

BEFORE THE
UNITED STATES POSTAL REGULATORY COMMISSION
WASHINGTON, D.C.

Regulations Establishing a System
of Ratemaking

Docket No. RM2007-1

REPLY COMMENTS OF
FEDERAL EXPRESS CORPORATION
REGARDING ORDER NO. 26 PROPOSING REGULATIONS
TO ESTABLISH A SYSTEM OF RATEMAKING

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On August 15, 2007, the Commission requested comments and replies thereto on proposed regulations that would establish a modern system for regulating rates and classes for market dominant and competitive products.¹ In this document, Federal Express Corporation (FedEx) respectfully offers the following reply to initial comments filed with the Commission in this proceeding.

1 Section 407 does not exempt inbound international mail from the division of postal products into market dominant and competitive categories.

In section 2 of its initial comments, the U.S. Postal Service (the Postal Service) suggests that “inbound international mail should be treated on an exceptional basis.” Initial Comments of the United States Postal Service in Response to Order No. 26 (September 24, 2007) at 13 (hereafter “USPS”). Although it does not immediately explain what an “exceptional basis” is, at the end of section 2, the Postal Service sums

¹Order No. 26, 72 Fed. Reg. 50744-86 (Sep. 4, 2007). Such regulations are required by amendments to Title 39, United States Code, effected by the Postal Accountability and Enhancement Act (PAEA), Pub. L. No. 109-435, 120 Stat. 3198 (December 20, 2006). See also Commission Order No. 30 (Aug. 29, 2007) extending until October 9, 2007, the deadline for filing reply comments.

up its argument as follows:

In sum, the Postal Service submits that *inbound international mail should not be “classified” in the MCS, and that inbound charges should not be subject to the same regulations as other Postal Service products. Notwithstanding, inbound mail incurs costs and earns revenue that must be reported in some manner in the Postal Service’s finances.* This requires separating inbound international mail into market-dominant and competitive categories, a topic that the Postal Service discusses in the next section below. [Page 22 (footnotes omitted, emphasis added)]

In support of its argument, the Postal Service presents three points:

- inbound services are not offered or priced by the Postal Service in the same manner as outbound services;
- the provisions of Section 407 of title 39 reflect the characteristics of inbound international mail; and
- practical considerations require a different regulatory treatment for inbound international mail.

We shall consider each of these arguments in turn.

To begin, however, it appears useful to review the common areas of our legal positions, for it is not clear how much our position differs from that of the Postal Service. The Postal Service does not seem to be challenging the view that inbound international mail is a “postal service,” i.e., “delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto.” § 102(6). And the Postal Service accepts that inbound international mail service is a service that “incurs costs and earns revenue.” USPS at 22. If inbound international postal services earn revenues, there must be “rates” (a term that “includes fees for postal services” (§ 102(8)) that specify the amount of revenue per unit of service provided. Indeed, the Postal Service seems to agree, since it refers to a variety of such fees -- terminal dues, inward land rates, and negotiated

“delivery charges” for EMS. USPS at 14. Indeed, the Postal Service does not seem to argue otherwise.

In our view, these points lead inexorably to the conclusion that inbound international postal services are “products”— i.e., “a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied.” § 102(6). From that point, it seems a necessary conclusion that inbound international postal products must be included in the “lists” of market dominant and competitive products which the Commission is obliged to keep up to date under § 3642(a). As we understand it, § 3642(e) explicitly requires this conclusion: *“no product that involves the physical delivery of letters, printed matter, or packages may be offered by the Postal Service unless it has been assigned to the market-dominant or competitive category of mail.”* The Postal Service does not address the requirements of § 3642(e) nor does it specifically argue that it is inapplicable to inbound international mail products.

What the Postal Service does say is that “inbound international mail should not be ‘classified’ in the MCS, and that inbound charges should not be subject to the same regulations as other Postal Service products.” For its part, FedEx would agree that something less than a formal mail classification schedule (MCS) regulation would satisfy the requirements of § 3642(a).² And FedEx would also agree that regulation of rates for inbound international products should take into account special features of those rates, if any. Moreover, FedEx accepts that, as the Postal Service points out, the PAEA requires the Commission to make use of supplemental

²In our view, what Congress apparently intended in § 3642(a) was that the Commission should maintain “lists” of market dominant and competitive products, where a *list* is a set of product names similar to the initial lists set out in § 3621(a) and § 3631(a). To give further definition to listed products, the simplest approach would seem to be something like the tariff filing procedures used in the regulation of other industries. Such an approach would appear more flexible and less legalistic than a mail classification schedule issued as a Commission regulation.

procedures if the Department of State sets rates by intergovernmental agreement. Taking all of these factors into account, however, does not necessitate or justify ignoring the plain commands of the statute insofar as product classification is concerned. Instead, we believe, the overall regulatory framework for postal products should be, and can be, flexible enough to accommodate inbound international products.

With this prologue, we consider each of the Postal Service's points in support of its argument that inbound international mail should be treated on an exceptional basis.

1.1 The fact that inbound services are not offered or priced in the same manner as outbound services is irrelevant to whether inbound services are products subject to classification in the same manner as other postal products.

The Postal Service first notes that “inbound services are not offered or priced by the Postal Service in the same manner as outbound services.” USPS at 13. While this observation is true to some extent,³ it does not affect the chain of legal reasoning summarized above. An inbound service is still a “product” and must still be classified as either market dominant or competitive.

In its exposition, the Postal Service begins by summarizing two methods currently used to set rates for delivery of inbound international mail: (1) a contractual rate agreement concluded between the Postal Service and the origin post office and (2) an intergovernmental rate agreement adopted through procedures of the UPU.

³ Outbound and inbound postal services are two sides of the same coin. Despite different marketing by origin post offices, the underlying services – letter post, parcel post, and EMS – are the same whether viewed from origin or destination post office. Hence, while it is true in a sense that “inbound services are not offered or priced by the Postal Service in the same manner as outbound services,” it is also true that the differences reflect the fact that outbound and inbound services are names for different portions of a single international postal service. In the same way, the Postal Service's collection and dispatch service for letters posted in New York and its receipt and distribution service for the same letters in Los Angeles represent different portions of one underlying postal service for letters sent from New York to Los Angeles.

USPS at 14. For the sake of completeness, we note here that there is a third method for setting rates for delivery of inbound international mail, application of domestic rates.⁴

The Postal Service uses contractual rate agreements to establish rates for delivery of EMS (i.e., international express mail) received from about 190 countries and to establish “bilateral terminal dues” for other types of mail received from selected countries. Currently, the Postal Service apparently has one bilateral letter post terminal dues agreement with Canada Post and several bilateral parcel post terminal dues agreements.⁵ In principle, a contractual rate agreement seems no different from the mailer-specific “negotiated service agreements” (NSAs) employed in both domestic and outbound international postal services. Indeed, it seems likely that the EMS agreements are not specific to each origin post office. EMS agreements are organized through a private association of public postal operators, the EMS Cooperative,⁶ and are probably replications of a small number of standard contracts. In general, contractually negotiated rates for the delivery of inbound international products appear to be “rates,” essentially the same as NSA rates.

At the bottom of page 14, the Postal Service makes the summary statement that, “The prices applicable to inbound mail are thus to a large extent outside of the control of the Postal Service.” This statement is apparently intended to refer to

⁴The Postal Service accepts “direct injection” mail, that is, inbound international mail that is freighted into the United States and tendered as domestic mail. USPS at 22, n. 36. In this case, the rates for delivery are domestic rates. Although such services are not today regarded as separate international mail products, it does not seem implausible that they could be so deemed in the future. That is, it does not seem implausible that such services could qualify as “a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied.” § 102(6). In such case, there does not appear to be any reason why such products would not be inbound international mail subject to classification under the regulatory framework applicable to all postal products.

⁵In the past, the Postal Service had multiple bilateral letter post terminal dues agreements with major foreign postal administrations.

⁶See generally <http://www.ems.coop>.

contractual rate agreements as well as intergovernmental rate agreements (discussed below). Insofar as it is intended to apply to contractual rate agreements, however, this claim does not appear any more plausible than one which might claim that that rates established in a domestic NSA are “to a large extent outside of the control of the Postal Service.”

As noted, the Postal Service also offers inbound international postal services that comply with intergovernmental rate agreements which establish rates for delivery for most inbound international letter post and parcel post items. Current agreements are established in accordance with the procedures of the UPU, although intergovernmental agreements arranged outside the UPU could be employed in the future. To justify exceptional legal treatment for services covered by intergovernmental rate agreements, the Postal Service cites two considerations. First, the Postal Service argues that the multilateral rate agreements are imposed by governmental regulation, in this case by the Department of State acting in concert with other governments:

Under the Acts currently in effect, terminal dues are set by the UPU Congress and inward land rates are set by the UPU Postal Operations Council, respectively. In both circumstances, *the interests of the United States are to be represented by the State Department*, which must negotiate and conclude instruments based in part on geopolitical considerations and the dynamics of the UPU’s one country-one vote system. [USPS at 15 (emphasis added)]

However, the fact that rates may be constrained by external regulatory authority does not seem to alter the legal conclusion that, under the postal law, postal services for inbound international mail are “products” subject to classification under § 3642.⁷ In the case of domestic postal products, especially market dominant products,

⁷Prior to enactment of the PAEA, the Department of State did not exercise its regulatory authority over postal affairs in a transparent manner. It is therefore difficult for observers to comment on the extent international rates established by the UPU are in fact set by the Department of State

the Postal Service's authority to set rates is likewise constrained by external regulatory authority, i.e., the regulations of the Commission. Rate levels will soon be constrained by regulations implementing the statutory price cap. Rate relationships will also be constrained by regulations implementing, inter alia, the objectives of § 3622(b) and the provisions on worksharing discounts. It seems likely that the Department of State, as regulator of inbound international rates, gives at least as much deference to the views of the Postal Service as the Commission does, as regulator of other domestic and international rates. Moreover, in one key respect, the Department of State has less control over inbound international rates than does the Commission over other rates. As the Postal Service concedes (USPS at 14), the UPU rate agreements provide that postal administrations may opt out of the system by means of contractual rate agreements. In fact, the Postal Service has employed this option for letter post items received from Canada Post and for parcel post items received from "certain industrialized countries" (USPS at 14)—an indefinite grouping which may include the majority inbound international parcel post items.

The Postal Service, however, suggests the opt-out provision is impractical and therefore should not be considered to weaken the force of the regulatory argument:

The alternative of having the Postal Service negotiate bilateral agreements with every country in the world is not practical, as it would be a cumbersome and time-consuming process to manage for most countries that do not produce sufficient mail flows to justify the investment needed to negotiate and manage contractual relationships for mail exchange. [USPS at 15]

The Postal Service here seems to be taking an unduly pessimistic view of the potential for using contractual rate agreements to alleviate its regulatory burden. In fact, it appears that the Postal Service has negotiated contractual rate agreements with 190 or

exercising independent, external regulatory authority or merely ratified by the Department of State after multilateral commercial negotiations among postal operators.

so postal administrations for delivery of EMS. And, as we understand it, the Postal Service (or the Department of State) is currently supporting a proposal in the UPU to create a similar mechanism for setting international parcel post rates. It thus appears that negotiated rates may be a viable alternative to rates imposed by Department of State regulation. Moreover, while the Postal Service receives mail from about 190 foreign postal administrations, it appears likely that most of this volume is tendered by a relatively small number of postal administrations.⁸ Hence, while the practicality of the opt-out provision does not seem legally relevant to whether an inbound international postal service is a “product,” to the extent it may be relevant, opting out of the regulatory framework by means of contractual rate agreements seems a feasible means of alleviating most, if not all, of the regulatory burden.

The Postal Service then interposes the consolidated nature of inbound international mail as an additional reason why it is different from outbound international mail:

Another characteristic of inbound international mail that makes it different from outbound mail is that the Postal Service has no relationship whatsoever with the originator of the inbound international mailpiece. Rather, a relationship exists between the originator and the foreign postal administration, and a separate relationship exists between the foreign postal administration and the Postal Service. . . . [T]he Postal Service, in essence, is acting as a contractor or delivery agent for the foreign post when it is providing inbound services. [USPS at 15]

The fact that the Postal Service acts as a “last mile” delivery agent for inbound international mail does not, however, distinguish inbound international mail from mail that the Postal Service receives from other types of consolidators. A significant portion of domestic mail is received from companies that physically collect items

⁸For international mail generally, the 20 or so industrialized countries account for about 5.4 out of 7.5 billion letter post items. UPU, *The Post in 2001* (2002). Subtracting the U.S. traffic (1.1 billion), the remaining industrialized countries would account for about 68 percent of international mail.

from third parties or print items based on the instructions of third parties. In such cases, as well, a relationship exists between the originator and the consolidator and a separate relationship exists between the consolidator and the Postal Service. The fact that the Postal Service delivers inbound international mail for what are, in effect, mail consolidators does not appear to affect the legal conclusion that the service provided is a “product” subject to classification under § 3642.

In sum, inbound services may not be offered or priced in precisely the same manner as other most other domestic and outbound international mail services, but upon examination it appears that inbound international postal services are “products,” similar to specific types of domestic mail services. Remaining differences, if any, are immaterial to the legal question as to whether such services are “products” subject to classification under § 3642.

1.2 The provisions of § 407 do not create an exception to the requirement the all postal products must be classified as market dominant or competitive.

The Postal Service’s second general argument in favor of treating inbound international postal services as “exceptional” is grounded in its reading of the procedures of § 407. In our view, however, nothing in § 407 purports to exempt inbound or outbound international postal products from the broader regulatory framework of the Act. Subsection 407(a) provides objectives for U.S. international postal policy. Subsection 407(b) grants the Secretary of State authority to negotiate intergovernmental agreements relating to international postal and delivery services. Subsection 407(c) provides for review by the Commission if the Secretary of State decides to establish rates or classifications for market dominant products by intergovernmental agreement. Subsection 407(c) does not need to address the possibility that the Secretary might establish rates and classifications for competitive products by intergovernmental agreement since § 407(b)(1) explicitly prohibits the

Secretary from concluding any agreement that grants any undue or unreasonable preference to the Postal Service or anyone else. Subsection 407(d) grants the Postal Service specific authority to enter into commercial or operational contracts with foreign postal operators.

The Postal Service summarizes its view that § 407 supports exceptional treatment for inbound international postal products as follows:

Revised § 407 of the Act establishes procedures for Commission input into postal treaties and conventions negotiated by the State Department, as well as authority for the Postal Service to enter into commercial or operational contracts with agencies of foreign governments. *This section thus establishes a separate scheme for transparency and oversight of inbound international mail charges, including those established by the UPU Convention, by the Postal Operations Council, or through negotiations between the Postal Service and foreign postal administrations. As such, inbound international mail should be treated on an exceptional basis and not be classified in the Mail Classification Schedule (MCS) or regulated in the same manner as outbound international mail services. [USPS at 16 (emphasis added)]*

The Postal Service's argument is subdivided into two sections: the first dealing with intergovernmental rate agreements concluded by the Secretary of State in accordance with § 407(c) and the second dealing with the contractual rate agreements concluded by the Postal Service under § 407(d).

1.2.1 Rates for market dominant products set by intergovernmental agreement under § 407(c)

Section 407(c) includes special provisions for intergovernmental agreements that establish rates and classifications for market dominant postal products, as follows:

(c)(1) Before concluding any treaty, convention, or amendment that establishes a rate or classification for a product subject to subchapter I of chapter 36, the Secretary of State shall request the Postal Regulatory Commission to submit its views on whether such rate or classification is consistent with the standards and criteria established by the Commission under section 3622.

(2) The Secretary shall ensure that each treaty, convention, or amendment concluded under subsection (b) is consistent with the views submitted by the Commission pursuant to paragraph (1), except if, or to the extent, the Secretary determines, in writing, that it is not in the foreign policy or national security interest of the United States to ensure consistency with the Commission's views. Such written determination shall be provided to the Commission together with a full explanation of the reasons thereof, provided that the Secretary may designate which portions of the determination or explanation shall be kept confidential for reasons of foreign policy or national security.

After paraphrasing this subsection, the Postal Service concludes that “[t]hese provisions establish a separate and unique regulatory scheme for inbound charges established through the UPU.” USPS at 17. Yet, by its terms, § 407(c) says precisely the opposite. Rather than establish a separate and unique regulatory scheme for services whose rates are set by intergovernmental agreement, § 407(c) explicitly references the broader regulatory framework applicable to market dominant products: “a product subject to subchapter I of chapter 36.” In other words, to be subject to § 407(c), a postal service must first be a “product” included in the “market dominant” category in accordance with the provisions of § 3621 and § 3642.⁹

The Postal Service continues by observing that the Department of State may be unable to negotiate rates with foreign governments that are compatible with the statutory price cap:

This oversight mechanism recognizes the incompatibility of applying a price cap to such inbound charges. *There is no assurance that the State Department could negotiate inbound charges that fit precisely within the calculation of the price cap in any given year.* [USPS at 17 (emphasis added)]

This argument, however, misses its target entirely. The statutory price cap applies only to “a class of mail, as defined in the Domestic Mail Classification Schedule as in

⁹Nor is § 407(c) limited to “inbound” international postal products. It applies to international postal products whose rates or classifications are set by intergovernmental agreement. Under the Postal Service’s interpretation, the Department of State could exempt outbound as well as inbound international postal products from the regulatory framework established by the Commission.

effect on the date of enactment of the Postal Accountability and Enhancement Act.” § 3622(d)(2)(A). Since no inbound or outbound international mail product was included in the DMCS in effect on the date of enactment of the PAEA, international rates and classifications set by intergovernmental agreement are not subject to the statutory price cap.

Finally, the Postal Service argues that the Department of State may, by executive agreement, supersede the provisions of Title 39 and the Commission’s regulations:

Moreover, inbound charges set through international treaties and conventions have the force and effect of international law, and may well supercede any rates for market dominant mail established through the pricing rules issued under the Act. [USPS at 17]

However, the Postal Service then adds a footnote: “Of course, § 407(c) ensures that treaties and conventions negotiated by the Secretary of State, to the extent possible, reflect whatever standards and criteria are established by the PRC under § 3622.” USPS at 18 n. 32. Yet, if § 407(c) “ensures” that rates and classifications set by intergovernmental agreement are consistent with the Act, then these rates are *not* superseding the pricing rules under the PAEA. The thread of the Postal Service’s argument here is unclear but, for present purposes, it seems sufficient to presume (as FedEx does) that the Secretary of State will not try to use executive agreements to “supersede” the regulatory framework established by the Act and the Commission’s regulations.¹⁰

1.2.2 Rates set by negotiated rate agreement under § 407(d)

The Postal Service goes on to address rates for inbound international mail services that are established by contractual rate agreements. In essence, the Postal

¹⁰ The Postal Service raises the possibility of using executive agreements to override U.S. statutes again, at USPS 24 n. 40 (“whether any requirements for parity would be consistent with the international obligations of the United States under the Universal Postal Convention”).

Service seems to be arguing not that the general regulatory framework is inapplicable but only that, in applying the regulatory framework, the Commission must pay special attention to the element of “reciprocity” that may be present in such rates:

With respect to bilateral contractual agreements, the dynamics of the negotiation process with foreign posts, which are strongly influenced by the effects of reciprocity, have considerable effect on inbound charges. Thus, *since inbound charges are ultimately tied to the destination charges assessed on a reciprocal basis*, the volume and mail characteristic profile of the flows between posts can cause rate-setting relationships to differ from rates set for regular customers that do not offer reciprocal delivery services with the Postal Service. Given the dynamics of reciprocity, the Postal Service submits that the standards under which those charges should be evaluated should differ as compared to rates set for outbound mail. [USPS at 18 (emphasis added)]

FedEx agrees with the Postal Service on this point.

Whenever a contract involves an exchange of services between organizations, the Commission needs to consider the possibility that the nominal rates quoted by the parties do not reflect the rates that should be ascribed for regulatory purposes. For example, if two relatively similar postal administrations exchange precisely 100 tonnes of letter post items in each direction each year, then they are indifferent whether their contractual rate agreement establishes a nominal rate of \$0.01 per kilogram or \$10.00 per kilogram. What post office **A** owes post office **B** will be offset by what **B** owes **A**. In truth, what **A** is gaining is the economic value of delivery by **B** and what it is paying for this delivery service is the economic value of the inward delivery service that it is providing for **B**. Fortunately, the economic value of both services can be measured easily because both post offices have arm’s length relations with most of their customers. To administer regulatory standards, the Commission will need to consider economic value where nominal value is not representative of true value.

Contractual rate agreements between postal administrations are only one

example of this problem. The same problem of evaluation arises in respect to rates established by intergovernmental agreement. Furthermore, a similar problem would arise in a domestic mail context if, for example, the Postal Service were to agree to a special rate for postal services provided to a large bank and at the same time agree to buy financial services from the bank. The problem to which the Postal Service alludes is not specific to contractual rate agreements for international mail and in no way suggests that inbound international postal products provided in accordance with contractual rate agreements are not “products” subject to classification under § 3642.

In sum, then, the provisions of § 407 do *not* create a separate and unique regulatory scheme for inbound international mail charges. On the contrary, § 407(c) and (d) incorporate and depend upon the main features of the larger regulatory framework, including the concept of “product” and the categorization into market dominant and competitive products.

1.3 Practical considerations do not require or allow creation of a different regulatory framework for inbound international mail.

In a third section of its argument, the Postal Service argues that “[s]everal practical considerations militate in favor of extending different regulatory treatment to inbound mail.” USPS at 20. The legal import of this argument is unclear. Of course, the Commission is not free to disregard a statute merely because it considers it “impractical.” In any case, this portion of the Postal Service’s argument raises no additional issues of practicality that might justify treating inbound international postal products as outside the regulatory framework for postal products generally.

The Postal Service’s exposition reiterates three points: (1) that inbound rates set by the UPU are outside the control of the Postal Service; (2) that the Postal Service has no commercial relation with the originator of inbound international mail; and (3) that rates for inbound international mail may be incompatible with the statutory price

cap. Each of these has been discussed above.

To these, the Postal Service adds a fourth point: “with regard to non-monopoly inbound competitive categories of international mail, the marketplace provides protection.” USPS at 21. FedEx agrees that, in deciding whether an inbound international postal service is a market dominant or competitive product, the Commission should take into account whether the marketplace prevents introduction of excessive rates for non-monopoly inbound competitive categories of international mail. This factor does not, however, offer a legal justification for exempting inbound international postal services from the concept of “product” and the assignment of such products into market dominant and competitive categories.

2 Accounting rules for single-piece inbound international postal products should be consistent with accounting rules for all other postal products.

In section 2, part B, of its initial comments, the Postal Service proposes to report costs and revenues associated with single-piece inbound international postal services by dividing such products into two categories: “market dominant” and “competitive.”¹¹ For such accounting purposes, however, the terms “market dominant” and “competitive” would not have the same meaning as used in the Act and the Commission’s regulations for other postal products. Moreover, the Postal Service seems to say that division of inbound international postal services into market dominant and competitive categories for accounting purposes might not be the same as division of the same inbound products into the same categories for other purposes of the Act.

FedEx finds this proposal confusing. We believe that the best course would be to apply the new regulatory framework to inbound international postal products in the

¹¹ The Postal Service does not address the accounting for bulk inbound mail and does not explain this omission.

same manner as to all other postal products. We also believe that this is the course required by the Act.

2.1 The Commission should not introduce special definitions of “market dominant” and “competitive” for the purpose of accounting for costs and revenues of inbound international postal products.

The Postal Service suggests that, for accounting purposes, whether or not an inbound international postal product is categorized as market dominant or competitive should be determined by weighing three factors. The Postal Service describes this approach as the “most logical”:

The Postal Service proposes that inbound financial reporting most logically should be guided by the consideration of three elements: (1) the content characteristics of inbound mail as compared to the scope of the letter monopoly, (2) whether charges are established beyond the control of the Postal Service, and (3) whether the charges are negotiated. [USPS at 22]

The proposed three-pronged guidance process would replace the statutory lists of market dominant and competitive products set out in § 3621(a) and § 3631(a) and the criteria for categorizing products set out in § 3642(b).

The short answer to this proposal is that it is inconsistent with the Act. Neither the Postal Service nor the Commission is free to invent new definitions of “market dominant” and “competitive” applicable only to inbound international postal products. For inbound international postal products as well as all other postal products, whether or not a specific product is categorized as market dominant or competitive is determined by consulting the lists in § 3621(a) and § 3631(a). These lists should be interpreted in light of related provisions of the Act and the purposes of the statute generally and, in particular, in light of the criteria of § 3642(b), since these are the criteria that the Commission must to use to categorize new products and shift existing products from one category to the other. This is a straightforward exercise in statutory

interpretation. What the Postal Service proposes is a formula of words that sounds vaguely rational but that, in the end, amounts to ignoring the statute.

We have already commented on how the lists of market dominant and competitive products found in §§ 3621(a) and 3631(a) may be applied to inbound international postal products. See Comments of Federal Express Corporation in Response to Order No. 26 Proposing Regulations to Establish a System of Ratemaking (Sep. 24, 2007) at 6-14 (hereafter, “FedEx”). There is no need to repeat those points. In the following comments we shall address only some subsidiary issues raised by this portion of the Postal Service's initial comments.

2.2 The Commission should *not* attempt to define the scope of the postal monopoly in this proceeding.

As we also explained in our initial comments, FedEx understands that the Commission’s purpose in this proceeding is to establish an initial regulatory framework by implementing §§ 3621(a) and 3631(a). That is, in this proceeding, the Commission is not seeking to shift products from one category to another by applying the criteria of § 3642(b). This is an important distinction. In its proposed balancing test for categorizing inbound international postal products (for accounting purposes), the Postal Service includes as one factor deference to the letter monopoly. USPS at 22. As we noted in our initial comments, there appears to be an incongruity between the product lists of §§ 3621(a) and 3631(a) and the § 3642(b) criteria for shifting products between lists. FedEx at 29. Specifically, § 3642(b)(2) prohibits placing a monopoly product in the competitive category while § 3631(a) has already placed in the competitive category bulk international letters, which appears to be a monopoly product. If the Commission proposes to implement the lists of §§ 3621(a) and 3631(a) and to adjust these lists under the criteria of § 3642(b) in a single proceeding, then it must define the boundaries of the postal monopoly. As we indicated in our initial

comments, interpretation of the postal monopoly will inevitably raise a number of complex issues which, in our view, will require separate notice and comment as a matter of fairness to the parties.

We see no need to burden this proceeding with such complexities. At this point, the public interest will be served best if the Commission proceeds immediately to establish an initial regulatory framework by applying the lists of market dominant and competitive products drawn up by Congress. Sorting out possible incongruities between these lists and the criteria of § 3642(b) can be left to a future proceeding. We understand this to be the intention of the Commission. But we say again, if the Commission decides to take up the Postal Service's suggestion and fix the scope of the postal monopoly as part of the process of determining the categories of inbound international postal products, then we earnestly request the Commission to provide for a separate opportunity for parties to address the scope of the postal monopoly law.

2.3 The Commission's determinations of market dominant and competitive products are binding on other federal agencies.

Finally, in a footnote the Postal Service seems to imply that it believes that Customs and Border Protection (CBP) and other federal agencies may disregard the Commission's definitions of market dominant and competitive products.

The Postal Service's position before the Commission is that inbound mail tendered by postal administrations should be treated on an exceptional basis for purposes of the application of the Act's pricing and classification requirements. *The Postal Service does not, however, intend that its comments be treated as exempting inbound mail from the scope of any applicable requirements in the Act related to customs.* In this regard, the Postal Service observes that the proposed division of revenue of inbound international mail would inform the potential scope of the requirements of § 407(e)(2) concerning the application of private sector customs requirements to shipments of international mail. [USPS at 23 n. 40 (emphasis added)]

Precisely what the Postal Service is saying in the italicized sentence is not clear. Nonetheless, it appears useful to clarify the legal relationship between the Commission's determinations and the duties of other federal agencies.

Section 407(e)(2), requires CBP and other federal agencies to apply import and export laws equally to "shipments of international mail that are competitive products within the meaning of section 3631" and similar shipments by private companies. The legal issue that the Postal Service raises sua sponte is this: may CBP create its own list of competitive products or is it bound to accept the determination of the Commission as to which products are competitive products? The answer, it seems to us, is that only the Commission can determine what products are "competitive products within the meaning of section 3631" and once the Commission has so determined, CBP and other federal agencies are bound by this determination. The explicit reference to products "within the meaning of section 3631" seems too clearly linked to the Commission's special area of expertise for other agencies to ignore.

Once the Commission has made its determination of "competitive products within the meaning of section 3631," it should be up to the CBP and other agencies to determine which products of private companies are "similar. In so doing, it would seem incumbent on such agencies to consult with the private companies as well as the Postal Service. Finally, the Postal Service's suggestion that the Universal Postal Convention of 2004, a pre-existing executive agreement, may take precedence over provisions of the PAEA relating to international postal services seems to us highly improbable.¹²

¹² See generally, American Law Institute, 1 Restatement of Law: The Foreign Relations of the United States § 115 (1987).

3 Conclusion: the new role of the Commission in international postal policy

The PAEA has given the Commission a new role in the regulation of international postal services. In other sectors, including aviation and telecommunications, reasoned application of American regulatory concepts to our commercial relations with the rest of the world has exerted a powerful influence in rationalizing and ultimately reforming the regulatory framework for global commerce generally. While international mail represents an exceedingly small portion of the Postal Service's total volume (about half of one percent), sound development of the global regulatory framework for delivery services is very important to the U.S. economy generally. In the PAEA, Congress, after days of specialized hearings, adopted a new U.S. international postal policy that is well-conceived, forward-looking, and pro-competitive. In so doing, Congress repeatedly rejected entreaties by the Postal Service to retreat from this new vision. How firmly this new policy will take root is now up to the Commission. Implementing any new policy is crucial, for "as the twig is bent, so grows the tree." We entreat the Commission to take extra care to carry out faithfully the reforms of the PAEA in respect to international postal services.

Respectfully submitted

A handwritten signature in cursive script that reads "Nancy Sparks" with a circular flourish at the end.

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