

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

Review of Nonpostal Services

Docket No. MC2008-1

**PITNEY BOWES INC. MOTION TO COMPEL UNITED STATES POSTAL SERVICE
TO FILE A COMPLETE LIST OF NONPOSTAL SERVICES**

James Pierce Myers
Attorney at Law
1617 Courtland Road
Alexandria, Virginia 22306
Telephone: (571) 257-7622
Facsimile: (571) 257-7623
E-Mail: jpm@piercemyers.com

Michael F. Scanlon
K&L GATES LLP
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 778-9000
Facsimile: (202) 778-9100
E-Mail: michael.scanlon@klgates.com

Russell Hochman
Vice President and Deputy
General Counsel
Global Government Affairs
PITNEY BOWES INC.
1 Elmcroft Road
Stamford, Connecticut 06926
Telephone: (203) 351-7607
E-Mail: russell.hochman@pb.com

Counsel to PITNEY BOWES INC.

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I. INTRODUCTION

Pitney Bowes has just learned that the Postal Service has recently entered the postage meter supplies business by offering USPS-branded replacement meter cartridges as substitute products for Pitney Bowes and other postage meter ink cartridges. Yet nowhere in the record of this proceeding has the Postal Service disclosed the nature of this activity or the revenues associated with this new line of business. The Postal Service's action violates not one, but two, Commission orders requiring the Postal Service to file a complete list of nonpostal services.¹ Such a list and description is necessary for the Commission to fulfill its responsibilities under the Postal Accountability and Enhancement Act (PAEA) in determining which nonpostal services should continue and how to classify those continuing services.² *See* 39 U.S.C. §404(e)(3).

Accordingly, Pitney Bowes respectfully requests that the Commission again issue an order directing the Postal Service to file a complete list and description of all existing and new offerings that may be subject to this proceeding.³ Following the Postal Service's submission of a complete listing of all existing and new nonpostal services, the Commission should afford interested parties the opportunity to comment on the newly disclosed activities.⁴

¹ *See* PRC Order No. 50, December 20, 2007; PRC Order No. 74, April 29, 2008.

² *See* Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006). The PAEA amends various sections of title 39 of the United States Code. Unless otherwise noted, section references in these comments are to sections of title 39.

³ Because the Postal Service has failed to comply fully with the Commission's prior orders, the Commission would be entitled under its inherent authority to protect the integrity of the proceeding and the due process rights of other interested parties and to direct the Postal Service to suspend performance of any new offerings that may be subject to this proceeding pending the Commission's review of the same.

⁴ Pursuant to the procedural schedule set forth in PRC Order No. 74, the time initially provided for comment on whether activities previously identified by the Postal Service should continue has passed. The newly discovered activities described in the attached declaration, and any similar previously undisclosed

II. DISCUSSION

A. The Pending Nonpostal Proceeding.

The PAEA limits the Postal Service's authority to provide nonpostal services to those it offered as of January 1, 2006. The PAEA also directs the Commission to review each nonpostal service that was offered by the Postal Service on the date of the PAEA's enactment, December 20, 2006, and to determine within two years of that date whether that nonpostal service should be allowed to continue. *See* 39 U.S.C. §§ 404(e)(2) and (e)(3). The term "nonpostal service" is defined in section 404(e)(1) as "any service that is not a postal service defined under section 102(5)." 39 U.S.C. §§ 404(e)(1).

Section 102(5) defines the term "postal service" to mean "the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto[.]" 39 U.S.C. § 102(5). This definition reflects Congress' intent in enacting the PAEA to focus the Postal Service on its core responsibilities to provide "adequate and efficient postal services at fair and reasonable rates and fees." 39 U.S.C. § 403(a). Congress recognized that the Postal Service, like any other successful business, must focus on its core mission. The core mission of the Postal Service is to provide trusted, affordable, universal postal services. Accordingly, the Postal Service ought to focus on its core postal functions as a means of enhancing the value and ensuring the constant, vigorous improvement of the mail.

The purpose of the Commission's review under section 404(e)(3) is to determine which nonpostal services should continue, taking into account the public need for the service and the private sector's ability to meet that need. Any nonpostal service that the

activities which may come to light as a result of this Motion, could not have been considered within the time period allowed under Order No. 50.

Commission concludes should not continue shall terminate. *See* 39 U.S.C. § 404(e)(4).

Any nonpostal service that the Commission authorizes to continue “shall be regulated under this title as a market dominant product, a competitive product, or an experimental product.” 39 U.S.C. § 404(e)(5).

By Order No. 50, the Commission directed the Postal Service to file “a complete description of each nonpostal service offered by the Postal Service on the date of enactment of the PAEA.” PRC Order No. 50, December 20, 2007, at 2. The Postal Service failed to comply with that directive. Rather, the Postal Service’s March 19, 2008 filing included only a partial listing of existing nonpostal services and presented legal arguments as to why the Postal Service believes the plain language of section 404(e) should not be followed.

On March 25, 2008, the Public Representative filed a motion to compel the Postal Service to file a complete list of nonpostal services.

By Order No. 74, the Commission granted the Public Representative’s motion to compel and again directed the Postal Service to file “‘a complete listing and comprehensive description’ of all ‘revenue-generating’ activities which do not fall within the statutory definition of ‘postal services.’” PRC Order No. 74, April 29, 2008, at 14.⁵

After seeking clarification as to the nature of the Commission’s Order, the Postal Service purported to file responsive pleadings on June 9, June 23, and June 24, 2008.

⁵ Following the plain language of the statute, the Commission in Order No. 74 strongly suggests there are only two categories of revenue-generating activities: postal and nonpostal. *See* PRC Order No 74 at 11-12. The Postal Service disagrees. Pitney Bowes believes the legislative history supports the Commission’s view and demonstrates Congress’ clear intent to establish a binary system where activities are categorized as either postal or nonpostal.

B. The Postal Service's Failure To Comply With The Commission's Orders.

Notwithstanding two Commission Orders expressly directing the Postal Service to file a complete listing and comprehensive description of all revenue-generating activities which do not fall within the statutory definition of postal services, the Postal Service has still failed to comply.⁶ As set out in the attached declaration, Pitney Bowes has only just learned that the Postal Service has entered the meter supplies business by offering USPS-branded replacement postage meter cartridges as substitute products for Pitney Bowes and other postage meter ink cartridges. *See* Wragg Decl., at ¶ 6, Ex. A. Yet nowhere in the record of this proceeding has the Postal Service disclosed the nature of this activity or the revenues associated with this new line of business as required by Order No. 74. Pitney Bowes certainly appreciates that the Commission is under significant time pressure since it must by law conclude this proceeding by December 20, 2008. Nevertheless, the Postal Service's failure to disclose the introduction of a new nonpostal service *during the pendency of this proceeding*, despite the clear directives contained in the Commission's prior orders, makes the need for an examination of the issues raised by this motion even more compelling.

Under the PAEA, the Commission, not the Postal Service, is vested with the authority to determine which offerings are nonpostal services within the scope of section 404(e) and which of those offerings should continue. The Postal Service's failure to disclose a complete listing of nonpostal offerings threatens to undermine the

⁶ Under Order No. 74 "the Postal Service is directed to file no later than June 9, 2008 a complete listing and comprehensive description of each nonpostal service provided as of December 20, 2006, including all existing agreements (contracts, arrangements, or however categorized) that generate revenues (or for which the Postal Service otherwise receives compensation) regardless of the statutory authority claimed for such agreements." *See* PRC Order No. 74, at 14.

Commission's ability to discharge its statutory authority to review a complete listing of all nonpostal services offered by the Postal Service on December 20, 2006. This is contrary to section 404(e) and the overarching transparency and accountability policy objectives of the PAEA.

The Postal Service's failure to disclose a complete list of new and existing nonpostal services also violates the Commission's rules of practice and procedure. Under Commission Rule 26(f), a participant has a duty to amend a prior answer that was incorrect when made or is no longer true, and to supplement answers in a timely manner. *See* 39 C.F.R. § 3001.26(f). The duty of the Postal Service in this docket should be no less. The Postal Service's responses to Orders No. 50 and 74 are no longer correct. Previously undisclosed or new activities that generate revenues exist. The Postal Service has a duty to supplement the record. The Commission should require it to do so.

The Postal Service's failure to disclose a complete list of existing nonpostal offerings also denies interested parties the opportunity to meaningfully review these offerings and to assess, under the test set forth in section 404(e)(3), whether they should be permitted to continue.

C. The Postal Service Has No Authority Under the PAEA To Offer This New Nonpostal Service.

The PAEA limits the Postal Service to grandfathered nonpostal services which were offered as of January 1, 2006, and requires that all grandfathered nonpostal services be terminated or continued based on the public need for the service and the ability of the private sector to meet that need. *See* 39 U.S.C. § 404(e)(2)-(3). Because the Postal Service was not offering USPS-branded replacement postage meter cartridges on January

1, 2006, this represents a new nonpostal service in violation of section 404(e)(2). *See* 39 U.S.C. § 404(e)(2).

Nor can the Postal Service's meter supply business reasonably be construed as a variation or innovation of a nonpostal product that was offered as of January 1, 2006 and thus subject to the grandfather authority. USPS-branded postage meter replacement cartridges are materially different from any other existing nonpostal product. Furthermore, even assuming the meter supplies business could credibly be construed as an outgrowth of an existing nonpostal service subject to the grandfather authority – and it cannot be – the offering fails the test set out in section 404(e)(3), *see* 39 U.S.C. § 3642(e)(3), because there is no evidence that the Postal Service's entry into the mature, highly-competitive meter supplies market would serve a public need that the private sector is not currently serving.⁷ *See* Wragg Decl., at ¶ 3. Rather, the Postal Service's entry into the competitive meter supplies space with USPS-branded replacement cartridges would inflict substantial commercial harm on Pitney Bowes and other companies who would be forced to compete against a governmental entity operating in a commercial space in which the same governmental entity also exercises regulatory authority.⁸ *See* Wragg Decl., at ¶ 11. Accordingly, the Postal Service has no authority to offer the USPS-branded replacement meter cartridges as a nonpostal service.

The Postal Service's foray into the competitive meter supply business likewise fails as a "postal service" because it falls well beyond the statutory definition of postal

⁷ The Postal Service's attempt to obtain a commercial advantage in a competitive marketplace by trading on its brand equity as a trusted federal agency is inconsistent with the Congress' intent to focus the Postal Service on its core business and threatens to dilute the trust and value perceived in the USPS brand.

⁸ Although beyond the scope of this proceeding, the Postal Service's entry into the meter supply business also violates the "regulate / compete" provisions of section 404a which prohibit the Postal Service from unfairly competing in markets in which it also acts as a regulator. The provisions of section 404a also protect against the potential for abuse where, as here, the Postal Service has an inherent conflict of interest as both a regulator and market participant.

services in section 102(5). *See* 39 U.S.C. § 102(5). Manufacturing or branding meter cartridge ink is no more related to the core postal functions articulated in the PAEA than the manufacture or branding of paper stock, computers, printer ink jet or laser toner cartridges, ballpoint pens, or any other upstream activity associated with the mail.

Even if the manufacture or branding of meter supplies could be construed to be a “postal service” within the meaning of section 102(5), the Postal Service is required by law to seek the Commission’s approval under section 3642 *prior* to introducing any new postal service. *See* 39 U.S.C. § 3642(e); Post Comm et. al Reply Brief at 7-14. Here the Postal Service has failed to even disclose the fact that it has introduced this new offering, much less seek Commission approval under section 3642. Furthermore, even if the Postal Service were to seek the required approval under section 3642, the Postal Service’s entry into the competitive meter supply business fails all three of the considerations set out under section 3642(b)(3). *See* 39 U.S.C. § 3642(b)(3). Accordingly, the Postal Service has no authority to offer the product as a “postal service.”

Finally, the Postal Service cannot justify this new line of business as part of an amorphous third category of revenue-producing activities which are neither postal nor nonpostal. The plain language of section 404(e) is clear. Under the PAEA, the Postal Service is limited to offering either postal services or nonpostal services. There is no third category. The Postal Service’s suggestion that it maintains some open-ended and ill-defined authority to engage in activities authorized by independent grants of statutory authority (e.g., the general powers enumerated in section 401 including, without limitation, the Postal Service’s licensing authority under section 401(5)) effectively reads out of the statute the specific limitations imposed in section 404. As evidenced by the

necessity of this motion, the notion that the general powers enumerated in section 401 permit the Postal Service to engage in a limitless range of activities, beyond the scope of the Commission's review or knowledge, would subvert the overriding policy goals of transparency and accountability and the clear Congressional intention to focus the Postal Service on its core postal business. As stated by the Commission in Order No. 74, the Postal Service's position in support of the third category is "untenable and unconvincing." PRC Order No. 74, at 10.

