SUPPLEMENTARY INFORMATION:

Background

Section 4204 of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, (''ERISA'' or the ''Act''), provides that a bona fide arm's-length sale of assets of a contributing employer to an unrelated party will not be considered a withdrawal if three conditions are met. These conditions, enumerated in section 4204(a)(1) (A)–(C), are that—

(A) The purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contributions base units for which the seller was obligated to contribute;

(B) The purchaser obtains a bond or places an amount in escrow, for a period of five plan years after the sale, in an amount equal to the greater of the seller's average required annual contribution to the plan for the three plan years preceding the year in which the sale occurred or the seller's required annual contribution for the plan year preceding the year in which the sale occurred (the amount of the bond or escrow is doubled if the plan is in reorganization in the year in which the sale occurred); and

(C) The contract of sale provides that if the purchaser withdraws from the plan within the first five plan years beginning after the sale and fails to pay any of its liability to the plan, the seller shall be secondarily liable for the liability it (the seller) would have had but for section 4204.

The bond or escrow described above would be paid to the plan if the purchaser withdraws from the plan or fails to make any required contributions to the plan within the first five plan years beginning after the sale.

Additionally, section 4204(b)(1) provides that if a sale of assets is covered by section 4204, the purchaser assumes by operation of law the contribution record of the seller for the plan year in which the sale occurred and the preceding four plan years.

Section 4204(c) of ERISA authorizes the Pension Benefit Guaranty Corporation (''PBGC'') to grant individual or class variances or exemptions from the purchaser's bond/escrow requirement of section 4204(a)(1)(B) when warranted. The legislative history of section 4204 indicates a Congressional intent that the sales rules be administered in a manner that assures protection of the plan with the least practicable intrusion into normal business transactions. Senate Committee on Labor and Human Resources, 96th Cong., 2nd Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations 16 (Comm. Print, April 1980); 128 Cong. Rec. S10117 (July 29, 1980). The granting of an exemption or variance from the bond/escrow requirement does not constitute a finding by the PBGC that a particular transaction satisfies the other requirements of section 4204(a)(1). Such questions are to be decided by the plan sponsor in the first instance, and any disputes are to be resolved in arbitration. 29 U.S.C. 1382, 1399, 1401.

Under the PBGC's regulation on variances for sales of assets (29 C.F.R. Part 2643, recodified at 29 C.F.R. Part 4204), a request for a variance or waiver of the bond/escrow requirement under any of the tests established in the regulation (sections 4204.12–4204.13) is to be made to the plan in question. The PBGC will consider waiver requests only when the request is not based on satisfaction of one of the three regulatory tests or when the parties assert that the financial information necessary to show satisfaction of one of the regulatory tests is privileged or confidential financial information within the meaning of section 552(b)(4) of the Freedom of Information Act.

Under section 4204.22 of the regulation, the PBGC shall approve a request for a variance or exemption if it determines that approval of the request is warranted, in that it—

(1) Would more effectively or equitably carry out the purposes of Title IV of the Act; and

(2) Would not significantly increase the risk of financial loss to the plan.

Section 4204(c) of ERISA and section 4204.22(b) of the regulation require the PBGC to publish a notice of the pendency of a request for a variance or exemption in the Federal Register, and to provide interested parties with an opportunity to comment on the proposed variance or exemption.

The Request

The PBGC has received a request from Dunham-Bush, Inc. (the ''Buyer'') for an exemption from the bond/escrow requirement of section 4204(a)(1)(B) with respect to its purchase of certain of the assets of Allagash Fluid Controls, Inc., which was formerly known as Dunham-Bush, Inc. (the ''Seller'') on January 6, 1995. In the request, the Buyer represents among other things that:

1. The Buyer was established on January 6, 1995.

2. Included among the assets purchased was a plant in Harrisonburg, Virginia, for which the seller had an obligation to contribute to the Sheet Metal Workers' National Pension Fund (the ''Plan'').

3. The Buyer has assumed the Seller's obligation to contribute to the Plan at the purchased operations, and continues to make contributions for substantially the same number of contribution base units as the Seller.

4. The Seller has agreed to be secondarily liable for any withdrawal liability it would have had with respect to the sold operations (if not for section 4204) should the Buyer withdraw from the Plan within the five plan years following the sale should the Buyer withdraw and fail to pay withdrawal liability.

5. The estimated amount of the unfunded vested benefits allocated to the Seller with respect to the operations sold is $3,000,000.

6. The amount of the bond/escrow required under section 4204(a)(1)(B) is $545,409.29.

7. On December 29, 1995, the Buyer placed in escrow an amount equal to the amount required under 4204(a)(1)(B).

8. The Buyer submitted its financial statement as of January 26, 1996. According to that statement, the Buyer's net tangible assets are just over $20 million.

9. A copy of the request, excluding the financial statements of the Buyer, was sent to the Plan and to the collective bargaining representative of the Seller's employees.

Comments

All interested persons are invited to submit written comments on the pending exemption request to the above address. All comments will be made a part of the record. Comments received, as well as the relevant non-confidential information submitted in support of the request, will be available for public inspection at the address set forth above.

Issued at Washington, D.C., on this 16th day of December, 1996.

Martin Slate,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 96–32360 Filed 12–19–96; 8:45 am]

BILLING CODE 7708–01–P

POSTAL RATE COMMISSION

[Order No. 1145; Docket No. C96–1]

Complaint of Coalition Against Unfair USPS Competition; Declaratory Order Finding Complaint to be Justified and Providing For Further Proceedings

Before Commissioners: Edward J. Gleiman, Chairman; H. Edward Quick, Jr., Vice-

Chairman; George W. Haley; and W.H. ''Trey'' LeBlanc III
December 16, 1996.

I. Introduction and Procedural History

This somewhat unusual proceeding concerns a complaint lodged by private-sector competitors of the Postal Service against the Service's provision of a packaging service which it is offering under the name ''Pack & Send.'' This service, which is performed by Postal Service personnel for postal customers according to a variable schedule of fees, has never been submitted for the Commission's consideration and possible recommendation in a mail classification or rate change proceeding. Thus, it is not a service recognized within the comprehensive Domestic Mail Classification Schedule which officially codifies all services provided in the Nation's postal system, and the fees charged by the Postal Service have never been reviewed or recommended. On this basis alone, the Complainant asks the Commission to find that the Postal Service is charging rates which do not conform to the policies and requirements set out in Title 39 of the United States Code.

This docket was initiated by a Complaint filed by the Coalition Against Unfair USPS Competition (CAUUC) on May 23, 1996. Complainant identifies itself as a coalition consisting of organizations and individuals doing business in the Commercial Mail Receiving Agency (''CMRA'') industry, and states that ''[e]ach of the individual stores offer pack and send services as part of the overall retail value-added services provided in these stores.'' Complaint at 2. Inasmuch as the Postal Service is rendering a packaging service without first having requested a recommended decision on the service and its rates from the Commission, Complainant alleges that the Postal Service is charging rates which do not conform to the policies of the Postal Reorganization Act. Additionally, the Complaint alleges, by offering the Pack & Send service the Postal Service ''is in effect going into direct competition with the CMRA industry * * *.'' Ibid.

Accompanying the Complaint are several attachments intended to document particulars of the Pack & Send service, its competitive purpose, and the terms under which it is being offered. Complaint, Attachments 2–3, 5. Also included is an affidavit reporting the experience of an individual customer who purchased Pack & Send service in a Postal Service retail store in Anchorage, Alaska. Id., Attachment 4.

The Postal Service responded to the Complaint in an Answer filed on June 24, 1996. The Answer denies most of the Complaint's allegations, but concedes that the Service ''has begun to offer packaging on an experimental basis at a few selected retail outlets.'' Answer at 2. The Service also denies that Pack & Send is a ''bundled'' service that necessarily entails mailing, but admits that the packaging service has not been the subject of a rate or classification proceeding pursuant to 39 U.S.C. 3622 or 3623 respectively, and that the Domestic Mail Classification Schedule does not include a separate classification for packaging. Id. at 2, 5 and 7. However, the Postal Service also takes the position that the Complaint is not properly before the Commission, on the grounds that Pack & Send is no more than a ''limited parcel packaging trial,'' (id. at 8), and that it ''is not a postal service, within previous interpretations of the term.'' Id. at 9.

Three days after filing its Answer, the Postal Service submitted a motion to dismiss the proceeding with prejudice ''on the grounds that the subject matter of this proceeding does not fall within the scope of 39 U.S.C. 3662.'' Motion of the United States Postal Service to Dismiss Proceeding, June 27, 1996, at 1. The Service argues that Pack & Send is a service that properly belongs in the category of ''non-postal'' services, over which the Commission exercises no jurisdiction, and relies on Commission precedent and judicial authority for support.

In Order No. 1128, issued July 30, 1996, the Commission denied the Service's motion to dismiss, finding that some of the information proffered by Complainant would tend to support an inference that Pack & Send is a postal service. In light of its tentative conclusion that available facts did not warrant a summary determination, and that the Complaint might be justified, the Commission decided to conduct formal proceedings in conformity with 39 U.S.C. 3624, established a deadline for filing notices of intervention, and appointed W. Gail Willette, Director of the Commission's Office of the Consumer Advocate, to represent the general public in the proceeding. Complainant was also directed to provide a statement estimating the amount of time it would require to develop and file a direct case. PRC Order No. 1128 at 13. On the same date, the Chairman issued a notice designating Commissioner George W. Haley to serve as Presiding Officer in the docket.

On September 13, the Complainant proffered its direct case, accompanied by a Motion for Summary Judgment,[1] and a supporting memorandum. Recognizing that disposition of Complainant's motion could ''involve a final determination of the proceeding[,]'' (39 C.F.R. 3001.27(a)(7)), the Presiding Officer certified it to the full Commission on the same date. P.O. Ruling C96–1/2 at 1.

In Order No. 1135, issued October 4, 1996, the Commission noted the parties' consensus that only one issue—namely, the ''postal'' character of Pack & Send—requires resolution by the Commission, and that this consensus greatly simplifies the case. However, the Commission found that it would not be appropriate to conclude the proceeding by granting Complainant's motion, in light of the existence of genuine issues of material fact and the requirements of procedural fairness. Consequently, the Commission declined to curtail the opportunities of the Postal Service or any other interested party to develop further relevant and material information for inclusion in the record of the proceeding, but appropriately limited that evidence to factual matters that bear directly on the ''postal'' or ''non-postal'' character of the Pack & Send service. Although the Commission found that the procedural status of CAUUC's complaint made it inappropriate to reach the merits on the CAUUC Motion for Summary Judgment, it stated an expectation that the Presiding Officer would expedite the initial phase of Docket No. C96–1 in light of the urgent considerations of competitive harm cited by Complainant. PRC Order No. 1135 at 4–7.

A prehearing conference was held in this docket on October 8, 1996.[2] In accordance with the procedural schedule established in P.O. Ruling C96–1/6, an opportunity was provided for a hearing on Complainant's direct case. However, the Postal Service and all other parties declined the opportunity to conduct oral cross-examination. The Presiding Officer extended the deadline for filing rebuttal testimony to November 1, 1996, in granting a Postal Service motion in part. P.O. Ruling C96–1/7. The deadline was further extended as requested in a second Postal Service motion. P.O. Ruling C96–1/8. A hearing was

[1] Complainant Coalition Against Unfair USPS Competition's Direct Case; Motion of Complainant for Summary Judgment, September 13, 1996. On September 16, Complainant filed a related motion which sought to compel additional responses by the Postal Service to Complainant's discovery requests in the event its Motion for Summary Judgment was denied. Complainant Coalition Against Unfair USPS Competition's Alternative Motion to Compel Discovery, September 16, 1996.

[2] *See* Transcript Volume 1.

conducted on the rebuttal testimony of Postal Service witness Patricia M. Gibert on November 12, 1996.[3]

Initial briefs were filed by the Complainant, the Postal Service, and OCA on November 22, 1996. The same parties submitted reply briefs on November 27, 1996.

In light of the foregoing proceedings, the central issue posed by the Complaint is now ripe for determination.

II. Criteria for Distinguishing ''Postal'' From ''Non-Postal'' Services

As all parties to this proceeding recognize, a determination of the merits of the instant Complaint depends upon applying legal criteria for distinguishing ''postal'' from ''non-postal'' service to the facts contained in record evidence. Thus, it is appropriate to begin with a review of these criteria and the history of their application in prior proceedings.

A. Early Institutional History

In the first and second omnibus rate proceedings before the Commission, the Postal Service did not include any proposed changes in fees for special services in its requests.[4] Shortly after filing its request in Docket No. R76–1, the Postal Service gave separate notice of its intention to increase fees for 11 special services after a period for submission of written comments, and provided details of these changes to the Commission for informational purposes only. A mailer organization, Associated Third Class Mail Users (ATCMU), filed a suit in U.S. District Court to enjoin implementation of the changes in special service fees, arguing that fees could not be changed without submitting a request to the Commission. The District Court agreed with ATCMU, finding with respect to the 11 special services at issue:

> It is clear that nearly all of these other services are very closely related to the delivery of mail. The single possible exception is the selling of money orders, since they can be used equally as well without being delivered by mail. But it does seem that the vast majority of money orders sold at post offices are actually sent by mail. Therefore, it appears safe to say that all of these services would be considered ''postal services'' in ordinary parlance.

Associated Third Class Mail Users v. *Postal Service*, 405 F.Supp. 1109, 1115 (D.D.C. 1975). The court also observed that ''the fees set for these services have substantial public effect[,]'' (ibid.), which apparently reinforced its conclusion that the services were ''postal'' in nature. It then went on to reject the Postal Service's claim of unilateral authority to change fees applicable to the special services, concluding from its analysis of the Reorganization Act, ''that the Postal Rate Commission has jurisdiction over changes in the fees for the services at issue here. Therefore, * * * the Postal Service cannot increase its fees for these services until it has complied with the [formal rate-change procedures] of Chapter 36 of the Act.'' Id. at 1118.

On review, the Court of Appeals affirmed the District Court's judgment, without adopting all of its reasoning. The court said:

> Giving ''postal services'' a plain meaning, all of the services here at issue may reasonably be so classified. With one possible exception, each clearly involves an aspect in the posting, handling and delivery of mail matter. (citation omitted) * * * As for the one possible exception—money orders—it is undisputed that the great majority of these are sent through the mail and that therefore the provision of money orders may itself reasonably be viewed as intimately a part of postal services * * *
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> * * * * *
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> In sum, we agree with the district court that a plain reading is the proper reading of section 3622: ''postal services'' as used there is a generic term and was meant to include all the special services here at issue.

National Association of Greeting Card Publishers v. *Postal Service*, 569 F.2d 570, 596–97 (D.C. Cir. 1976), *vacated on other grounds*, 434 U.S. 884 (1977) (commonly known as ''NAGCP I''). (Emphasis added.)

In Docket No. R76–1, after the Postal Service had supplemented its initial rate request to include special services in response to the District Court's decision in ATCMU, the Commission addressed the question of which services are within its jurisdiction for ratesetting purposes, and which are not. In the Commission's view, a number of the services furnished by the Postal Service in addition to the actual collection, transmission, and delivery of mail ''are clearly nonpostal in character.'' PRC Op. R76–1, Vol. 1, at 266. The Commission discussed the principles governing its determinations of ratesetting jurisdiction for individual special services in an appendix to its opinion,[5] but also stated as its general conclusion:

> Special postal services—that is, those which fall within the ambit of section 3622—are services other than the actual carriage of mail but supportive or auxiliary thereto. They enhance the value of service rendered under one of the substantive mail classes by providing such features as added security, added convenience or speed, indemnity against loss, correct information as to the current address of a recipient, etc. We believe that this standard is consistent with the decision in *Associated Third Class Mail Users, supra,* that special postal fees are within the jurisdiction of the Commission.

Id. at 266–67. (Footnotes omitted.) (Emphasis added.)

B. Subsequent Developments

There have been few subsequent disputes regarding the ''postal'' or ''non-postal'' character of service innovations adopted by the Postal Service.[6] However, one area in which a ''postal'' versus ''non-postal'' dispute has been litigated recently concerns the Postal Service's provision of philatelic services.

The Postal Service is explicitly authorized ''to provide philatelic services'' in a provision that is separate from the grant of power to provide all aspects of mail service. 39 U.S.C. 404(a)(1), (a)(5). Courts presented with controversies regarding philatelic services have generally interpreted these portions of the Reorganization Act to mean that the Postal Service has authority to exercise broad and unilateral discretion over philatelic operations.[7] They have also found that the rights and procedural safeguards provided for users of the mail in the Reorganization Act do not extend to users of philatelic services.[8] On these grounds, courts have found that philatelic customers have no enforceable right of action against the Postal Service for allegedly improper philatelic activities.[9]

In the single Commission complaint proceeding that has involved philatelic services, the disposition is consistent with the judicial treatment described above. In Docket No. C95–1,

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[3] *See* Transcript Volume 2.

[4] See PRC Op. R71–1, June 5, 1972; PRC Op. R74–1, August 28, 1975.

[5] See PRC Op. R76–1, Vol. 2, Appendix F.

[6] More commonly, litigation has involved claims that a service change contemplated or implemented by the Postal Service is a ''change in the nature of postal services'' requiring the submission of a proposal to the Commission under section 3661; the ''postal'' quality of the service has not been in controversy. The first dispute of this type was litigated in *Buchanan* v. *United States Postal Service*, 375 F.Supp. 1014 (N.D. Ala. 1974), affirmed in part, 508 F.2d 259 (5th Cir. 1975), in which a Postal Service nationwide plan to reconfigure retail facilities was found to be a ''change in the nature of postal services,'' thus requiring a request and proceedings under section 3661. The Postal Service subsequently filed a complying request, and proceedings were held in Docket No. N75–1.

[7] *Morris et al.* v. *Runyon et al.*, 870 F.Supp. 362, 368–69 (D.D.C. 1994), appeal dismissed, No. 94–5344 (D.C. Cir. 1994).

[8] *Unicover et al.* v. *United States Postal Service*, 859 F.Supp. 1437, 1446 (D. Wyo. 1994), appeal dismissed, No. 94–8085 (10th Cir. 1994). See also Morris, supra, at 368–69.

[9] Morris, supra, at 370–71; Unicover, supra, at 1446.

complainant David B. Popkin challenged planned increases in the shipping and handling charges for orders placed with the Postal Service Philatelic Fulfillment Service (PFSC) catalog sales program. The Postal Service moved to dismiss the proceeding, primarily on the ground that, ''the subject matter * * * concerns philatelic services which are not within the scope of 39 U.S.C. 3662.'' Motion of the United States Postal Service to Dismiss Proceeding, April 13, 1995, at 2. (Footnote omitted.) The Service also claimed that the absence of the word ''fee'' from section 3662 should be construed to preclude adjudication of complaints concerning fees for postal services, as distinguished from rates. Id. at 3, n. 3.

In Order No. 1075, the Commission rejected the latter argument, concluding that, ''complaints concerning fees for postal services do fall within the scope of section 3662[.]'' PRC Order No. 1075, September 11, 1995, at 5. However, the Commission concurred with the Postal Service's primary jurisdictional argument, based on an application of the District Court's standard in the ATCMU decision:

> Applying the rationale of the District Court to the facts involved in the present complaint, the Commission finds that the services involved—the handling and shipping of catalog orders placed with the Philatelic Fulfillment Service Center—are not closely related to the delivery of mail and, therefore, the charges for such services do not constitute ''fees for postal services'' within the scope of section 3662 of title 39, United States Code.

Ibid. Having reached this conclusion, the Commission dismissed the complaint.[10]

III. Applying the Criteria to the Facts

A. Which Test or Tests Should Apply?

Determining whether the Pack & Send service is ''postal'' or ''non-postal'' in character is complicated by a disagreement among the parties in this case regarding which legal standard or standards should govern that determination. Among other arguments they present, both Complainant and the OCA claim that the Pack & Send service should be deemed ''postal'' on the same basis on which the *ATCMU* and *NAGCP* courts found money orders to constitute a postal service: the ''great likelihood'' that use of the service will be coupled with mailing of the parcel so prepared. OCA Initial Brief at 6; CAUUC Brief at 12–13. The Postal Service argues against use of this so-called ''statistical'' test, citing misgivings expressed in the R76–1 opinion regarding its application to money orders, and stating that it would be ''unwise for the Commission now to rely on allegations concerning the proportion of postal-packaged parcels that are also mailed in determining whether packaging service is a postal service.'' Postal Service Initial Brief at 16. The Postal Service argues for application of a ''structural'' analysis of the Pack & Send service, which it claims the Commission applied to certain special services in the R76–1 opinion, and under which the Service argues that Pack & Send is ''non-postal'' in character. Id. at 9–17; Postal Service Reply Brief at 3–5. Both Complainant and the OCA challenge the validity of the Postal Service's ''structural'' standard.

It is understandable that each party would advance the standard which it considers to provide the strongest support of its position on the ''postal'' or ''non-postal'' nature of Pack & Send. However, from the Commission's perspective, it is neither necessary nor productive to canonize any one particular test in preference to, or to the exclusion of, every other potentially applicable criterion. The courts have stated that the fundamental inquiry to be made is whether the service under scrutiny is a ''postal service'' in ordinary parlance, the ''plain meaning'' of which is established by reference to the routine postal functions of accepting, handling and delivering mail matter. *ATCMU, supra,* at 1115; *NAGCP, supra,* at 596–97. It is also appropriate to consider the extent to which fees set for the service have ''substantial public effect,'' as suggested in the *ATCMU* opinion. As the Commission has recognized in prior proceedings, most notably Docket No. R76–1, there are a variety of analytical lenses through which potential relationships to customary postal functions may be usefully viewed. PRC Op. R76–1, Appendix F, *passim*.[11] Accordingly, in considering the ''postal'' or ''non-postal'' character of the Pack & Send service, the Commission will assess the utility and persuasive force of all the theories and interpretations of the factual record advanced by the parties to this proceeding.

B. Relationship to Non-Postal Statutory Functions of the Postal Service

As was noted in the earlier review of criteria for distinguishing ''postal'' from ''non-postal'' services, one conclusive basis on which a service can be found to be ''non-postal'' applies where the service pertains exclusively to performance of a statutory function of the Postal Service that is distinct from the carriage of mail. Philatelic sales and services, performed pursuant to the separate grant of authority in 39 U.S.C. 404(a)(5), exemplify such statutorily non-postal services.

The Postal Service makes no such claim regarding the Pack & Send service. Instead, the Service characterizes the service as ''an enhancement to the retail sale of packaging materials[,]'' which is intended ''to provide a higher level of service that our existing customers have requested.'' Rebuttal Testimony of Patricia M. Gibert, USPS–RT–1, at 3. Consequently, as Complainant has argued, the Pack & Send service is unlike the Postal Service's sale of migratory waterfowl stamps or distribution of information pertaining to civil service examinations, which fulfill a distinctly governmental, non-postal function. Therefore, the Pack & Send service cannot be found ''non-postal'' on this particular ground.

C. Intrinsic and ''Structural'' Features of the Pack & Send Service

Although there appears to be little disagreement regarding the basic factual details of the Pack & Send service, the parties characterize the service, and portray its relationship to mailing, very differently. The Service espouses what might be called a ''free-standing'' view of Pack & Send: a mere extension of the sale of packaging materials, with no relation to any aspect of mail service nor to any operational objective or benefit of the Postal Service. USPS–RT–1 at 3–4; Initial Brief at 5–7, 11–17. By contrast, Complainant and the OCA present a perspective in which the Pack & Send service transaction is intertwined with mailing. OCA argues that the service is postal in character because ''packing'' and ''sending'' are integrated in a ''seamless'' operation that intermingles packaging and mailing activities, in a transaction throughout which the Postal Service retains custody of the item tendered by the customer for service. OCA Initial Brief at 1–4.

In the Commission's opinion, the Postal Service's characterization of the Pack & Send service is seriously flawed in several respects. Moreover, it is fundamentally at odds with the significance of adding a parcel

[10] Complainant subsequently petitioned for reconsideration of the Commission's determination to dismiss the Complaint. The Commission denied his motion in Order No. 1088, issued November 15, 1995.

[11] The Postal Service summarizes some of these considerations in its Initial Brief at 10–12.

packaging service to the current array of services offered at postal facilities.

First, the Commission rejects the Postal Service's blanket assertion that Pack & Send service ''is not an aspect of the acceptance, handling, or delivery of the mail[.]'' Postal Service Initial Brief at 6. The record clearly establishes that Pack & Send service is an optional aspect of the acceptance of parcels for mailing. A postal customer may either tender a finished parcel to a window clerk for mailing, or purchase the Pack & Send service for packaging the contents. In either case, the criterion of mailability applies; the Postal Service will not provide Pack & Send service for non-mailable contents. USPS–RT–1 at 6, n. 2; Exhibit USPS–1B. In response to a question from Chairman Gleiman, witness Gibert testified: ''The first question [Postal Service employees] are trained to ask is, is the item mailable?'' Tr. 2/204. When asked why this determination is important, the witness stated, in part, ''[b]ecause a significant number of the pieces that will be packed will also be sent via Postal Service[.]'' Id. at 205. Thus, acceptability for mailing applies equally to finished parcels and materials tendered for Pack & Send service.

Second, the Commission finds no persuasive force in the Postal Service's arguments that Pack & Send service does not achieve any operational objective of, or confer any operational benefit upon, the Postal Service. As an initial matter, these assertions are unproven on the record and far from self-evident. For example, by complying with packaging requirements prescribed in a Postal Service Training Manual, see Tr. 2/72, a parcel prepared in a Pack & Send transaction would be unlikely to suffer damage to the contents or cause damage to postal equipment,[12] and thereby confer an operational benefit to the Service. More importantly, operational objectives and benefits would not appear to be particularly useful reference criteria for establishing that a given service is non-postal. By restricting scrutiny to considerations internal to the Postal Service, employing these criteria would neglect the needs of, and potential benefits to, postal customers. Moreover, it is unlikely that several current special services subject to the Commission's mail classification and rate jurisdiction would pass muster as ''postal'' under such criteria. As witness Gibert confirmed in response to a question from Chairman Gleiman, ''[i]n the case of certificate of mailing [service], it appears that the benefit is to the customer.'' Id. at 233.

Finally, the Commission is in fundamental disagreement with the Postal Service's characterization of the Pack & Send service and its significance in the universe of postal and non-postal services. Contrary to the Service's formalistic insistence on brief that packaging ''cannot properly be called 'mail preparation' '' because the latter is a term of art ''not applied to the non-technical activities that every mailer must undertake to enter an item into the mail,'' Postal Service Initial Brief at 5, n. 1, the Commission concludes that, in ordinary parlance, Pack & Send service constitutes mail preparation for a fee. It also constitutes an entirely new form of access to the parcel services offered by the Postal Service, which allows a potential parcel mailer to tender the items they wish to send, rather than finished packages. For this reason, Pack & Send can properly be viewed as a value-added special service for parcels; the added value results from the alternative form of acceptance it makes possible.

For these reasons, the Commission concludes that the Pack & Send service is both structurally related to mailing in the acceptance function, and intrinsically postal. The ability of Pack & Send customers, who are so disposed, to purchase the packaging service without also purchasing a category of parcel delivery service does not alter these conclusions.

D. Correlation Between Use of Pack & Send Service and Use of the Mail

Both the Complainant and OCA argue that the Pack & Send service should be found to be ''postal'' on the same ground that the *ATCMU* and *NAGCP* courts found the sale of money orders to be ''postal'': that the vast majority of transactions lead to actual use of the mail. Complainant cites the Postal Service's rebuttal testimony as establishing that a typical Pack & Send transaction involves the purchase of postage. CAUUC Brief at 9. CAUUC also presents the affidavits of Michael L. Phillips and Edward N. Frye, both of whom testify that only a very small percentage—1 percent or less—of the parcels packed by their stores will not be mailed or shipped by those stores. Tr. 2/82, 88; CAUUC Initial Brief at 5. Citing the same affidavits and witness Gibert's concession that ''the likelihood of [Pack & Send customers] mailing is fairly high[,]'' OCA argues that the ''great likelihood that Pack and Send will be coupled with mailing would constitute a dispositive tendency * * *'' toward a finding that the Service is ''postal'' under the *ATCMU* court's standard. OCA Initial Brief at 5–6.

The Postal Service argues that CAUUC's and OCA's invocation of the test it labels ''statistical'' is both inconsistent with the ''structural'' standard it espouses and flawed. The first flaw in the approach, the Service argues, ''is that the record is devoid of this statistic.'' Postal Service Reply Brief at 5. The Service characterizes the Phillips and Frye affidavits as ''an attempt to fabricate an ersatz statistic'' because the record is devoid of evidence that would support an analogy between the packaging operations in affiants'' stores and the Postal Service's implementation of Pack & Send service. Id. at 5–6. Additionally, the Service argues that the record rebuts CAUUC's and OCA's conclusion that the sale of Pack & Send is combined with the sale of postage for accounting purposes, because a separate Account Identifier Code (AIC) has been established for Pack & Send transactions. Id. at 6–7.

Notwithstanding the Postal Service's arguments against application of what it calls the ''statistical'' standard, the Commission agrees with Complainant and the OCA that the available information regarding Pack & Send service indicates a high correlation between purchase of the Pack & Send service and use of the mail for the parcel so prepared. The Postal Service concedes it has no records that would indicate how many Pack & Send transactions to date have culminated in a parcel mailing, Reply Brief at 6, but witness Gibert's best ''judgmental answer'' is that ''a fairly high proportion are shipped.'' Tr. 2/189. Furthermore, while the Phillips and Frye affidavits submitted by Complainant report experience in private stores, not Postal Service operations, they serve to confirm the common-sense expectation that a customer who brings an unpackaged item into a facility that offers both packing and shipping services is likely to use both. Therefore, in the Commission's view, the available facts justify a reasonable degree of certainty that the Pack & Send service would satisfy the standard applied by the *ATCMU* court to money orders. The Commission agrees with OCA that the likely coupling of the service with parcel mailing establishes a ''dispositive tendency'' toward a finding that the Service is ''postal.''

E. Public Representations and Public Effect

The record of this proceeding is replete with public declarations of the Postal Service, and inducements to

[12] As witness Gibert illustrated this point, in ''follow[ing] our own packaging requirements'' a Postal Service employee ''wouldn't use string'' in securing the parcel, because ''[i]t could get hung up in machinery.'' Tr. 2/239.

potential customers, that present Pack & Send service conjunctively with the mailing of parcels, or in the context of the parcel mailing services it offers. The Report of the Postmaster General for 1995 describes Pack & Send as ''a value-added service designed to strengthen the Postal Service's retail parcel service while adding an important convenience to customers.'' Tr. 3/264. See also Tr. 2/38, 2/227. Part of a written response of the Postmaster General to Chairman McHugh of the Subcommittee on the Postal Service of the House Committee on Government Reform and Oversight describes Pack & Send as ''[a] value added service that allows customers to bring items to selected post offices and have them packaged and mailed.'' Tr. 3/271. Internal communications of the Postal Service have contained similar characterizations. Tr. 2/36, 43, 49, 51–52. Advertising has urged potential customers to ''Let Us Box, Pack and Ship Your Gifts,'' and offered the inducement of discount coupons applicable to the cost of packing material and labor. Tr. 2/45, 42, 55, 59–60.

All these materials would lead an objective observer to conclude that the Pack & Send service is a new feature and an enhancement of the Postal Service's pre-existing parcel delivery services, and that in offering Pack & Send the Postal Service is pursuing both potential users of the service and additional use of parcel services. The Postal Service does not dispute the authenticity of any of these materials.[13]

The public effect of offering the Pack & Send service appears to be minor to date, as witness Gibert testifies that the ''current sales average is about one parcel packaging transaction per business day per Pack & Send site.'' USPS–RT–1 at 4. However, should the Postal Service decide to expand the availability of the service significantly, the potential competitive injury anticipated by CAUUC could occur, depending on the Service's success in attracting Pack & Send customers. The Phillips and Frye affidavits establish that a customer for a store's packaging service will almost certainly purchase shipping in the same transaction. Therefore, diversion of a potential packaging customer from a store to the Postal Service would represent not only the loss of the packaging business, but also whatever revenue would be associated with the shipping transaction. This being the case, the levels of fees charged for Pack & Send service are likely to have a significant public effect, particularly on stores in the Commercial Mail Receiving Agency industry.

F. General Conclusion

Application of the legal standards that have been employed in prior decisions to distinguish ''postal'' from ''non-postal'' services leads the Commission to conclude that the Pack & Send service is definitely ''postal'' in character. By offering postal customers a parcel preparation service for items they bring to retail facilities, the Postal Service has introduced a wholly new method of accepting mailable items for ultimate delivery as parcels. Thus, Pack & Send service has a direct structural relationship to the provision of postal services. Intrinsically, it is a value-added service available for the categories of parcel service provided by the Postal Service; the locus of the added value is the alternative form of acceptance it provides. For this reason, Pack & Send is a service ''other than the actual carriage of mail but supportive or auxiliary thereto[,]'' which ''enhance[s] the value of service rendered under * * * substantive mail classes[,]'' and thus satisfies the general criterion for ''postal'' services formulated by the Commission in Docket No. R76–1. PRC Op. R76–1 at 267. In common parlance, as well as under these more analytical legal tests, it is a postal service.

In addition, as might reasonably be expected, there is a high correlation between a postal customer's use of the Pack & Send service and mailing of the finished parcels it produces. This is the very response that the Postal Service's public representations outside this proceeding anticipate, and that the Service's advertising to the public seeks to produce. Furthermore, because of this effective linkage between parcel preparation and mailing, the availability of the Pack & Send service and the level of its fees have the potential for causing a significant impact on competing stores in the private sector that offer packaging service and access to alternative means of shipping parcels.

For all these reasons, the Commission finds that the Pack & Send service is ''postal'' in character, and that establishment of the service and recommendations concerning its fees are functions that the Postal Reorganization Act contemplates to be within the jurisdiction of the Postal Rate Commission.

IV. Allegations Regarding Pack & Send Costs and Pricing

While the parties apparently concur that the costs of providing the Pack & Send service and the levels of the fees set for it by the Postal Service are matters of secondary importance in this proceeding, in comparison with a determination of the service's postal or non-postal character, they have been subjects of controversy. CAUUC's Complaint alleges that, ''the Postal Service is not pricing this service based on any attribution of costs[,]'' but instead on ''what our competitors charge.'' Complaint at 3. In her rebuttal testimony, witness Gibert testifies that the price set for the Pack & Send service is based on the cost of packaging material, together with the cost of the labor time involved in performing the packaging service, plus a markup of approximately 60 percent. USPS–RT–1 at 2; Tr. 2/133–34. Regarding the prices charged for the service, which are not uniform for all locations that offer it, witness Gibert testifies that the Service selects ''prices in the upper end of the local market'' for privately-offered packaging services. USPS–RT–1 at 2–3. On brief, the Postal Service claims that it ''has applied appropriate, generous markups in calculating the prices for its packaging service,'' and also ''has affirmatively priced its packaging service * * * to avoid underpricing with respect to alternative sources.'' Postal Service Initial Brief at 17. (Footnote omitted.)

Both Complainant and the OCA argue, to the contrary, that the Postal Service has set the prices for Pack & Send service at levels that are unlikely to recover the average costs of providing the service. Both parties argue that, at the reported average labor cost of $3.24 per Pack & Send transaction, a labor rate of $29.04 per hour, and a 60 percent markup of the labor cost, the average Pack & Send transaction would have to be accomplished in 4.2—minutes which CAUUC characterizes as ''unbelievable'' (Initial Brief at 14) and OCA as ''preposterous'' (Initial Brief at 9). Based on the reported costs of administering the service (Tr. 3/271), CAUUC also calculates an average of $7.22 per transaction, which would also require that labor time be ''minimal.'' Initial Brief at 14.

Finally, both Complainant and the OCA argue that Pack & Send prices are likely to be set too low in their respective markets in light of the higher wage rates paid by the Postal Service to its unionized work force. CAUUC Initial Brief at 14–15; OCA Initial Brief 10–13. On the basis of these analyses and

[13] However, witness Gibert did testify that, ''we have subsequently said no promotional materials may be produced in this regard unless they get cleared by my organization, because of some of the issues around wording in the coupons.'' Tr. 2/228.

considerations, OCA claims ''that the Postal Service is offering Pack and Send at predatory prices.'' Id. at 7.

In its reply brief, the Postal Service denies the claims of predatory pricing and cross-subsidization, and challenges the calculations on which CAUUC and OCA base their arguments that Pack & Send prices are not likely to be compensatory. The Service notes that the parties' calculations used the retail prices of packaging material, rather than their costs to the Postal Service, and that substituting the latter would leave enough labor cost to allow for almost 7 minutes of clerk time per transaction. Postal Service Reply Brief at 9–10. Additionally, the Service argues that the parties' calculations fail to take into account that the average hourly rate for labor used in Pack & Send transactions is likely to be lower than the average hourly rate for window and window distribution clerks, who are generally senior employees, because in some instances the packaging service is performed by part-time or lower-wage postal employees. Id. at 10–11. To illustrate these points, the Service appends a table which purports to demonstrate that the average Pack & Send charge could cover costs and bear some markup with varying amounts of labor per transaction. Id., Table 1.

After examining the scant record evidence available on these issues, the Commission concludes that it is simply impossible to reach any informed conclusion regarding the costs of providing the Pack & Send service, or whether the fees charged by the Postal Service are compensatory. Apparently the prices charged for the service have not been uniform across all areas where Pack & Send has been offered,[14] and comprehensive volume and revenue information is unavailable. While the Postal Service purportedly begins with labor cost in arriving at Pack & Send prices, that figure (or range of figures) has not been quantified on the record of this proceeding.[15] As CAUUC and OCA point out, costs recovery would depend on the duration of the transaction, and data on this critical operational question are likewise unavailable. Finally, there is no information concerning price levels that prevail in the Commercial Mail Receiving Industry for competing packaging services. These are all matters that would either require or warrant exploration should the Pack & Send service be considered on its merits in a proceeding conducted pursuant to sections 3622 and 3623.

V. Disposition of the Complaint and Provision For Further Proceedings

Having found that the Complaint of CAUUC is justified, the Commission must decide on an appropriate course of action. Complainant asks the Commission to declare its finding that Pack & Send is a postal service being offered in violation of the Reorganization Act, and to commence a second phase of this docket which would consider the Pack & Send service on its merits pursuant to sections 3622 and 3623. CAUUC Initial Brief at 16. Similarly, OCA argues that the Commission should issue a threshold jurisdictional order now, and simultaneously initiate a second stage of this proceeding to establish classification provisions and rate levels for the Pack & Send service. OCA Initial Brief at 14–16. However, the Postal Service argues that the procedures suggested by OCA would be inconsistent with the statutory scheme of the Reorganization Act, the terms of section 3662, and section 3001.87 of the Commission's rules of practice. Postal Service Reply Brief at 16–18. Should the Commission find the Complaint to be justified, the Postal Service argues that the Commission ''should only issue a recommended decision to the Governors to that effect.'' Id. at 17.

In a typical proceeding under section 3662 concerning rates or fees charged by the Postal Service, the Commission would issue a substantive recommended decision pursuant to section 3662 and section 87 of the rules of practice. For example, if the Commission found justified a Complaint that the rates for a subclass of mail were no longer compensatory, the Commission would recommend appropriate adjustments in those rates after a proceeding conducted pursuant to section 3624. Similarly, if the Commission found justified a Complaint that the Postal Service was applying rates in a preferential or unduly discriminatory manner, the Commission would issue a decision recommending appropriate changes in Postal Service rate application practices.

However, in this case there is no substantive recommendation for the Commission to make under section 3622 or section 3623. The Postal Service contends that as it has never requested that a rate be set for the Pack & Send service, the Commission is not authorized to make a substantive recommendation pursuant to section 3622.[16] Even if it were, for reasons presented above the Commission would lack an evidentiary basis on which to make findings concerning costs, volumes and revenues for Pack & Send service. There is a similar dearth of evidence on which the Commission could base substantive findings on the merits of Pack & Send service as a potential mail classification, in response to the criteria of section 3623(c). Furthermore, a recommended decision simply declaring that Pack & Send is a postal service, and thus subject to the Commission's jurisdiction, would be a hollow vessel lacking any recommendation of substance upon which the Governors could act under section 3625.

For this reason, the Commission will issue a declaratory order, as suggested by Complainant and the OCA. However, the Commission will not initiate a second stage of this proceeding *sua sponte*, as these parties request, in order to accommodate the considerations cited by the Postal Service:

> In this regard, if only as a practical matter, but also as a matter related to the relative responsibilities of the Commission and the Postal Service, if the Commission concludes that Pack & Send is a postal service, it should defer to the Postal Service's determination as to whether it should seek authorization to continue the service by filing a request for a recommendation from the Commission.

In the footnote to this sentence, the Service states:

> As an additional practical matter, until such time as the Postal Service has developed and documented the data needed to support a rate or fee, it would be unwise and inefficient for a proceeding to go forward.

Postal Service Reply Brief at 17–18 (footnote omitted) and 18, n. 16. Therefore, further proceedings in this docket shall be held in abeyance pending the filing of a Request of the Governors of the United States Postal Service for establishment of Pack & Send service as a mail classification and for the recommendation of rates for that service, or the filing of a notice by the United States Postal Service to the effect that Pack & Send service has been discontinued. The Commission expects that postal management will devote its prompt attention to reaching a decision on this matter, and will collaborate with the Governors to achieve an expeditious resolution.

[14] In response to a question posed by Commissioner LeBlanc, witness Gibert testified that ''different prices have been tested in different markets.'' Tr. 2/213.

[15] The Postal Service states that Pack & Send prices are intended to recover a variety of associated costs in addition to window transaction labor cost, but that: ''Our analysis has not yet extended to determining the associated cost segments and components.'' Tr. 3/273.

[16] ''Congress made the deliberate decision to confer rate origination authority solely upon the Postal Service.'' *Dow Jones & Co.* v. *United States Postal Service*, 656 F.2d 786, 790 (D.C. Cir. 1981).

It is ordered: 1. Having conducted hearings pursuant to 39 U.S.C. § 3662 for the purpose of considering the Complaint of the Coalition Against Unfair USPS Competition, filed May 23, 1996, the Commission finds that Complaint to be justified.

2. For the reasons set out at length in the body of this Order, the Commission finds the Pack & Send service currently offered on a limited basis by the United States Postal Service to be a postal service subject to the Commission's ratemaking jurisdiction pursuant to 39 U.S.C. 3622 and its mail classification jurisdiction pursuant to 39 U.S.C. 3623.

3. Further proceedings in this docket shall be held in abeyance pending the filing of a Request of the Governors of the United States Postal Service for establishment of Pack & Send service as a mail classification and for the recommendation of rates for that service, or the filing of a notice by the United States Postal Service to the effect that Pack & Send service has been discontinued.

4. The Secretary of the Commission shall notify the Complainant, the Postal Service, and all other parties to this proceeding of the actions taken in this Order, as well as the Governors of the United States Postal Service, and shall submit it for publication in the Federal Register.

By the Commission.

Margaret P. Crenshaw,

Secretary.

[FR Doc. 96–32288 Filed 12–19–96; 8:45 am]

BILLING CODE 7710–FW–P

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

SUMMARY OF PROPOSAL(S):

(1) *Collection title:* Employee's Certification.

(2) *Form(s) submitted:* G–346.

(3) *OMB Number:* 3220–0140.

(4) *Expiration date of current OMB clearance:* February 28, 1997.

(5) *Type of request:* Extension of a currently approved collection.

(6) *Respondents:* Individuals or households.

(7) *Estimated annual number of respondents:* 5,400.

(8) *Total annual responses:* 5,400.

(9) *Total annual reporting hours:* 450.

(10) *Collection description:* Under Section 2 of the Railroad Retirement Act, spouses of retired railroad employees may be entitled to an annuity. The collection obtains information from the employee about the employee's previous marriages, if any, to determine if any impediment exists to the marriage between the employee and his or her spouse.

ADDITIONAL INFORMATION OR COMMENTS: Copies of the form and supporting documents can be obtained from Chuck Mierzwa, the agency clearance officer (312–751–3363). Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092 and the OMB reviewer, Laura Oliven (202–395–7316), Office of Management and Budget, Room 10230, New Executive Office Building, Washington, D.C. 20503.

Chuck Mierzwa,

Clearance Officer.

[FR Doc. 96–32299 Filed 12–19–96; 8:45 am]

BILLING CODE 7905–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35—26625]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

December 13, 1996.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 6, 1997, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

AYP Capital, Inc., et al. (70–8951)

AYP Capital, Inc. (''AYP''), a nonutility subsidiary company of Allegheny Power System, Inc. (''APS''), a registered holding company, both located at 10435 Downsville Pike, Hagerstown, Maryland 21720, have filed an application under sections 9(a) and 10 of the Act and rule 54 thereunder.

By order dated July 14, 1994 (HCAR No. 26085), APS was authorized, among other things, to organize and finance AYP to invest in companies: (1) Engaged in new technologies related to the core utility business of APS; and (2) that acquire and own exempt wholesale generators (''EWGs''). By subsequent order dated February 3, 1995 (HCAR No. 26229), AYP was authorized to engage in the development, acquisition, construction, ownership and operation of EWGs and in development activities with respect to: (1) Qualifying cogeneration facilities and small power production facilities (''SPPs''); (2) non-qualifying cogeneration facilities, non-qualifying SPPs, and independent power production facilities (''IPPs'') located within the service territories of APS public utility subsidiary companies; (3) EWGs; (4) companies involved in new technologies related to the core business of APS; and (5) foreign utility companies (''FUCOS''). APS was also authorized to increase its investment in AYP from $500,000 to $3 million.

By order dated October 27, 1995 (HCAR No. 26401) (''October Order''), the Commission authorized AYP or a special-purpose subsidiary (''NEWCO'') to provide certain enumerated energy management services (''EMS'') and demand-side management services (''DSM'') to non-associated customers at market prices and to associated companies at cost,[1] and AYP to engage

[1] The EMS services authorized included: (1) Identification of energy cost reduction and efficiency opportunities; (2) design of facility and process modifications to realize such efficiencies; (3) management of or the direct construction and installation of energy conservation and equipment; (4) training of client personnel in operation of equipment; (5) maintenance of energy systems; (6) design, management, construction and installation of energy management systems and structures; (7) performance contracts; (8) identifying energy conservation or efficiency programs; (9) system

Continued