¹) are not services provided to the general public. Employee and retiree health benefits and federal retirement benefits are employee benefits provided to *postal workers*, not services or activities provided to *the public*. Costs associated with binding labor arbitrations, Equal Employment Opportunity complaints, appeals from the Merit Systems Protection Board (“MSPB”), and federal workers’ compensation claims are legal costs or costs arising from liabilities; again, they are not services or activities provided to the public. Similarly, regulatory costs such as the cost of going through Commission review, purchasing requirements, and the costs of compliance with Presidential emergency preparedness directives are not costs of providing services directly to the public. As a result, these costs should not be included in the Commission’s annual report under section 3651.

II. SOME OF THE COSTS THE POSTAL SERVICE CLAIMS ARE UNIQUE TO IT AS A GOVERNMENTAL ENTITY ARE NOT UNIQUE BECAUSE PRIVATE CARRIERS ALSO BEAR COSTS OF THE SAME NATURE.

Even if the costs cited are incurred as a result of a public service or activity, there is an additional requirement in section 3651(b)(1)(C) – that the service or activity “would not otherwise have been provided by the Postal Service but for” the legal requirement. The Postal Service does not contend that the costs it has identified are for operations that it would not provide if it were not required. Rather, it tries to change the test, arguing that its costs are not felt

¹ UPS does not dispute that the Postal Inspection Service may come within the scope of the section 3651(b)(1)(C) because it is a law enforcement service for the general public.

equally by private carriers. But that fact alone does not mean those costs are properly considered within the scope of section 3651.

Moreover, a number of the costs that the Postal Service has cited *are* indeed borne by private sector companies, indicating the Postal Service would almost certainly incur these costs even in the absence of any legal requirement. Private sector competitors incur these costs either to compete or to comply with other federal rules and regulations glossed over by the Postal Service.

For example, private carriers such as UPS provide health benefits to their employees and offer retirement benefits in order to recruit employees and to comply with Federal mandates. Private carriers also bear costs associated with labor disputes and are subject to workers' compensation claims. And while the Postal Service discusses its unique litigation costs, including MSPB appeals and binding arbitration of labor issues, the Postal Service does not discuss its unique legal advantages, including sovereign immunity for tort claims pertaining to negligent transmission of mail. See 28 U.S.C. § 2680(b).

Beyond general operating costs, which are not appropriate for inclusion in section 3651(b)(1)(C), private sector competitors often perform activities analogous to the those done by the Postal Service. For instance, companies like UPS perform extensive (and expensive) security operations that encompass many of the same activities performed by the Postal Inspection Service, such as fraud detection and other security-related functions. They do so without the substantial advantages the Postal Service has arising from postal inspectors' law enforcement powers. Compliance with transportation, customs, and law

enforcement regulations – along with liability and other risks – often require that private companies incur these types of costs. And private companies must also take extensive steps to comply with legal and practical business requirements concerning the screening of shipments they transport, both for safety reasons (e.g., in the case of hazardous materials) and to guard against terrorist activities and shipments of contraband. While many of these security-related operations may not be required by law, good business practice necessitates that they be performed.

III. THE POSTAL SERVICE'S COST ESTIMATES ARE TOO IMPRECISE FOR ADOPTION.

Aside from the question of what activities should be included in the Commission's report, the Postal Service (properly) notes "the necessary imprecision" of many of its admittedly preliminary cost estimates. Postal Analysis at 3. Given the uncertainty as to the costs of these activities, the Commission should not wander into the realm of speculation by adopting such "more or less rough estimates offered in [the Postal Service's] memorandum." Postal Analysis at 17.

We recognize that the analysis is not a straightforward one. But given the need to adjust the Postal Service's estimates for the costs it would have incurred in the absence of the legal requirements imposed on it, the Commission would be better advised, we think, to note instead that further work needs to be done before it is able to put a price tag on the cost of additional activities that would not otherwise have been provided by the Postal Service.

Moreover, the Commission's report cannot accurately inform Congress of the impact that legal requirements have on postal costs if it includes a laundry list of all legal requirements applicable to the Postal Service without also addressing the benefits conferred by law. If the Commission considers expanding the scope of activities included in its report to encompass the Postal Service's general operational activities, then the Commission should identify and quantify costs that are avoided by the Postal Service that it would otherwise incur as a private entity (e.g., costs saved due to exemptions from state and local fuel and property taxes, regulations, and fines, etc.) as well as continuing to report on the value of the letter and mailbox monopolies.²

CONCLUSION

Many of the activities the Postal Service proposes to be included in the Commission's report are not "public" services or activities "provided by" the Postal Service as required by section 3651(b)(1)(C). Moreover, while private businesses may not be subject to the same legal mandates as the Postal Service, in many cases private businesses perform similar activities, indicating that the Postal Service would likely provide them even if not legally required to do

² Section 703 of PAEA not only requires the Commission to consider the initial recommendations of the Federal Trade Commission concerning explicit and implicit legal advantages enjoyed by the Postal Service over private competitors with respect to competitive products when revising regulations promulgated under PAEA, but it also requires the Commission to revisit the issue as necessary by considering any "subsequent events that affect the continuing validity of the estimate of the net economic effect" of the Postal Service's legal status. PAEA of 2007, Pub. L. No. 109-435, § 703(d). (Section 703 of PAEA was not codified into Title 39, but is still a part of the statute at large and is current law.)

so.

Finally, to the extent the Commission's report broadly includes "all legally mandated services or activities" performed by the Postal Service (Postal Analysis at 2), it should also include the costs saved by the Postal Service, as well as the extra revenues it earns, as a result of the benefits conferred on it by law or by its own regulations. Although – like many of the costs listed by the Postal Service – this information is not expressly required by section 3651(b)(1)(C), the Commission's report cannot provide a complete and accurate picture of the impact that legal requirements have on postal costs if it includes a laundry list of all legal requirements applicable to the Postal Service without also addressing the benefits conferred by law.

Respectfully submitted,

John E. McKeever
Laura B. Mitchell
Attorneys for United Parcel Service

McKeever & Mitchell
335 Wyndmoor Lane
Huntingdon Valley, PA 19006
(215) 947-5765