

101(d) and 403(c), unless the allegations otherwise fail to state a colorable claim.⁵

The Postal Service's dismissal motion overlooks that the contested counts expressly include other allegations based upon section 101(d). Each count plainly has at least one clear statutory basis upon which to seek recourse. Thus, despite its apparent reliance on section 404(b) at the very end of the counts, GameFly still satisfies the standards of pleading statutory authority at this juncture. See Complaint at 1, *citing* 39 U.S.C. 101(d), and 403(c). The Commission has determined that the Postal Service's Motion for Partial Dismissal must therefore be denied.

The Commission finds that the pleadings raise issues of both law and fact relevant to whether or not the actions, or inactions, of the Postal Service violate 39 U.S.C. 101(d) or 403(c), either by (a) Rising to the level of undue discrimination or preferences among users of the mails, or (b) charging rates inequitably among such mailers. 39 U.S.C. 3662(b).

IV. Prehearing Conference and Public Representation

A prehearing conference is scheduled for July 23, 2009 at 10 a.m. in the Commission's hearing room.

GameFly and the Postal Service must meet and confer at least two weeks before the conference date to consider the appropriate scope and timeframes for discovery. Discussion should separately address each of the categories mentioned in the Complaint. See Complaint at para. 41. They shall jointly prepare a prehearing conference memorandum that identifies relevant undisputed facts. They shall offer suggestions, and be prepared to discuss the proper scope of discovery and the dates to complete discovery and to present their cases. They are urged to stipulate to an orderly process that streamlines the discovery schedule so as to reduce the need for motions on any special challenges. Where a mutually acceptable process cannot be agreed to, GameFly and the Postal Service shall fashion a joint statement clarifying areas of contention. The joint prehearing conference memorandum, with any related proposed stipulations, must be filed no later than July 20, 2009.

⁵ See Complaint at para. 2 (the rates and services offered to high volume DVD mailers violate sections 101(d) and 403(c), which prohibit undue discrimination, and inequitable rates and practices.); see also Answer at para. 2; and see generally Docket No. C2001-1, Order Partially Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings, March 20, 2001, at 9 n.11.

V. Opportunity for Intervention

Except as otherwise specified above, any interested person may file a notice of intervention, consistent with the Commission's rules of practice, as a full or limited participant. See 39 CFR 3001.20 and 3001.20a. The notice of intervention shall be filed using the Internet (filing online) at the Commission's Web site (<http://www.prc.gov>) unless a waiver is obtained for hard-copy filing. See 39 CFR 3001.9(a) and 3001.10(a). Notices of intervention are due no later than July 22, 2009.

Pursuant to 39 U.S.C. 505, E. Rand Costich and John Klingenberg are appointed to serve as officers of the Commission (Public Representative) to represent the interests of the general public in the above-captioned docket.

VI. Ordering Paragraphs

It is ordered:

1. The Commission finds that the Complaint by GameFly, Inc., filed April 23, 2009, regarding violations of law by the Postal Service, raises material issues of fact and shall begin proceedings in this Complaint.

2. The Motion of GameFly, Inc. for Leave to File Reply to Request of the United States Postal Service for Disposition of Complaint, filed June 2, 2009, is granted.

3. The Motion of the United States Postal Service for Partial Dismissal of Complaint, filed May 26, 2009, is denied.

4. The Commission will sit *en banc* in this proceeding.

5. The deadline for filing any notices of intervention is July 22, 2009. Notices shall indicate whether the intervening party intends to participate in the hearing and the nature of that participation.

6. A prehearing conference will be held in the Commission's hearing room on July 23, 2009 at 10 a.m. At least two weeks before the conference, the parties shall meet and confer on discovery. They shall prepare a joint prehearing conference memorandum that must be filed no later than July 20, 2009.

7. The Commission appoints E. Rand Costich and John Klingenberg as Public Representative to represent the interests of the general public in this proceeding.

8. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Judith M. Grady,
Secretary.

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POSTAL REGULATORY COMMISSION

[Docket No. CP2009-41; Order No. 237]

New Competitive Postal Product

AGENCY: Postal Regulatory Commission.
ACTION: Notice.

SUMMARY: The Commission is noticing a recently filed Postal Service request to add an additional Inbound Direct Entry Contract to the Competitive Product List. The Postal Service has also filed a related contract. This notice addresses procedural steps associated with these filings.

DATES: Comments are due July 10, 2009.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>.

FOR FURTHER INFORMATION CONTACT:

Stephen L. Sharfman, General Counsel,
202-789-6820 and
stephen.sharfman@prc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On June 29, 2009, the Postal Service filed a notice, pursuant to 39 U.S.C. 3633 and 39 CFR 3015.5, announcing that it has entered into an additional Inbound Direct Entry Contract (IDE), which it states fits within the previously established Inbound Direct Entry Contracts.¹ The Postal Service states that the instant constant is functionally equivalent to previously submitted IDE contracts and is supported by the Governors' Decision 08-6 filed in Docket No. MC2008-6.² Notice at 2.

The Notice also references Order No. 105 which established the individual IDE contracts in Dockets Nos. CP2008-14 and CP2008-15 as functionally equivalent and added the contracts to the competitive product list as one product under the IDE classification.³ The IDE service allows the Postal Service to provide foreign postal administrations with the ability to ship sacks of parcels that are pre-labeled for direct entry into the Postal Service's mail stream, in exchange for applicable domestic postage plus a sack handling

¹ Notice of United States Postal Service of Filing of Functionally Equivalent Inbound Direct Entry Contracts, Negotiated Service Agreement, June 29, 2009 (Notice).

² See Docket No. MC2008-6, Decision of the Governors of the United States Postal Service on the Establishment of Prices and Classifications for Inbound Direct Entry Contracts with Foreign Postal Administrations (Governors' Decision No.08-6), May 6, 2008.

³ See PRC Order No. 105, Order Concerning Prices Under Inbound Direct Entry Contracts with Certain Foreign Postal Administrations, September 4, 2008, at 8 (Order 105).

fee. The core of the service is the sack handling and entry as domestic mail and it is not dependent on the underlying domestic mail services. The Postal Service states that the instant contract is functionally equivalent to the IDE contracts previously submitted, fits within the Mail Classification Schedule (MCS) language included as Attachment A to Governors' Decision No. 08-6 and should be included within the IDE Contracts product. Notice at 2.

The instant contract. The Postal Service filed the instant contract pursuant to 39 CFR 3015.5. The contract is with P&T Express Mail Service Joint Stock Company (VNPE). VNPE is established under the auspices of the Vietnam Post and Telecommunications Group, the public postal administration for Vietnam, responsible for Vietnam's compliance with international obligations relative to Express Mail Service. The Postal Service submitted the contract and supporting material under seal and attached a redacted copy of the contract and certified statement required by 39 CFR 3015.5(c)(2) to the Notice. *Id.*, Attachments 1 and 2 respectively.⁴

The Postal Service will notify the customer of the effective date of the contract within 30 days after receiving all regulatory approvals. The contract term is 1 year from the effective date. The contract is subject to automatic renewal after the 1 year term unless the parties determine otherwise. *Id.*, Attachment 1.

The Notice advances reasons why the instant IDE contract fits within the Mail Classification Schedule language for IDE contracts. The Postal Service states that the instant contract is functionally equivalent to the IDE contracts filed previously because it shares similar cost and market characteristics and therefore, the contracts should be classified as a single product. *Id.* at 3-4. It states that in Governors' Decision No. 08-6, a pricing formula and classification system were established to ensure that each contract meets the statutory and regulatory requirements of 39 U.S.C. 3633. The Postal Service states that the costs of each contract must conform to a common description and the contract language of the MCS prescribes that each IDE contract must cover its attributable costs. *Id.*

The Postal Service reports that the instant contract covers the same domestic services as those in Docket

Nos. CP2008-14 and CP2008-15 except for the addition of the Priority Mail small flat rate box. It asserts that in "almost all substantive respects," the instant IDE contract resembles the contracts in CP2008-14 and CP2008-15. *Id.* at 4. The Postal Service contends that even though fees or the underlying domestic services offered may be different, these distinctions do not affect the contracts' functional equivalence because the total costs associated with IDE Contracts are volume variable and the basic service offered of handling inbound sacks in the domestic mail stream is the same. *Id.* Other changes include language to update changes in policies and product structures and terms to clarify the applicability of Postal Service export requirements. *Id.*

The Postal Service also affirms the instant contract has material differences reflected in the language of this agreement compared to other IDE contracts. *Id.* These differences include: (1) The 1 year term of the instant contract is subject to automatic renewal which differs from the contracts in CP2008-14 and CP2008-15 which are automatically renewed unless terminated; (2) Priority Mail small flat rate box has been added as a domestic mail type which Vietnam Post can access via IDE service while other included domestic mail services included are the same as in previous contracts but have updated rate structures;⁵ (3) terms are included which express the parties' wish to explore future opportunities for volume based discounts which the Postal Service states does not represent a new commitment; (4) terms that clarify charges for non-conforming size or weight items, and Delivery Confirmation charges for First-Class Mail parcel items; (5) language which explains the need for a permit application fee; (6) terms which address changes to IDE customer payment requirements upon detention or seizure of mail by Customs and Border Protection; and (7) terms to explain the use of the Centralized Trust Account payment method as applicable to Vietnam's financial regulatory requirements which were not offered in the contract for CP2008-14. *Id.* at 5-6.

The Postal Service maintains that these differences only add detail or amplify processes included in previous IDE contracts and do not affect the fundamental service being offered or the

essential structure of the contracts. *Id.* at 7. It asserts that the contracts are substantially equivalent in all pertinent respects. *Id.*

The Postal Service maintains that certain portions of the contract and certified statement required by 39 CFR 3015.5(c)(2), related financial information, portions of the certified statement which contain costs and pricing as well as the accompanying analyses that provide prices, terms, conditions, and financial projections should remain under seal. *Id.* at 2-3.

II. Notice of Filing

The Commission establishes Docket No. CP2009-41 for consideration of the matters related to the contract identified in the Postal Service's Notice.

Interested persons may submit comments on whether the instant contract is consistent with the policies of 39 U.S.C. 3632, 3622, or 3642. Comments are due no later than July 10, 2009.

The public portions of these filings can be accessed via the Commission's Web site (<http://www.prc.gov>).

The Commission appoints Paul L. Harrington to serve as Public Representative in this docket.

III. Ordering Paragraphs

It is Ordered:

1. The Commission establishes Docket No. CP2009-41 for consideration of the issues raised in this docket.

2. Comments by interested persons in these proceedings are due no later than July 10, 2009.

3. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

Dated: July 1, 2009.

By the Commission.

Judith M. Grady,

Acting Secretary.

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POSTAL REGULATORY COMMISSION

[Docket No. R2009-4; Order No. 236]

Postal Service Price Changes

AGENCY: Postal Regulatory Commission.

ACTION: Approval of price changes.

DATES: Implementation is scheduled for July 19, 2009.

⁴ Attachment 1 was revised by Notice of United States Postal Service of Filing Erratum to Attachment 1 to Notice of United States Postal Service of Filing Functionally Equivalent Inbound Direct Entry Contracts Negotiated Service Agreement, June 30, 2009.

⁵ The Postal Service states that the other domestic mail services are the same as in Docket Nos. CP2008-14 and CP2008-15, but the instant contract reflects the updated Priority Mail rate structure based on the price adjustments for competitive products in Docket CP2009-8.