

terminate as of that date. There is nothing that the Commission or courts can do to reverse that Congressionally mandated outcome.

Recognizing the severity of these consequences, in its Initial Brief, the Public Representative presented a workable draft list to classify and categorize the Postal Service's postal and nonpostal activities subject to this proceeding for insertion onto the MCS.² In its Reply Brief, the Postal Service takes issue with the Public Representative's proposed MCS language.³ However, rather than provide its own proposed MCS language in reply or build upon the Public Representative's proposed MCS language, the Postal Service has sought to "roll the dice" and not provide any proposed MCS language at this time without express direction from the Commission.⁴ Instead, it is gambling its ability to provide certain nonpostal services in the future based upon its flawed reading of the statute and the fact that it apparently believes that the Commission will issue an Order deciding discrete legal issues in this case well in advance of the December 20, 2008 statutory deadline – in enough time for the Postal Service to submit proposed MCS language at a later date (yet in advance of that deadline). The Postal Service's failure to file proposed MCS language also violates Commission rule 3020.31(f).⁵

While, ordinarily, it is not appropriate for a litigant to tell another litigant how to put on its case, it is not in the interest of the general public to allow certain nonpostal services to terminate by operation of law because the Postal Service has failed to provide timely draft MCS language on those services. While the Public Representative

² Public Representative Brief at 20-36.

³ See, e.g., Postal Service Reply Brief at 61 (Postal Service stating that "[t]he Public Representative's product descriptions are so broad that they inadvertently seek to expand the Commission's authority far beyond activities that generate revenue.").

⁴ Postal Service Reply Brief at 59 n.163 ("The Postal Service notes that the Commission never requested specific MCS language."); *Id.* at 29 n.164 (The Postal Service "anticipates the precise wording of the classification language will be the subject of future submissions once the Commission has ruled on the scope of section 404(e).").

⁵ 39 CFR § 3020.31(f) (A request to modify product lists shall "include a copy of the applicable sections of the Mail Classification Schedule and the proposed changes therein.").

believes that his proposed MCS language would be appropriate,⁶ it would be highly unusual for the Commission to adopt MCS language without the benefit of a counterproposal or specific criticism of proposed language from the Postal Service, especially in circumstances where all the information about the services are within the direction and control of the Postal Service.

The general public is also concerned about timing. In effect, once again,⁷ the Postal Service has unilaterally, and without authorization from the Commission, decided to bifurcate the Commission's decision making in this proceeding.⁸ As a first step, it is asking the Commission to categorically exclude large segments of its activities from consideration as part of this proceeding without the benefit of proposed MCS language identifying the limits and characteristics of those offerings. As a second step, if the Commission does determine that some of those activities are subject to this proceeding, the Postal Service presumably envisions another few rounds of briefing to determine the scope of the MCS language for these services that are allowed.

If the Commission were to follow that path, it would inevitably have to restart this entire process with respect to those offerings that it decided should be subject to this proceeding after it issues its first decision on the legal issues. This would require additional Commission time and resources. Furthermore, even assuming that the Commission can make a quick decision on these complex legal matters (albeit, handicapped without Postal Service proposed MCS language), this would leave less than two months for the participants to file and comment on proposed MCS language prior to the date that the services terminate by operation of law.

⁶ Public Representative Brief at 20-36.

⁷ Ironically, the Public Representative's original motion to compel in this case raised similar concerns. Public Representative Motion to Compel United States Postal Service to File Complete List of Nonpostal Services, March 25, 2008, at 3-4. As discussed therein, it is in the Commission's discretion to determine how it seeks to adjudicate matters – whether in separate phases or with one, comprehensive decision. At the very least, if the Postal Service wishes to bifurcate this proceeding, it must file a motion to bifurcate with the Commission.

⁸ Postal Service Reply Brief at 29 n.164 (“[T]he Postal Service ...anticipates the precise wording of the classification language will be the subject of future submissions once the Commission has ruled on the scope of section 404(e).”)

It is important to note that to determine whether a specific service should continue, the Commission must have proposed MCS language to determine the scope and outer limits of the service that the Postal Service is allowed to continue offering.⁹ The Commission cannot, for example, decide from whole cloth whether, for example, the EPM service should continue. It must ultimately come up with MCS language for insertion onto the MCS that describes the scope and limitations of that service. Furthermore, it may be that the Commission will decide after reviewing specific MCS language that the service is utterly unworkable and the entire service should not be continued. Under the bifurcated proceeding implicitly proposed by the Postal Service, the Commission has been foreclosed from exercising this option.

In the vast majority of mail classification cases, the Postal Service submits proposed MCS language and the Commission comments on that language or makes revisions.¹⁰ In this very important mail classification case where the lack of such language can cause parts of such services that are not properly categorized to terminate, the Postal Service has chosen not to provide such language absent express direction from the Commission.¹¹

⁹ The Postal Service continues to argue that for the activities whose status is disputed, almost none are capable of being classified as either market dominant or competitive. Postal Service Brief at 59-71; Postal Service Reply Brief at 59 n.163. However, given the choice by a court of having these services terminate or classifying them as market dominant or competitive, the Public Representative finds it difficult to believe that the Postal Service would rather allow these important activities to terminate.

¹⁰ See *e.g.*, PRC Order No. 85 (June 27, 2008) at 9 (“The Global Plus classification language submitted by the Postal Service includes the requirement that each agreement executed pursuant to that shell classification (and the accompanying Governors’ decision) cover its attributable costs. This is a key provision and the classification language adopted for all competitive negotiated service agreements will include the same provision.”).

¹¹ Postal Service Reply Brief at 59 n.163 163 (“The Postal Service notes that the Commission never requested specific MCS language.”).

Therefore, the Public Representative respectfully requests the Commission enter an order directing the Postal Service to file proposed Mail Classification Schedule language classifying all postal and nonpostal services identified in its filings in this case that fall within the purview of Commission Order 74 within seven days.¹²

Respectfully Submitted,

/s/ Robert Sidman

Robert Sidman

Public Representative for
Docket No. MC2008-1

901 New York Avenue, N.W.
Washington, DC 20268-0001
(202) 789-6827; Fax (202) 789-6891
e-mail: robert.sidman@prc.gov

October 1, 2008

¹² PRC Order No. 74 (April 29, 2008) at 14.