

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

REGULATIONS PERTAINING TO 39 U.S.C. § 601

Docket No. RM2020-4

**COMMENTS OF THE NATIONAL POSTAL POLICY COUNCIL AND
THE NATIONAL ASSOCIATION OF PRESORT MAILERS**

(April 7, 2020)

The National Postal Policy Council and the National Association of Presort Mailers respectfully submit these comments in response to the Advance Notice of Proposed Rulemaking in this proceeding.¹ The Commission invited comment on what, if any, regulations it should consider promulgating to carry out the provisions of the Private Express Statutes found in 39 U.S.C. §601.

NPPC and NAPM caution the Commission against using its regulatory authority to propose substantive changes at this time.² The Private Express Statutes are only one component of a number of closely-related policies, each of which deserve significant consideration before changes are made. However, the Commission should consider adopting regulations to simplify and clarify the existing regulatory scheme relating to Section 601. In addition, the Commission

¹ Order No. 5422 (Feb. 7, 2020) (Advance Notice of Proposed Rulemaking To Consider Regulations To Carry Out The Statutory Requirements of 39 U.S.C. 601), 85 *Fed. Reg.* 8789 (Feb. 18, 2020) (“ANPRM”).

² Many NPPC and NAPM members currently are very focused on addressing the serious implications of the COVID-19 pandemic on their operations and customers, and consequently have been unable to give this proceeding the attention that it deserves. NPPC and NAPM trust that the Commission will generously accept late filed comments.

and the Postal Service should consider innovative product redesigns that might reduce costs and increase the attractiveness of mail, and then to evaluate whether new or revised regulations might be appropriate to accommodate them.

I. BACKGROUND

The National Postal Policy Council is an association of large business users of letter mail, primarily First-Class Mail using the Automation rate category, with member companies from the telecommunications, banking and financial services, insurance, subscription service, and mail services industries.

Comprised of 36 members, including many of the largest customers of the Postal Service with aggregated mailings of many billions of pieces and pivotal suppliers, NPPC supports a robust and universal postal system as a key to its members' business success and to the health of the economy generally. NPPC members account for a large majority of the Presort Letters and Cards, a significant amount of First-Class Single-Piece letters (especially Metered Mail and residual mail pieces), and substantial volume in USPS Marketing Regular Letter mail (particular the 5-Digit rate category).

NAPM is a nonprofit organization that represents mailers, both mail owners and mailing service providers who commingle, sort and prepare quality mailings inducted and compliant with work share requirements. NAPM member mail service provider companies interact with and perform mailing services for tens of thousands of clients and businesses nationally on a daily basis that use postal mailing products.

NPPC and NAPM members and their clients use the mail to deliver account statements, insurance policies, financial disclosures, billing notices, promotional materials, and many other basic documents in everyday American life. Some notices are required by law to be delivered through the mail; others are delivered through the mail through customer preference or business needs. In 2018, business correspondence and transactions First-Class Mail, such as that sent by our members, accounted for more than 20 percent of the total mail received by households. United States Postal Service, *The Household Diary Study: Mail Use & Attitudes in Fiscal Year 2018* at 2 & Tables 3.10 and 3.12 (Mar. 2019).

NPPC and NAPM members rely upon the Postal Service's universal service reach to serve their customers every day. They understand the important role that the Private Express Statutes play in providing financial support to universal service. In comments in Docket No. PI2020-1, NPPC noted that the Postal Service serves an essential role in the nation's communications and commercial infrastructure. *Comments of the National Postal Policy Council, Docket No. PI2020-1, at 3* (Nov. 1, 2019) ("*NPPC PI2020-1 Comments*"). That role was established by Congress when it directed the Postal Service to operate "as a basic and fundamental service provided to the people by the Government of the United States" to "provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. §191(a).³ Given the importance of the Private Express

³ In those comments, NPPC pointed out that the postal monopolies confer an important qualitative value to mailers and recipients that is not captured by the quantitative calculation

Statutes to universal service, NPPC and NAPM have a strong interest in this proceeding.

II. THE PRIVATE EXPRESS STATUTES SHOULD NOT BE VIEWED IN ISOLATION

This proceeding is focused exclusively on the Private Express Statutes. For that reason, it should not lead to the Commission making important decisions as to their scope in isolation from other important related issues such as the universal service obligation and the mailbox rule. Accordingly, the Commission should be extremely cautious before proposing substantive changes in this proceeding due to their potential implications on these closely related and vitally important postal policies.

As the Commission notes, the Postal Service and its Board of Governors have repeatedly justified the letter monopoly as necessary to offset the costs imposed on it by various laws, including the universal service obligation. Postal Regulatory Commission, *Report on Universal Postal Service and the Postal Monopoly*, at 186-187 (2008) (*USO Report*). The Commission's review of the history of the postal monopolies makes evident that the Private Express Statutes and the mailbox monopoly were established, and modified a number of times over the years, in order to deter competition to post office revenues. *USO Report*, at 37-61 (2008).

currently used to estimate the value of the postal monopolies to the Postal Service. *NPPC PI2020-1 Comments*, at 1.

Although the specific scope of the Private Express Statutes has changed from time to time over the more than two centuries of their existence,⁴ the fundamental purpose has remained unchanged. The Private Express Statutes, and their implementing regulations, exist to provide vital financial support for universal service, which is essential to our members. NPPC and NAPM members require delivery to their customers everywhere, every day, at an affordable price. The *USO Report* itself assumes (at 118) that the postal monopolies protect against cream-skimming arising from the uniform price mandate and its analysis throughout assumes that is true. Entertaining possible modifications of the Statutes and regulations before the scope of the universal service that it supports is defined is unlikely to produce a sustainable result.

The Commission also has pending a proceeding to review the quantitative value of the postal monopolies. The Commission should consider these issues concurrently, as they are integrally entwined with the universal service obligation and related issues. However, the *ANPRM* does not indicate whether or how the Commission would take these two separate proceedings into mutual account.

Moreover, issues 12 and 13 raised by the *ANPRM* invite commenters to address implications of possible changes in the scope of the Statutes. Issue 12, which invites commentary of the possible effects of changes to the Statutes on postal revenues, involves especially far-reaching concerns. We need hardly mention that, at this very moment, the Commission in Docket No. RM2017-3 is contemplating drastic rate changes. Those alone are beyond the range of

⁴ See Postal Regulatory Commission, *Report on Universal Postal Service and the Postal Monopoly*, at 37-84 & Appendix C (Dec. 19, 2008).

experience upon which current calculations of price elasticities are based, so the consequences of those proposals, if adopted, are unknown. A second set of changes here affecting postal revenues would be unwise.

And there are still other important issues that are outside the scope of this proceeding. For example, this proceeding explicitly does not address the mailbox rule in 39 U.S.C. §1725. *ANPRM* at n.1. The Postal Service has commented previously that “Mailbox security is essential to the Postal Service brand.”⁵ The mailbox monopoly in practice enhances the value of the mail by promoting its security, deterring theft, and enhancing the Postal Inspection Service’s ability to maintain the security of the mails.

Nor does the *ANPRM* discuss the role of the monopoly in preventing the transfer of significant portions of the market-dominant mailstream to the Competitive category. Section 3642(b)(2) prohibits the transfer of a product covered by the postal monopoly to the Competitive category. 39 U.S.C. §3642(b)(2). Thus, any modification of the scope of the postal monopoly in this proceeding could well have implications on the regulatory regime applicable to individual products. Indeed, the George Mason University School of Public Policy report on the postal monopoly laws attached to the USO Report states, and the Commission acknowledges in the *ANPRM*: “[A]ny decision by the Commission interpreting the term letter in section 601 would be considered

⁵ *Initial Comments of the United States Postal Service on the Commission Report*, Docket No. PI2009-1, at 7 (Feb. 17, 2009). Large First-Class Mailers would have very serious reservations about “opening up the mailbox” to non-Postal Service deliveries. Not only does their mail often have sensitive personal information on the envelope, but opening the mailbox would put credit cards, financial and health information, and government checks at risk.

tantamount to defining the scope of the monopoly.” *ANPRM* at n.11, quoting USO Report, Appendix C, at 250.

Although important, the Private Express Statutes are just one part of a number of closely related postal laws and policies. As this proceeding is limited to only the Statutes, the Commission should be very cautious in making any substantive changes in this docket.

III. ELECTRONIC ALTERNATIVES HAVE NO MORE RELEVANCE TO THE PRIVATE EXPRESS STATUTES THAN DO TELEPHONES

ANPRM issue 12 asks whether any “social, economic, technological, or other trends” should be taken into account by Congress in considering the scope of the monopoly. *ANPRM* at 8. This appears to be an invitation to discuss electronic “diversion.” It is important that the Commission, and the Congress, understand that while electronic communications are a fact of life in the United States today, they are not equivalent to hard-copy mail and do not constitute “competition” for letter mail in the way that UPS and FedEx compete with the Postal Service’s package services. Put differently, email and electronic statements delivered via Internet websites have no more legal effect on the Private Express Statutes than electronic alternatives such as the telephone (and telemarketing) and television have had for many decades.

Issue 12 correctly assumes that the appropriate body to take any such trends into account is the Congress, not the Commission. Congress has delegated authority to the Commission only to adopt regulations “necessary” to “carry out” Section 601. 39 U.S.C. §601(c). The Commission may adopt only

regulations that are “necessary” and its authority is limited to regulations that “carry out” the legislature’s intent as to when a letter may be carried out of the mail.

Second, insofar as the Commission may be invited by others to consider electronic communications as “competition” for mail subject to the monopoly, such an analysis must proceed only on a case-by-case basis to be meaningful. Although it is superficially easy to assert that the decline of letter volume that has occurred while the marketplace has shifted to electronic communications means that the latter “competes” with the former, electronic and hardcopy are different ways to communicate with different features and attributes.

What the growth in electronic communications (itself a very broad category) really means is that the nation is undergoing a fundamental change in how it communicates certain types of messages. There are far more communications today than in 2006 – the year of the Postal Service’s peak volume – but many of these are communications that simply did not exist at that time. That people and businesses communicate in new ways (email, texts, websites, social media) does not mean that those communications are replacements or substitutes for letter mail; they are simply different ways of communicating just as telephones, telegraphs, and facsimile machines were in previous eras. Each way of communicating has distinct advantages and disadvantages.

A problem for the Postal Service, however, is that unfortunately it has not sufficiently maintained or improved the attractiveness of its offerings in the midst

of this secular trend toward electronic communications. This has resulted in its having an ever-declining share of the total communications marketplace as electronic communications expand and letter mail declines.

Whether a particular mail product is subject to significant and genuine electronic “competition” would require a case-by-case factual determination. Among the factors to be considered are the existence of laws that require hardcopy delivery of certain types of notices and statements, the criteria that the federal E-SIGN Act and state-level Uniform Electronic Transactions Act require in order to allow certain electronic communications, customer preferences, and the comparative security of the mailstream and mailbox versus electronic and other communications.

The Commission has gathered no information about these considerations. It certainly should refrain from drawing conclusions about particular types of mail solely or predominantly on the basis of superficial assertions about social, economic, or technological trends towards electronic diversion.

IV. RECOMMENDED STEPS

The Commission invites comment on whether it should adopt regulations that replicate, in whole or in part, the regulations adopted previously by the Postal Service that appear at 39 C.F.R. §310.1 and 320.2 through 320.8. *ANPRM* at 8. If it does so at this time, it should do so only to resolve any questions about the legal status of the regulations currently found at 39 C.F.R. §310 *et seq.*

First, the legal status of the regulations that appear at 39 C.F.R. §310.1 and 320.2 through 320.8, which were adopted by the Postal Service in years past, is unclear because Congress removed its rulemaking authority in the PAEA. Assuming that the regulations were adopted lawfully in the first place,⁶ Congress's removal of its rulemaking authority leaves those regulations in an orphan status. Arguably the removal of the Postal Service's rulemaking authority also eliminated the Service's power to repeal those regulations.

But the regulations remain in the Code of Federal Regulations and therefore presumably have legal effect, although arguably their continued existence could be *ultra vires*. But at the least, 39 C.F.R. §§310.1 and 320.2-320.8 have legal significance because they define what carriage was permissible as of July 1, 2005 –the Postal Service did not change them after that date -- and that carriage remains permissible today.

For the sake of regulatory clarity, the Commission should consider promulgating regulations that are essentially identical to 39 C.F.R. §§310.1 and 320.2-320.8 and include a notation to the effect that such is how those regulations appeared as of July 1, 2005. As an alternative, the Commission could adopt a clarified and simplified version of those regulations, and place the July 1, 2005, version in a footnote to provide a record for how those regulations existed as of that date.

That means that the Commission should consider adopting, essentially unchanged, the definition of a "letter" as defined in 39 C.F.R. §310.1. See

⁶ It has been suggested in the past, but apparently never so held by a court, that the Postal Service may not have had legal authority to adopt certain exceptions or suspensions.

ANPRM, Question 10. The Commission may also consider whether to adopt the current exclusions, exceptions, and suspensions of the Statutes, or whether to standardize the terminology used while retaining the substance.

In addition, the Commission should discuss whether it believes that it has legal authority to broaden or narrow the scope of permissible private carriage. Section 601(c) authorizes the Commission to adopt regulations to “carry out” Sections 601(a) and (b); it does not specifically grant the Commission authority to modify the definition of a “letter” or “envelope” or even “private carriage.” It should also address whether, in the case of 39 C.F.R. §§ 310.1 and 320.2-320.8, Congress may have narrowed whatever authority the Commission may have generally with respect to Sections 601(a) and (b)(1) and (2) by effectively grandfathering the suspensions in those regulations.

Furthermore, the Commission should address the status of Private Express Statutes advisory rulings issued in the past by the Postal Service. See 39 C.F.R. §310.6. Those rulings provided helpful guidance when issued; however, they are not available online, appear to be available to the public only in the library of the Postal Service, and their existence is not generally known to all but a small number of persons who follow postal matters closely. The Postal Service has also issued Customer Support rulings that implicate the Private Express Statutes. Although at least some of these are available online and they have historical interest, their legal status is unclear in light of 39 U.S.C. §601(c). If they are to have any legal significance, they must be far more transparent. The

Commission should indicate what legal significance or weight it ascribes to those types of rulings.

Finally, to the extent the Commission believes it has authority to make substantive “modernization” of the Private Express Statutes regulations, it should refrain from doing so at this time. Instead, the Commission should work with Congress in defining universal service, and work with the Postal Service and mailers to identify the Postal Service’s true business needs, collaborate on redesigning products appropriate for today’s communications market, reduce costs, and build on the Postal Service’s competitive advantages. For the Postal Service to survive and flourish, it must find new ways to meet the hardcopy communication needs of today. It cannot simply raise rates on the declining products it offers today.

V. CONCLUSION

The National Postal Policy Council and the National Association of Presort Mailers respectfully urge the Commission not to consider the Private Express Statutes regulations separately from other important national postal policies, such as the universal service obligation. We ask the Commission to consider

these comments and to invite further comments at such time as the COVID-19 pandemic subsides and business activity can return to a more normal condition.

Respectfully submitted,

Robert Galaher
Executive Director and CEO
NATIONAL ASSOCIATION OF PRESORT
MAILERS
PO Box 3552
Annapolis, MD 21403-3552
(877) 620-6276

By: /s/ William B. Baker
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20004
(571) 317-1922
wbaker@potomaclaw.com

Arthur B. Sackler
Executive Director
NATIONAL POSTAL POLICY COUNCIL
1629 K Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 508-3687