

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Section 701 Report

Docket No. PI2016-3

(Issued April 14, 2016)

NOTICE AND ORDER SEEKING COMMENTS ON REPORT
TO THE PRESIDENT AND CONGRESS PURSUANT TO SECTION 701 OF THE
POSTAL ACCOUNTABILITY AND ENHANCEMENT ACT

I. INTRODUCTION

The Commission establishes Docket No. PI2016-3 for the purpose of obtaining public comment on its second report to the President and Congress pursuant to section 701 of the Postal Accountability and Enhancement Act of 2006.¹

¹ Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3198 (2006), section 701.

II. LEGAL REQUIREMENTS AND BACKGROUND

A. Statutory Requirements

Under the PAEA, the Commission is required at least every 5 years to submit a report to the President and Congress concerning (1) the operation of the amendments made by this Act; and (2) recommendations for any legislation or other measures necessary to improve the effectiveness or efficiency of the postal laws of the United States.

PAEA section 701(a). Before submitting the “701 Report,” the Commission must afford the Postal Service a reasonable opportunity to review the report and submit written comments. PAEA section 701(b).

B. 2011 Report

In 2011, the Commission submitted its first section 701 report.² The 2011 Report focused on three main areas involved with the implementation of the PAEA: (1) the Postal Service’s financial condition; (2) rate and service matters; and (3) improvements to Commission processes. 2011 Report at 1-2.

In its review of the Postal Service’s financial condition, the Commission recommended that Congress adjust the Postal Service Retiree Health Benefit Fund and suggested several alternative payment options intended to alleviate Postal Service liquidity issues. *Id.* at 21-25. The 2011 Report also discussed the Postal Service’s annual financial reporting requirements and Sarbanes-Oxley Act compliance, finding that the PAEA requirements resulted in improved transparency and greater cost savings. *Id.* at 25-27.

The 2011 Report also included several recommendations regarding rate and service matters. First, the Commission recommended that the PAEA be amended to allow the Postal Service to add new market dominant classes of mail. *Id.* at 44.

² Postal Regulatory Commission, Section 701 Report, Analysis of the Postal Accountability and Enhancement Act of 2006, September 22, 2011 (2011 Report).

Second, the 2011 Report recommended that if Congress chose to allow the Postal Service to introduce new nonpostal services, it should include adequate safeguards to reduce the potential for the introduction of unprofitable products. *Id.* at 50. The Commission suggested that new nonpostal products be subject to review under 39 U.S.C. 404(e)(3), the same regulatory review applied to determining whether to “grandfather” a nonpostal service. *Id.* Although the Commission found that the PAEA constraints on market tests were effective and not unduly burdensome, the 2011 Report included as its third recommendation that Congress consider raising the maximum revenue limitation on experimental market test products to further bolster Postal Service revenue streams. *Id.* at 70. Fourth, the Commission recommended that Congress clarify the PAEA to require the Postal Service to consult with the Commission not only in establishing service standards for market dominant products, but also when seeking to change existing service standards. *Id.* at 64-65. The Commission did not recommend any changes to existing procedures for price adjustments and indicated that it had not vetted this concept, stating that Congress should consider allowing the Postal Service increased pricing flexibility based on improvements to quality of service. *Id.* at 40. The Commission stated that service quality pricing authority would create “an incentive for the Postal Service to increase the service performance of its products.” *Id.*

Finally, the Commission made three major recommendations aimed at developing enhancements to improve Commission processes. The first was a recommendation that Congress require the Postal Service to provide the Commission regular reports on retail network plans and activities. *Id.* at 77. The second recommendation was to clarify the scope of the Commission’s appellate review of post office closings, including a definition of “post office” that would encompass all Postal Service-operated retail facilities. *Id.* at 77-78. The third recommendation was that Congress consider providing statutory language allowing the Postal Service expedited consideration of requests for advisory opinions by the Commission.³

³ *Id.* at 83-84. As noted below in section III.H, the Commission amended its internal procedures for considering requests for advisory opinions in 2014. See Docket No. RM2012-4.

Since submitting its 2011 Report, the Commission has benefitted from its additional years of experience implementing the provisions of the PAEA. The Commission also recognizes the value of input from public stakeholders on matters concerning the operation of the provisions of the PAEA and ideas for legislative reform. Accordingly, the Commission invites public comment for consideration in preparing the upcoming 701 Report.

III. AREAS OF INTEREST

The requirements of section 701 allow the Commission significant discretion when providing recommendations to the President and Congress. The Commission is thus empowered to consider the PAEA amendment generally, as well as provide any appropriate recommendations related to the operations of the amendment.

However, to assist the public in focusing its comments and in furtherance of the Commission's mission of enhancing transparency and accountability of the Postal Service, the Commission has identified several topics that were either highlighted in the 2011 Report and not yet resolved, or the Commission has identified as potential areas of interest. Interested parties are invited to comment on any of the issues listed below, as well as any other pertinent areas related to the operation of PAEA amendments.

A. Postal Service Financial Situation

Despite a slight improvement in its liquidity from 2014, the Postal Service continues to face significant financial challenges ahead. In its initial 701 Report issued in 2011, the Commission made several recommendations aimed at strengthening the Postal Service's financial situation. 2011 Report at 2-3. Subsequent to the 701 Report, the Commission issued reports highlighting the Postal Service's continued financial

struggles.⁴ In its most recent review, the Commission found fundamental balance sheet issues with the Postal Service and made several additional findings.⁵

In sum, while the Postal Service's cash position is at the highest level since Fiscal Year (FY) 2007, significant balance sheet liabilities and off-balance sheet unfunded liabilities for pension and annuitant health benefits threaten the improvements in liquidity. See FY 2015 Financial Report at 3. In addition to requesting comments tied to specific parts of the PAEA as outlined below, the Commission also welcomes any comments or suggestions about provisions of the PAEA that impact the overall financial position of the Postal Service as described above.

B. Market Dominant Rate System

Perhaps chief among the amendments of the PAEA are the provisions on the establishment of a modern system for regulating rates and classes for market dominant products. See 39 U.S.C. 3622. Although this system is subject to a 10-year review pursuant to 39 U.S.C. 3622(d)(3), the 701 Report also contemplates reviewing this system. The Commission promulgates regulations with respect to this system of regulating rates and classes for market dominant products in accordance with PAEA directives. See 39 CFR 3010. Issues for consideration in the 701 Report might include: the financial success of the ratemaking system; challenges faced as a result of the system; a review of rate adjustments; mail classification; or compliance with the Sarbanes-Oxley Act. Recent rate case dockets include market dominant price adjustments,⁶ as well as an exigent rate adjustment.⁷ Given these dockets, the

⁴ See, e.g., Postal Regulatory Commission, Analysis of the United States Postal Service Financial Results and 10-K Statement for Fiscal Year 2014, Revised April 10, 2014.

⁵ Postal Regulatory Commission, Analysis of the United States Postal Service Financial Results and 10-K Statement, March 29, 2016, at 3-4 (FY 2015 Financial Report).

⁶ See, e.g., Docket Nos. R2016-2 and R2015-4.

⁷ See Docket No. R2013-11.

Commission welcomes comments on the effectiveness and challenges of the current market dominant rate system administered by the Commission.⁸

One potential area of interest associated with the market dominant rate system is worksharing. Workshare discounts provide reduced rates for mailers based on the costs avoided as a result of the mailer performing an activity that would otherwise be performed by the Postal Service. Under the PAEA, the Commission must review workshare discounts to ensure that the discounts do not exceed the Postal Service's avoided costs, subject to limited exceptions. 39 U.S.C. 3622(e)(2). Legally, workshare discounts are only bound by this ceiling; the Postal Service is not bound by this provision to increase a workshare discount that is less than avoided costs. A discussion of noncompliant workshare discounts is typically included in the Commission's Annual Compliance Determination (ACD).⁹

The Commission welcomes comments on the current operation of the provisions regarding workshare discounts, as well as insights on how the discounts and exceptions have functioned in practice.

C. Competitive Rate System

The PAEA also tasks the Commission with the regulation of rates for competitive products. See 39 U.S.C. 3633. The Commission must ensure that market dominant products do not subsidize competitive products, that each competitive product covers its costs, and that competitive products collectively cover an appropriate share of institutional costs. *Id.* The current appropriate share is a minimum of 5.5 percent of the Postal Service's total institutional costs. 39 CFR 3015.7(c). The Commission uses this framework to evaluate Postal Service requests for changes in competitive product rates

⁸ For a discussion of negotiated service agreements for both market dominant and competitive products, see section III.D below.

⁹ See, e.g., Docket No. ACR2014, Annual Compliance Determination, March 27, 2015, at 8-32.

of general applicability.¹⁰ In 2012, the Commission conducted its first review of the institutional costs contribution requirement.¹¹ See 39 U.S.C. 3633(b). This review is to be conducted every 5 years. The Commission welcomes comments on the statutory framework for review of competitive product rates.

Section 703(a) of the PAEA required the Federal Trade Commission (FTC) to submit a comprehensive report identifying federal and state laws that apply differently to the Postal Service with respect to competitive products.¹² The Commission seeks comment on the FTC Report's findings, including those regarding the postal and mailbox monopolies and the competitive products industry.

D. Negotiated Service Agreements

The Commission reviews negotiated service agreements (NSAs) for both competitive¹³ and market dominant products.¹⁴ NSAs for competitive products make up the overwhelming majority of all NSAs. The Commission reviews competitive NSAs to ensure: (1) that the competitive product is not subsidized by market dominant products; (2) that the NSA will cover its attributable costs; and (3) that competitive products as a whole cover an appropriate share of institutional costs. 39 U.S.C. 3633. The Commission invites comments on the current legal requirements for NSAs.

¹⁰ See, e.g., Docket No. CP2016-9, Order No. 2814, Order Approving Changes in Rates of General Applicability for Competitive Products, November 13, 2014.

¹¹ See Docket No. RM2012-3, Order No. 1449, Order Reviewing Competitive Products' Appropriate Share Contribution to Institutional Costs, August 23, 2012.

¹² Federal Trade Commission, Accounting for Laws that Apply Differently to the United States Postal Service and Its Private Competitors: A Report by the Federal Trade Commission, December 2007 (FTC Report) (*available at <https://www.ftc.gov/reports/accounting-laws-apply-differently-united-states-postal-service-its-private-competitors>*).

¹³ See 39 CFR 3015.5.

¹⁴ See 39 CFR 3010.40.

E. Post Office Closing/Consolidation Procedures

The Commission anticipates that its 701 Report will include a discussion of the procedures for appeals of Postal Service determinations to close or consolidate post offices. Under the PAEA, the Postal Service must consider, prior to closing or consolidating a post office, the effect on the community, the effect on its employees, economic savings, and consistency with a policy aimed toward providing a maximum degree of service to rural areas and communities. 39 U.S.C. 404(d)(2). When considering a timely appeal, the Commission is required to set aside Postal Service determinations found to be arbitrary or capricious, without observance of procedure required by law, or unsupported by evidence on the record. 39 U.S.C. 404(d)(5). The Commission's rules governing these appeals are located at 39 CFR part 3025.

Docket No. PI2016-2 is a pending Commission proceeding concerning the scope of the Commission's authority to review certain Postal Service determinations of closings and consolidations. At issue is whether a relocation or rearrangement of postal services is subject to Commission review. Also at issue is whether the Commission has authority to review the closing of contract postal units.

The Commission welcomes comments on the scope of the Commission's authority to review Postal Service determinations under the framework and procedures set forth in the PAEA for appeals of post office closings and consolidations.

F. Service Standards

The PAEA required that the Postal Service, in consultation with the Commission, establish service standards for market dominant products. 39 U.S.C. 3691(a). These standards and procedures are located at 39 CFR part 3055. The regulations outline the annual and periodic reporting of service performance achievements for each market dominant product. An assessment of service performance results for FY 2015 is included in the Commission's latest ACD.¹⁵

¹⁵ Docket No. ACR2015, Annual Compliance Determination, March 28, 2016, at 94-146.

A public inquiry docket pertaining to improvements to service performance measurement data is currently pending before the Commission.¹⁶ The Commission recently updated its website¹⁷ to provide service performance information to the public in a more readily accessible format. All service performance-related reports and dockets are available under a tab titled “Reports/Data Service Reports.” The Commission urges commenters to review background information on service standards and performance and welcomes comments on issues not already raised in Docket No. PI2016-1.

G. Nonpostal Services

The PAEA revoked the Postal Service’s authority to offer new nonpostal services. See 39 U.S.C. 404(e)(2). The Commission reviewed the Postal Service’s existing nonpostal services and designated them market dominant, competitive, or experimental products, in accordance with 39 U.S.C. 404(e)(5). Currently, the Postal Service offers two market dominant nonpostal services and nine competitive nonpostal products.¹⁸ The Commission welcomes comments on issues related to nonpostal services, particularly, whether the Postal Service should be permitted to offer them in the future and, if so, whether and how the Commission should review new nonpostal services.

H. The Postal Service Fund and the Postal Service Competitive Products Fund

The PAEA updated the guidelines for the Postal Service to utilize a separate Treasury fund to be made available for payment of costs attributable and allocable to competitive products, and for deposits of revenues and other receipts from competitive

¹⁶ Docket No. PI2016-1, Order No. 2791, Notice Establishing Docket Concerning Service Performance Measurement Data, October 29, 2015.

¹⁷ The Commission’s website is *available at* <http://www.prc.gov>.

¹⁸ Mail Classification Schedule, sections 1700.2 and 2700.2.

products (the Postal Service Competitive Products Fund, hereinafter “Competitive Products Fund”). 39 U.S.C. 2011(a)(b). The Competitive Products Fund is intended to operate separately from the Postal Service Fund (Postal Fund). See 39 U.S.C. 2003. The Postal Service provides an annual report to the Secretary of the Treasury concerning the operation of the Competitive Products Fund. 39 U.S.C. 2011(h)(2)(D)(i). Reporting material is also filed with the Commission each year in the ACD. The Competitive Products Fund reporting information for FY 2015 is available on the Commission’s website.¹⁹ The Commission invites comments on the operation of the Postal Fund and Competitive Products Fund to the extent they are not duplicative of matters raised within Docket No. RM2016-2.

The Commission also reviews the Postal Service’s annual calculation of the assumed Federal income tax on competitive products income pursuant to 39 U.S.C. 3634.²⁰ The Commission’s regulations require that the Postal Service develop a Competitive Products Income Statement for each fiscal year. 39 CFR 3060.21. The Commission reviews the calculation for compliance with Chapter 1 of the Internal Revenue Code. If the assumed taxable income from competitive products in a fiscal year is positive, the Postal Service must transfer the assumed Federal income tax amount to the Postal Service Fund no later than January 15 of the following fiscal year. 39 CFR 3060.43(b). The Commission invites comments on the effectiveness of the requirements for the annual computation of the assumed Federal income tax on competitive products income.

I. Advisory Opinion Process

Section 3661 of title 39 requires the Postal Service to seek an advisory opinion from the Commission whenever it determines that there should be a change in the nature of postal services which will generally affect service on a nationwide basis. In

¹⁹ Docket No. ACR2015, Library Reference USPS-FY15-39, December 29, 2015.

²⁰ 39 CFR 3060.42; see Docket No. T2016-1 and Docket No. T2015-1.

2014, the Commission revised its rules of procedure for these advisory opinion requests, referred to as “N-cases.”²¹ The primary objective of the adoption of the Commission's new procedural rules was “to establish a procedural framework in which advisory opinions could be issued within 90 days of the filing of a Postal Service request.” Order No. 2080 at 6. The PAEA requires “an opportunity for hearing on the record under sections 556 and 557 of title 5” before the Commission issues an opinion. 39 U.S.C. 3661(c). Given this requirement, the revised rules preserve the opportunity for participants to request a formal hearing on Postal Service proposals.

Since the adoption of the new N-case procedural rules, the Postal Service has filed no request for an advisory opinion on the nature of postal services. Nevertheless, the Commission welcomes comments on the advisory opinion process, including the advisability of preserving the opportunity for a hearing on the record in the PAEA.

J. Market Tests

The PAEA grants the Postal Service authority to conduct market tests of experimental products. 39 U.S.C. 3641(a). The Commission reviews market tests to ensure that: (1) the product is significantly different than all products offered by the Postal Service within the prior 2 years; (2) the product will not create an unfair competitive advantage for the Postal Service or any mailer; and (3) the Postal Service identifies the product as either market dominant or competitive. 39 U.S.C. 3641(b). The Commission also ensures compliance with the rules set forth at 39 CFR 3035. All notices of market tests must include a data collection plan including revenue, attributable costs, and volumes, but the Commission may request additional data as it deems appropriate. 39 CFR 3035.3. Market tests may not exceed 24 months in duration, although the Postal Service may request an extension of no more than 12 months. 39 CFR 3035.10. Total anticipated revenues for a market test must not

²¹ Docket No. RM2012-4, Order Adopting Amended Rules of Procedure for Nature of Service Proceedings Under 39 U.S.C. 3661, May 20, 2014 (Order No. 2080).

exceed \$10 million in any fiscal year, as adjusted for the change in the Consumer Price Index. 39 CFR 3035.15.

The last notice of a market test was authorized by the Commission on October 23, 2014.²² The experimental product, Customized Delivery, was approved while a request for an exemption from the \$10 million limitation was denied as premature. The Commission welcomes comments on the procedures for review of Postal Service notices of market tests of experimental products.

K. Universal Service Obligation and the Postal Monopoly

The Commission's report is required to include any recommended changes to the universal service obligation (USO) and the postal monopoly. PAEA section 702(b)(1). The Commission must include the perceived effects of the recommended changes, as well as the costs and benefits of the postal monopoly under current law. PAEA section 702(b)(2).

Each year, the Commission includes a discussion of costs of the USO and the value of the postal monopoly in the Annual Report to the President and Congress. For the most recent estimates, please refer to the Annual Report for FY 2015.²³

In 2008, pursuant to PAEA section 702(a), the Commission issued an in-depth report on universal postal service and the postal monopoly.²⁴ The USO Report reviews the historical development of the USO and postal monopoly, universal service and monopoly laws of other countries, economic considerations, needs and expectations of the United States public, policy options, and Commission recommendations. The Commission invites comments and recommendations regarding the USO and the postal monopoly.

²² Docket No. MT2014-1, Order No. 2224, Order Authorizing Customized Delivery Market Test, October 23, 2014.

²³ Postal Regulatory Commission, Annual Report to the President and Congress, Fiscal Year 2015, January 6, 2016.

²⁴ Postal Regulatory Commission, Report of Universal Postal Service and the Postal Monopoly, December 19, 2008 (USO Report) (*available at <http://www.prc.gov/prc-reports>*).

L. Requirement of a Public Representative

The Commission must designate a public representative in all proceedings on a case-by-case basis. See 39 U.S.C. 505; 39 CFR 3002.14. The public representative serves the interest of the general public in these proceedings, and is subject to ex parte communication restrictions with the Commission for those proceedings. The Commission welcomes comments on the utility of the public representative in Commission proceedings, and any improvements the Commission should consider to improve the public representative program.

M. Requirement of Commission Inspector General

The Commission's Office of the Inspector General has duties related to the oversight of Commission programs and operations. See 39 CFR 3002.16. The Inspector General reports to Congress and the Commission on a bi-annual basis its activities related to audits, inspections, and other evaluations.²⁵ The Commission welcomes comment on the Office of the Inspector General, and any perspectives on the cost benefit or effectiveness of the office.

IV. CONCLUSION

The Commission invites public comment on the issues noted above, and on any other issues of interest related to the operation of the amendments of the PAEA. Comments shall be submitted no later than June 14, 2016.

The Commission appoints Richard A. Oliver to serve as Public Representative in this docket.

²⁵ See Postal Regulatory Commission Office of Inspector General, Semiannual Report to Congress, April 1, 2015 through September 30, 2015 (*available at* <http://www.prc.gov/sites/default/files/oig-reports/SARC2015-2.pdf>).

V. ORDERING PARAGRAPHS

It is ordered:

1. The Commission establishes Docket No. PI2016-3 and invites public comments on the operation of the amendments of the Postal Accountability and Enhancement Act.
2. Comments are due no later than June 14, 2016.
3. Pursuant to 39 U.S.C. 505, Richard A. Oliver is appointed to serve as an officer of the Commission to represent the interests of the general public in this proceeding (Public Representative).
4. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Stacy L. Ruble
Secretary