



POSTAL REGULATORY COMMISSION

[Docket No. RM2017-1/RM2022-2; Order No. 6269]

Competitive Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is invites comments in this proceeding related to its analysis of subsequent events that impact the findings of a Federal Trade Commission Report. This document informs the public of this proceeding, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 21, 2022.

ADDRESSES: For additional information, Order No. 6269 can be accessed electronically through the Commission's website at <https://www.prc.gov>. Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the FOR FURTHER INFORMATION CONTACT section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

As part of its enactment of the Postal Accountability and Enhancement Act (PAEA), Congress sought to determine whether the Postal Service's competitive products enjoyed any legal advantages over private companies providing similar products.¹ Uncodified section 703 of the PAEA directed the Federal Trade Commission (FTC) to prepare a report identifying federal and state laws that apply differently to the Postal Service's competitive products than to similar products offered by private competitors.² The FTC was required to include any recommendations concerning how to end any such legal differences that it deemed appropriate and, in the interim, to account for the net economic effect resulting from such differences. PAEA section 703(b). Additionally, section 703 directed the Commission, when revising regulations under 39 U.S.C. 3633, to consider the FTC's recommendations as well as subsequent events that affect the continuing validity of the FTC's net economic effect finding. *Id.* section 703(d).

II. Background

The FTC issued its report in December 2007, which considered both the implicit subsidies enjoyed by, and legal constraints imposed on, the Postal Service's Competitive products due to the Postal Service's unique legal status.³ In Chapter IV of its report, the FTC completed its net economic effect analysis by specifically identifying those implicit subsidies and legal constraints that could be

¹ See Postal Accountability and Enhancement Act (PAEA), Pub. L. No. 109-435, title VII, section 703, 120 Stat. 3198, 3244 (2006); see also S. Rep. No. 108-318 at 29 (2004).

² PAEA section 703(a). Section 703 was not codified and is reproduced in the notes of 39 U.S.C.A. 3633. See also Federal Trade Commission, Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors, December 2007 (FTC Report), available at <https://www.ftc.gov/sites/default/files/documents/reports/accounting-laws-apply-differently-united-statespostal-service-and-its-private-competitors-report/080116postal>.

³ FTC Report at 55-77. In its review of the Postal Service's unique legal status, the FTC analyzed laws applicable to the Postal Service due to its status as a governmental entity as well as those disadvantages imposed on and advantages allowed by the PAEA. *Id.*

quantified in order to calculate any impact on the Postal Service.⁴ The FTC calculated the cost of the quantifiable legal constraints and the value of the implicit subsidies and concluded that the Postal Service's unique legal status placed it at a net competitive disadvantage in offering Competitive products relative to private competitors. *Id.* at 64.

On February 8, 2018, as part of the Commission's second 5-year review of the institutional cost contribution requirement for Competitive products, the Commission issued a Notice of Proposed Rulemaking, proposing revisions to its regulations pursuant to 39 U.S.C. 3633(a)(3) and (b) and completed an analysis pursuant to section 703(d) of the PAEA.⁵

The Commission found that there was only "one law linked to a separately delineated element within the FTC's calculation that has been amended, thereby constituting an event subsequent to the FTC Report's issuance that affects the validity of the estimate of the net economic effect." *Id.* at 63. The identified law was associated with international air transportation rate regulation and had been amended after the original FTC Report's issuance.⁶ The Commission removed the cost of the international air transportation rate regulation constraint from the total cost of the legal constraints and updated the FTC's calculation. See Order

⁴ *Id.* at 64 n.287. The FTC Report discussed additional implicit subsidies and legal constraints beyond those listed in its net economic effect analysis, but because the additional subsidies and constraints could either not be quantified or the effect on the Postal Service was unclear, the FTC did not include them as part of its final analysis. See *id.* at 1, 50, 54, 56, 64, 89.

⁵ See Order No. 4402 at 54-68; see *also* Docket No. RM2017-1, Revised Notice of Proposed Rulemaking, August 7, 2018, at 57-58 (Order No. 4742); Docket No. RM2017-1, Order Adopting Final Rules Relating to the Institutional Cost Contribution Requirement for Competitive Products, January 3, 2019, at 170-187 (Order No. 4963).

⁶ *Id.* at 63-64. In the FTC Report, the FTC explained that the Department of Transportation's regulation of international mail air transport rates increased Postal Service costs because it was not permitted to independently negotiate the rates on the free market as private companies were. FTC Report at 44, 56. In 2008, Congress eliminated the Department of Transportation's authority to regulate the prices paid by the Postal Service for air transport of international mail. See Pub. L. 110-405, 122 Stat. 4287 (2008); see *also* FTC Report at 44-45.

No. 4402 at 64. The Commission found that although the removal of the international air transportation rate regulation constraint altered the overall estimate of the net economic effect, that subsequent event did not undermine the FTC's overall finding of a net economic disadvantage and that the FTC's finding remained valid. *Id.* Additionally, the Commission performed a supplemental analysis by updating the high-end costs associated with both the implicit subsidies and legal constraints based on current competitive product revenue at the time Order No. 4402 was issued.

Subsequently, the United States Court of Appeals for the District of Columbia Circuit remanded Order No. 4963 to the Commission for further consideration of particular issues identified by the court consistent with the opinion issued in *United Parcel Serv., Inc. v. Postal Reg. Comm'n*, 955 F.3d 1038 (D.C. Cir. 2020). On November 18, 2021, the Commission issued Order No. 6043, which not only addressed the issues identified by the court, but also initiated the Commission's third 5-year review of the institutional cost contribution requirement for Competitive products.⁷ Docket Nos. RM2017-1 and RM2022-2 remain pending before the Commission.

III. Events Subsequent to the FTC Report

After the issuance of Order No. 6043 and the expiration of the comment period established therein, the Postal Service Reform Act of 2022 (PSRA) was enacted on April 6, 2022.⁸ Among other things, the PSRA requires Postal Service Health Benefits plans to participate in Medicare Part D, which would

⁷ Supplemental Notice of Proposed Rulemaking and Order Initiating the Third Review of the Institutional Cost Contribution Requirement for Competitive Products, November 18, 2021, at 130 (Order No. 6043).

⁸ See Postal Service Reform Act of 2022 (PSRA), Pub. L. No. 117-108, 136 Stat. 1127 (2022).

allow those plans to receive subsidies related to prescription drugs. See 5 U.S.C. 8903c(h). This new requirement is significant because, in its report, the FTC specifically identified and included the Postal Service’s inability to access subsidies offered to private employers under the Medicare Part D program in its calculation of the total legal constraints. See FTC Report at 38-39, 56. As a result, the Commission finds that there has been one law linked to a separately delineated element within the FTC’s calculation that has been amended, thereby constituting an event subsequent to the FTC Report’s issuance that affects the validity of the estimate of the net economic effect.⁹ The Commission removes the cost of the Medicare Part D constraint from the total cost of the legal constraints and updates the FTC’s calculation. Additionally, the Commission performed a supplemental analysis by updating the low-end and high-end costs associated with both the implicit subsidies and legal constraints based on the current appropriate share and competitive product revenue.

IV. Invitation for Comments

The Commission invites comment regarding its analysis of the “subsequent event” identified and discussed above. The Commission also invites comments on any other changes in law behind the implicit subsidies and legal constraints quantified by the FTC that have changed since March 25, 2022, which was the last opportunity to provide comment in Docket Nos. RM2017-1 and RM2022-2, and whether any of the identified changes affect the continuing validity of the FTC’s estimate of the net economic effect of those laws. Comments related to the reconsideration of the FTC’s original conclusions as to what implicit subsidies and legal constraints should be included in or excluded

⁹ The Commission finds no other changes to federal or state law affect the legal constraints estimate.

from the estimate of net economic effect, whether those subsidies or constraints were quantifiable, or whether alternative estimates of the quantified implicit subsidies and legal constraints are possible are all beyond the scope of this review.¹⁰

Comments are due September 21, 2022. Additional information concerning this filing may be accessed via the Commission's website at <http://www.prc.gov>.

Pursuant to 39 U.S.C. 505, Kenneth R. Moeller continues to be designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

V. Ordering Paragraphs

It is ordered:

1. The Commission seeks comment on the matters raised by this Notice.
2. Comments are due no later than September 21, 2022.
3. Pursuant to 39 U.S.C. 505, Kenneth R. Moeller continues to be designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.
4. The Commission directs the Secretary of the Commission to arrange for prompt publication of this Notice in the ***Federal Register***.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2022-19707 Filed: 9/12/2022 8:45 am; Publication Date: 9/13/2022]

¹⁰ See Order No. 4402 at 62-63; Order No. 4963 at 173-87.