

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0002

Docket No. RM2020-4

Advance Notice of Proposed Rulemaking to
Consider Regulations to Carry Out the Statutory
Requirements of 39 U.S.C. 601

COMMENTS OF THE BERKSHIRE COMPANY IN RESPONSE TO ORDER NO. 5442

Introduction

The Berkshire Company is an independent consulting firm for the print and mail industry. The comments in this document represent the firm's management, and not any of our clients.

General Comments

The specific topic being reviewed by the Postal Regulatory Commission (PRC) is a brief section of federal code that covers the USPS (Title 39 – Postal Service). Including the headings, the section (39 U.S.C. 601) uses only 244 words to describe the exceptions to the letter monopoly. However, those 244 words help protect over 50% of the revenue generated by the USPS.

As with most postal regulations, the laws describing and protecting the letter monopoly don't reflect the current technology used to create and send mail – electronic and physical. While it will require Congress to change those laws, the PRC can create the "regulations necessary to carry out" those laws.

The Berkshire Company (TBC) responses to the fourteen specific questions are provided below.

Specific Comments to Questions Included in the Order

1. Are the statutory requirements of 39 U.S.C. 601(a) clear and concise, or are additional regulations necessary to carry out the intent of the statute?

TBC Response: The requirements of 39 U.S.C. 601(a) are concise. However, it isn't clear if the letter must meet all 6 characteristics described to meet the requirement.

Because this section uses the term "letter" as determined by 39 U.S.C. 310.1, the requirements are outdated, and don't reflect the manufacturing methods of the 21st century. Images can be used to transmit specific information to a recipient without being "written or printed characters, drawing, holes, or orientations of magnetic particles in a manner having a predetermined significance."

Additionally, the requirement of an envelope excludes the use of a self-mailer that the message cannot be taken from it without defacing the carrier.

2. Are the statutory requirements of 39 U.S.C. 601(b) clear and concise, or are additional regulations necessary to carry out the intent of the statute?

TBC Response: The requirements of 39 U.S.C. 601(b) are concise. However, it isn't clear which characteristics described are required. Is it "(1) and (2)", or "(1) and (3)", or "(1) or (2) or (3)".

Also, there appears to be a conflict between 39 U.S.C. 601(b)(1) and 39 U.S.C. 320.6(c). Each covers the amount of postage that must be paid, however use vastly different formulae.

39 U.S.C. 601(b)(1) – "The amount paid for the private carriage of the letter is at least the amount equal to 6 times the rate then currently charged for the 1st ounce of a single-piece first class letter."

39 U.S.C. 320.6(c) – "It will be conclusively presumed that a letter is extremely urgent and is covered by the suspension if the amount paid for private carriage of the letter is at least three dollars or twice the applicable U.S. postage for First-Class Mail (including priority mail) whichever is the greater."

3. Is the scope of 39 U.S.C. 601(b)(3) – permitting that the carriage of letters out of the mail provided "such carriage is within the scope of services described by regulations of the United States Postal Service (including, in particular, sections 310.1 and 320.2-320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section (as then in effect)" – sufficiently clear and concise, or are additional regulations necessary to carry out the intent of the statute?

TBC Response: As with many federal regulations, this section refers to multiple sections of the Code of Federal Regulations (CFR) and each of those sections include multiple referrals to other sections of the CFR or US Code. Some of the sections are included in what is generally known as the "Private Express Statutes", which include even more referenced codes and regulations.

The regulations and definitions should be consolidated under one section, and the redundant and/or conflicting sections rescinded.

4. Do any terms that currently appear in 39 U.S.C. 601 require further definition?

TBC Response: Just the term "letter". Please see our response to Question #10 of this order.

5. Can consumers and competitors easily determine when a mailpiece is subject to monopoly protections?

TBC Response: No, it is not easily determined when a mailpiece is subject to monopoly protections. As noted above, the final determination about monopoly protections extend beyond 39 U.S.C. 601 to include multiple exceptions, including price, route and method of transport.

6. What is the current effect of the letter monopoly on consumers, small businesses, and competitors?

TBC Response: The current effect on consumers and small businesses is limited. The USPS offers low-cost delivery for most items that would classify as a "letter". For urgent matters,

consumers and small business have access to multiple alternative methods – whether digital or physical.

Competitors – including couriers, shippers and facilities management companies – have greater challenges. The outdated definitions and conflicting pricing restrictions require industry and legal expertise to maneuver through the regulations and ensure compliance. This is especially true with providing services for financial institutions with multiple branches and insurance companies with agent offices.

In some cases, such as facility management companies handling mail for companies, colleges and universities, the monopoly is ignored, and letters are carried outside the mail in violation of the monopoly protections.

7. Are the weight and/or price requirements found in 39 U.S.C. 601(b) still relevant?

TBC Response: The weight requirements are tied to the pricing chart that flats over 13 ounces are priced as parcels. However, using a weight requirement contradicts the reasoning that the content is a determinant of pricing. Under this scheme, a company could use an alternative carrier to send a large documents (14 ounces) at a lower rate than a smaller (12-ounce document), because it's now defined as a parcel.

8. Are the weight and/or price requirements found in 39 U.S.C. 601(b) applied uniformly?

TBC Response: It's unlikely that the weight and/or price requirements are applied uniformly. Most companies are unaware of the regulations unless they specifically ask a consultant or attorney. Numerous companies use courier services and/or facilities management companies to administer internal mail operations, and regularly move letters out of the mails. Enforcement only occurs when the violation is reported to the USPS or US Postal Inspection Service.

9. Have there been any post-PAEA Postal Service regulations that appear to limit, expand, or otherwise affect the scope of the letter monopoly contrary to law?

TBC Response: There have been no post-PAEA Postal Service regulations that have impacted how our clients remain compliant with the letter monopoly.

10. Is the term “letter” clear and concise, or can any improvements be made to the definition? If so, please provide any proposed definitions and explain how the proposed definition may better implement the intent of Congress and affect the scope of the letter monopoly.

TBC Response: The definition of a “letter” is provided in 39 U.S.C. 310.1. More than two-thirds of the definition is dedicated to clarifying what documents are not letters. When the exceptions are greater than the rule, then the rule is obtuse.

The lack of clarity is compounded when applied by the USPS to determine classification of mail as either First-Class Mail® or USPS Marketing Mail. For example, under 39 U.S.C. 310.1(a)(7) (ii) – “Checks, drafts, promissory notes, bonds, other negotiable and nonnegotiable financial instruments, stock certificates, other securities, insurance policies, and title policies when shipped to, from, or between financial institutions.” – are not letters. However, they are considered First-Class Mail® under the Domestic Mail Manual, Section 130.3.3, as they contain “personal information.”

Due to the interrelationships between differing sections of the Domestic Mail Manual, the US Code and the Private Express Statutes, a definition of a “letter” is more complicated than it appears. Further, changing the definition should include congressional action to streamline the contradictory sections of the US Code.

We recommend that the PRC and the USPS Board of Governors appoint a joint panel of postal executives, commissioners and postal industry leaders to:

- a. draft the definition of the term “letter”;
 - b. update the regulations that don’t require changes to the law; and
 - c. present recommendations for updates to the Private Express Statutes to the two congressional oversight committees.
11. Do the current statutory and regulatory requirements correctly implement the intent of Congress and advance the public interest, or should consideration be given to any changes that may be implemented by regulation?

TBC Response: The “intent of Congress” is obscured by over 227 years of laws and regulations passed since the US Postal Service Act of 1792 and the “public interest” is undefinable without context. As has been stated by others, the nation must decide what is the mission of the USPS, and how will it be funded.

12. How might changes to the statutory and regulatory requirements regarding the scope of the letter monopoly affect the financial condition of the Postal Service, competitors of the Postal Service, users of the Postal Service, and/or the general public interest?

TBC Response: With the consistent decline of letters, any changes to the protections provided by the regulations will only worsen the financial condition of the USPS. As evident in the current pandemic, the USPS is a critical component of the country’s infrastructure and must be maintained.

13. Are there any social, economic, technological, or other trends that should be taken into account by Congress in considering the scope of the monopoly?

TBC Response: Publishing, print and finishing technologies are going through a revolutionary period. The interplay of software and hardware allow for specific messaging on a growing selection of substrates on a previously unimaginable scale.

Simultaneously, an increasing number of traditionally printed documents are being delivered electronically; or eliminated due to regulatory changes. This trend is countered by several state or federal agencies mandating additional printed and mailed notices (e.g., privacy notices in multiple languages included with some healthcare documents).

With an undefined Universal Service Obligation, the current monopoly protects important revenue for the USPS. A financially unstable USPS has a direct negative impact on the 7.3 million mailing industry jobs and the \$1.58 trillion in sales revenue generated for the US economy (source: 2019 US Mailing Industry Economic Job Study, Envelope Manufacturers Association).

Congress needs to better define the mission of the USPS, including the Universal Service

Obligation. The funding of the USPS, including any monopolies, must follow the mission.

14. Because the Commission is tasked with developing regulations to carry out 39 U.S.C. 601, to what extent should the Commission adopt regulations that replicate, in whole or in part, the Postal Service's regulations that appear at 39 CFR 310.1 and 320.2 through 320.8?

TBC Response: As noted above, the interrelationships between these different regulations currently add to the confusion and lack of clarity. The next changes should consolidate the regulations under one heading.

April 6, 2020

Respectfully submitted,

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