

consumers improve their health and decrease their risk of contracting diseases by making sound dietary choices. The task force issued a final report on July 10, 2003 (68 FR 41387, July 11, 2003), which recommended that FDA seek public comment on several topics related to qualified health claims (i.e., claims that do not meet the significant scientific agreement (SSA) standard of evidence required by the Federal Food, Drug, and Cosmetic Act and FDA regulations to evaluate the scientific validity of health claims) and unqualified health claims (i.e., health claims that are supported by SSA and authorized by FDA by regulation). Some of the topics identified in the task force report were specifically addressed in the 1995 proposal. FDA reopened the comment period on the 1995 proposal to seek comment on these topics, which include the following: (1) The proposed amendments to permit unqualified health claims on certain foods that do not contain 10 percent or more of one of certain required nutrients; (2) the proposed amendments to provide criteria that FDA would consider in determining whether to grant an exemption from disqualifying nutrient levels related to unqualified health claims of certain nutrients; and (3) the proposed amendments to retain the word "may" or "might" in unqualified health claims to describe the relationship between a substance and a disease or health-related condition. In addition, FDA sought comment on the proposed use of unlisted synonyms and abbreviated health claims. Specifically, for unlisted synonyms (i.e., terms not defined by regulation), FDA repeated its request for data or other information demonstrating that unlisted synonyms that are anchored to defined terms in nutrient content claims are reasonably understood by consumers to be synonyms of the defined terms. FDA also sought comments on the petition process in 21 CFR 101.69(n) for synonyms and examples of synonyms that industry may be seeking to use. For abbreviated health claims, FDA sought comments and requested data or other information regarding whether abbreviated health claims would mislead consumers.

Following publication of the May 4, 2004, notice reopening the comment period, FDA received four requests for an extension of the comment period to allow interested persons additional time to comment. Two of the requests were submitted by NFPA and ABA, the petitioners. The requesters asserted that more time is needed, given the complexity of the issues, to thoroughly

review the specific elements of the 1995 proposal. Some requesters further supported their requests for additional time by noting that more than 7 years have passed since the 1995 proposal was last considered in comments and FDA's May 4, 2004, notice reopening the comment period. NFPA and ABA, which are trade associations, specifically stated that, over the intervening years, many of their member companies' representatives who were responsible for consideration of the technical aspects of the 1995 proposal have left their companies and have been replaced by staff that are less familiar with the 1995 proposal, subsequent comments, and underlying petitions. In addition, NFPA and ABA asserted that because the character of their membership has changed and current members may advocate different views of the issues raised in the 1995 proposal and in comments on the 1995 proposal received through 1997, additional time is needed to ensure that all members' concerns are addressed to accurately comment and respond to FDA. Another requester, also a trade association, also requested more time to ensure that all of its members' concerns are addressed to accurately comment and respond to FDA.

FDA has considered the requests for additional time to submit comments and, because the comment period for the 1995 proposal closed on July 6, 2004, FDA is again reopening the comment period on the 1995 proposal for an additional 60 days to provide interested persons an opportunity to comment on the issues identified herein and in FDA's May 4, 2004, notice reopening the comment period for the 1995 proposal.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments in response to FDA's request for comments and available data or other information identified in FDA's May 4, 2004, notice reopening the comment period on the 1995 proposal. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Identify comments with the docket numbers found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 8, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

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POSTAL RATE COMMISSION

39 CFR Part 3001

[Docket No. RM2004-1; Order No. 1424]

Definition of Postal Service

AGENCY: Postal Rate Commission.

ACTION: Proposed rule.

SUMMARY: This document addresses a proposal to add a definition of the term "postal service" to the rules of practice. This proposal is prompted by the Postal Service's action with respect to nonpostal initiatives. There is often controversy and uncertainty regarding the postal character of the services provided under those initiatives. The proposed definition is intended to provide guidance to the Postal Service and the general public concerning services that are subject to sections 3622 and 3623 of the Postal Reorganization Act.

DATES: 1. Deadline for filing initial comments: December 15, 2004.

2. Deadline for filing reply comments: January 12, 2004.

ADDRESSES: File all documents referred to in this order electronically via the Commission's Filing Online system at <http://www.prc.gov>.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, (202) 789-6818.

SUPPLEMENTARY INFORMATION:

Regulatory History

69 FR 3288, January 23, 2004.

69 FR 11353, March 10, 2004.

I. Introduction and Summary

In Order No. 1389, the Commission proposed to amend its rules of practice and procedure to include a definition of the term "postal service."¹ The postal character of a spate of relatively new services initiated unilaterally by the Postal Service is uncertain and the issue whether a service is postal or nonpostal has become increasingly controversial. Consequently, the Commission proposed to codify a definition of the term "postal service" in its rules to provide guidance to the Postal Service and the public for evaluating what falls within the scope of sections 3622 and

¹ See Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure, PRC Order No. 1389, January 16, 2004.

3623 of the Postal Reorganization Act (PRA).

Specifically, the Commission proposed to amend its rules by including the following definition: *Postal service* means the delivery of letters, printed matter, or packages weighing up to 70 pounds, including acceptance, collection, processing, transmission, or other services supportive or ancillary thereto.² Interested persons were invited to submit comments on the proposed rule.

No commenter, including the Postal Service, challenges the Commission's authority to adopt a definition of the term postal service. Under the Postal Service's construction of the Act, however, adopting a definition would essentially be an empty gesture since it contends that the Commission lacks the authority to determine the scope of its own jurisdiction. Under its theory, any service or product it unilaterally declares not to be a postal service is beyond the Commission's jurisdiction.³ Thus, under its interpretation, the Postal Service becomes the arbiter of all things postal.

The Commission rejects the claim that it cannot determine the scope of its own jurisdiction. The law on this point is well settled. "[T]he agency entitled to deference in the interpretation of 39 U.S.C. 3622–24 is the Rate Commission—not the Postal Service—as it is the Rate Commission which is charged with making recommended decisions on changes in rates and mail classification."⁴ Unilateral Postal Service actions do not determine the scope of the Commission's jurisdiction over postal services. Management's initial characterization of a service as postal or not, a prerequisite under the Act, is not dispositive of the Commission's jurisdiction. Analysis of the statute, legislative history, and precedent confirms that the Postal Service is not free to engage in unfettered commercial activities under the guise that they are nonpostal.

In its comments, the Postal Service argues that the Commission's definition of the term postal services imposes no limits on its authority under the Act.⁵ The Commission does not disagree. The proposed rule in no way restricts the types of services, postal or otherwise, that the Postal Service may wish to offer. It is free to offer whatever services

it chooses subject to the requirements of the Act. For those that are postal services, within the meaning of the proposed rule, the Postal Service has an obligation to request a recommended decision before commencing service or charging rates. Nothing in the proposed rule affects the lawfulness of Postal Service products or services that are *not* postal.⁶

While most commenters support the idea that the term postal service be defined, there is no unanimity on the definition. The diversity of views expressed has helped crystallize the Commission's thinking about the issues. It is apparent that continuation of the status quo is not in the public interest. On numerous, recent occasions, parties have challenged the legitimacy of the Postal Service's claim that various services, offered unilaterally pursuant to section 404(a)(6), are not postal services. The jurisdictional implications of these services, which have become increasingly controversial, are most efficaciously addressed by rule rather than on an ad hoc basis. Comments by competitors demonstrate that many of these services offered unilaterally by the Postal Service have a substantial public effect. Accordingly, the Commission believes that it is appropriate to include a definition of the term postal service in its rules.

Based on a thorough consideration of the comments, however, the Commission has determined not to adopt either its initial proposal or any suggested in the comments. Instead, the Commission concludes that it would be preferable to define the term postal service by reference to the Postal Service's statutory duties rather than as initially proposed or as specifically suggested by any commenter. The rule proposed herein represents an improvement over that proposed in Order No. 1389 since it makes the Service's "postal service" duties the touchstone of the definition rather than any specific activities the Postal Service may or may not perform.

The revised definition reads as follows: *Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services supportive or ancillary thereto. Because the definition focuses on the Postal Service's statutory functions, the proposed definition is distinguishable from that proposed in Order No. 1389.

⁶ To clarify, the Commission takes no position on services offered by the Postal Service that fall outside the proposed definition.

A major distinction is that the revised definition covers certain electronic services offered by the Postal Service, a result urged by several commenters. The Commission's decision to include certain electronic services is grounded on the statute and legislative history, both of which contemplate the use of technological advances in the provision of postal services. Nevertheless, inclusion of these services in the definition should not be read as a conclusion that all such services are jurisdictional; only such services that entail correspondence become postal services.

In lieu of adopting the foregoing definition now, the Commission will provide interested persons an opportunity to comment on the revised proposed rule. While not required under the Administrative Procedure Act, the additional comment period is deemed appropriate to assure that the impact of the rule is carefully considered and fully understood. Comments are due December 15, 2004. Reply comments may be filed on or before January 12, 2005.

II. Background

Two rulemakings pending before the Commission are companion proceedings, designed to define postal services on the one hand, Docket No. RM2004–1, and reporting requirements for nonpostal services on the other, Docket No. RM2004–2. In Order No. 1389, against the backdrop of an array of new services offered unilaterally by the Postal Service, the Commission reviewed both judicial and Commission precedent concerning the meaning, for jurisdictional purposes, of the term postal service.⁷ This review demonstrated that the postal character of these new services was unsettled, causing needless confusion and increasing controversy. Consequently, to address the issue, the Commission proposed to define the term postal service and provided interested persons an opportunity to comment on the proposed definition.⁸

² *Id.* at 12.

³ See Initial Comments of the United States Postal Service, March 15, 2004, at 2–3 (Postal Service Initial Comments).

⁴ *United Parcel Service v. U.S. Postal Service*, 604 F.2d 1370, 1381 (3rd Cir. 1979), cert. denied, 446 U.S. 957 (1980).

⁵ Postal Service Initial Comments at 3.

⁷ See PRC Order No. 1389, *supra*, at 1–8.

⁸ *Id.* at 12–16.

Seven sets of initial comments⁹ and four sets of reply comments¹⁰ were filed. These comments, addressed in detail below, advocate a variety of different perspectives. Four, the Association for Postal Commerce (PostCom),¹¹ the Office of the Consumer Advocate and Consumer Action (OCA/CA), United Parcel Service (UPS), and the Postal Service, suggest revisions to the Commission's proposed definition. Two, Parcel Shippers Association (PSA) and Pitney Bowes, Inc. (Pitney Bowes), endorse the proposed definition, albeit for different reasons; and one, Lifetime Addressing, supports OCA/CA's proposal.

The principal legal issues in this proceeding are the Postal Service's contention that the Commission lacks authority to determine the scope of its own jurisdiction and OCA/CA's claim that nonpostal services mean only those services provided by the Postal Service on behalf of other government agencies.

Docket No. RM2004-2, like this proceeding an outgrowth of Docket *2003, was initiated to consider the effects, if any, of non-jurisdictional services on jurisdictional rates.¹² Nonpostal services are a subset of non-jurisdictional services. In tandem, the two rulemakings are complementary, addressing opposite sides of the same coin.

In this proceeding, OCA/CA, citing the interrelationship between the two dockets, urge the Commission to define

the term nonpostal (as they interpret it) in this proceeding, essentially preempting the proposed amendment to rule 54 in Docket No. RM2004-2.¹³ In addition, OCA/CA propose that the Commission not employ the term nonpostal to identify services subject to the proposed reporting requirements in Docket No. RM2004-2.¹⁴

Lastly, since this proceeding commenced, two complaints have been filed with the Commission alleging that the Postal Service is providing postal services without first obtaining a recommended decision from the Commission.¹⁵ While not bearing directly on this proceeding, these complaints, particularly Docket No. C2004-2, underscore the continuing controversy and uncertainty surrounding the Postal Service's unilateral actions.

III. Commission Authority

Section 3603 of the PRA authorizes the Commission to adopt "rules and regulations and establish procedures, subject to chapters 5 and 7 of Title 5, and take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people as prescribed under this chapter." 39 U.S.C. 3603. No commenter disputes the Commission's authority to adopt a definition of the term postal service. The Postal Service, however, construes the Act in a manner that renders the exercise largely meaningless.

As a preface to its comments on the proposed rule, the Postal Service, referencing its comments in Docket *2003, reiterates its position that the Commission lacks authority to determine the scope of its own jurisdiction under Chapter 36 of the PRA.¹⁶ It asserts that "the Postal Service would not in any way be bound by [the proposed] definition" concerning its determination of whether a service is postal or nonpostal.¹⁷ Under this theory, its unilateral declaration of whether any product or service is or is not a postal service is determinative. Thus, under the Postal Service's interpretation, the Commission's jurisdiction is based not on its own consideration of the facts as applicable to the rate and classification factors of the Act, but rather on what the Postal Service unilaterally determines to

be postal. The Postal Service's position is wholly without merit.

The Commission concludes that it has the primary responsibility for interpreting whether services offered or proposed by the Postal Service are subject to chapter 36 of the Act.¹⁸ The Postal Service, but no other commenter, disagrees.¹⁹ This dichotomy prompts several observations. The Postal Service argues that a Commission definition of the term postal service imposes no limits on its authority under the Act.²⁰ The Commission does not disagree. The rule in no way restricts the types of service, postal or otherwise, that the Postal Service may wish to offer. The Postal Service is free to offer whatever services or products it wishes subject to the strictures of the Act. However, for those that are postal services, as defined by the Commission, the Postal Service has an obligation to obtain a recommended decision before commencing a service or charging the public.

The Act mandates that the Postal Service, to the extent it wishes to provide a postal service, submit a request to the Commission for a recommended decision on changes in the mail classification schedule. Management's initial characterization of a service as postal or not neither deprives the Commission of jurisdiction over postal services nor precludes Commission review, on complaint or otherwise, for purposes of determining its statutory jurisdiction. Such review does not impinge on management's prerogatives in a manner not contemplated by the Act. "The very existence and function of the Postal Rate Commission bespeaks a limitation on postal management's freedom."²¹

Furthermore, it is well settled that in matters involving rates and mail classifications the Commission's interpretation is entitled to deference. Federal courts have rejected the Postal Service's argument that its

⁹ Comments of Lifetime Addressing, Inc. Pursuant to Commission Order No. 1389, March 16, 2004 (Lifetime Addressing Comments); Office of the Consumer Advocate and Consumer Action Comments on Proposed Amendment to the Commission's Rules of Practice and Procedure, March 15, 2004 (Joint Initial Comments); Comments of the Parcel Shippers Association to the Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure, March 15, 2004 (PSA Comments); Comments of Pitney Bowes Inc., March 15, 2004 (Pitney Bowes Comments); PostCom Comments on Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure, March 1, 2004 (PostCom Initial Comments); Comments of United Parcel Service in Support of Proposed Rule, March 9, 2004 (UPS Comments); Postal Service Initial Comments, *supra*, March 15, 2004.

¹⁰ Reply Comments of Lifetime Addressing, Inc., April 15, 2004 (Lifetime Addressing Reply Comments); Office of the Consumer Advocate and Consumer Action Reply Comments on Proposed Amendment to the Commission's Rules of Practice and Procedure, April 15, 2004 (Joint Reply Comments); PostCom Reply Comments on the Proposed Rulemaking Concerning the Definition of "Postal Service," April 15, 2004 (PostCom Reply Comments); and Reply Comments of the United States Postal Service, April 15, 2004 (Postal Service Reply Comments).

¹¹ PostCom's suggestion was offered as an alternative to its principal recommendation that the Commission not adopt a definition of the term postal service in this proceeding. PostCom Initial Comments at 1-2.

¹² See PRC Order No. 1394, March 5, 2004.

¹³ Joint Initial Comments, *supra*, at 15.

¹⁴ *Id.*

¹⁵ See Complaint on Electronic Postmark, Docket No. C2004-2 and Complaint on Stamped Stationery, Docket No. C2004-3.

¹⁶ Postal Service Initial Comments at 1-2.

¹⁷ *Id.* at 3; see also Postal Service Reply Comments at 8-9.

¹⁸ See, e.g., PRC Op. R74-1, Vol. 2, Appendix F; PRC Op. R76-1, Vol. 1, at 263 *et seq.*, and Vol. 2, Appendix F; PRC Order No. 1239, May 3, 1999, at 9-14; see also *United Parcel Service v. U.S. Postal Service*, 604 F.2d 1370, 1381 (3rd Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

¹⁹ See Postal Service Initial Comments at 2. As a general matter, the Postal Service referred to its comments in Docket *2003 in lieu of restating its position.

²⁰ *Id.* at 3. In comments in Docket *2003, the Postal Service cast the argument, in part, as the Commission's authority to determine the legal status of nonpostal services. Comments of United States Postal Service on Consumer Action Petition, Docket *2003, January 30, 2003, at 12-13.

²¹ *United Parcel Service v. U.S. Postal Service*, 455 F. Supp. 857, 869 (E.D. Pa. 1978), *aff'd*, 604 F.2d 1370 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

interpretation of the Act deserves deference. “[I]t was recognized there, [in *NAGCP v. USPS*, 569 F.2d 570 (DC Cir. 1976)] as we do here, that the agency entitled to deference in the interpretation of 39 U.S.C. 3622–24 is the Rate Commission—not the Postal Service—as it is the Rate Commission which is charged with making recommended decisions on changes in rates and mail classification.”²²

Moreover, the Postal Service’s construction ignores a wealth of judicial precedent addressing the division of responsibility under the Act between the Postal Service and the Commission that makes it plain that rate and classification authority vests with the Commission. For example, in *National Association of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 821 (1983), the Supreme Court found:

Although the Postal Reorganization Act divides ratemaking responsibility between two agencies, the legislative history demonstrates ‘that ratemaking * * * authority [was] vested primarily in [the] Postal Rate Commission.’ S. Rep. No. 91–912, p. 4 (1970) (Senate Report); see *Time, Inc. v. USPS*, 685 F.2d 760, 771 (CA2 1982); *Newsweek, Inc. v. USPS*, 663 F.2d, at 1200–1201; *NAGCP III*, 197 U.S. App. DC, at 87, 607 F.2d, at 401. The structure of the Act supports this view. While the Postal Service has final responsibility for guaranteeing that total revenues equal total costs, the Rate Commission determines the proportion of the revenue that should be raised by each class of mail. In so doing, the Rate Commission applies the factors listed in § 3622(b). Its interpretation of that statute is due deference. See *Time, Inc. v. USPS*, 685 F.2d, at 771; *United Parcel Service, Inc. v. USPS*, 604 F.2d 1370, 1381 (CA3 1979), cert. denied, 446 U.S. 957 (1980).

Specifically mindful of the bifurcation of authority under the Act, the court, in *United Parcel Service*, supra, concluded:²³

The Commission’s existence insures that an agency independent of the Postal Service will provide for public notice and hearing input of those affected by the proposed action and full and on the record, see 39 U.S.C. § 3624(a), consideration of pertinent factors and congressionally imposed goals before certain types of decisions are made.

²² *United Parcel Service v. U.S. Postal Service*, 604 F.2d 1370, 1381 (3d Cir. 1979), cert. denied, 446 U.S. 957 (1980). Regarding the general principle that an agency’s interpretation of its jurisdiction is entitled to deference, see *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–44 (1984); *Transmission Access Policy Study Group v. Federal Energy Regulatory Commission*, 225 F.3d 667, 694 (DC Cir. 2000) (“It is the law of this circuit that the deferential standard of [Chevron] applies to an agency’s interpretation of its own statutory jurisdiction.”); and *Oklahoma Natural Gas Company v. Federal Energy Regulatory Commission*, 28 F.3d 1281, 1283 (DC Cir. 1994).

²³ *United Parcel Service*, supra, 455 F. Supp. at 869.

IV. The Provision of Postal Services Is the Service’s Core Mission

A. Grants of Authority Under the Act

Although the PRA does not define the term “postal services,” it is clear that “postal services” are central to the Postal Service’s mission. The point is underscored by the very first section of the Act: “The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people.” 39 U.S.C. 101(a). The Postal Service is explicitly directed to “plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees.” 39 U.S.C. 403(a).

The Postal Service performs a variety of activities; some clearly relate to its obligation to provide postal services, while others do not. Some have jurisdictional implications; others do not. By statute, the Postal Service has a monopoly over the carriage of letters. 39 U.S.C. 601.²⁴ The monopoly, however, does not limit “postal services” provided by the Service to the carriage of letters (or services ancillary thereto). Incontestably, the Postal Service’s carriage of mail not subject to the monopoly, such as packages and printed matter, is a “postal service.” Merely because such mail is outside the scope of the monopoly does not render such service “nonpostal.”²⁵

The Postal Service’s authority to engage in other activities also informs the scope of its core mission regarding postal services. These include authority to provide special, philatelic, international, and nonpostal services. It is well settled that special services, authorized by section 404(a)(6) of the Act, are postal services subject to the Commission’s rate and classification jurisdiction. In *Associated Third Class Mail Users v. U.S. Postal Service*, 405 F. Supp. 1109 (D.D.C. 1975) (*ATCMU*), the court (J. Sirica) enjoined the Postal Service’s unilateral attempt to increase fees for certain special services.²⁶ The

Postal Service argued that the phrase “fee or fees for postal services” in section 3622 applied only to certain annual mailing or permit fees and not to special services. In rejecting the Postal Service’s argument that section 404(a)(6) authorized it to proceed without first requesting a recommended decision from the Commission, the court held that “the term ‘postal services’ was meant to embrace also those special and other services which are the subject of this litigation.”²⁷ The court’s finding that the special and other services were postal services was based on the “common meaning” of the term.²⁸ This finding was colored by two considerations. First, it observed that, with the possible exception of money orders, “nearly all of these other services are very closely related to the delivery of mail.”²⁹ Second, the court held, “[i]t is also clear that the fees set for these services have substantial public effect.”³⁰

The Court of Appeals, without adopting all of its reasoning, found the district court’s interpretation of the Act persuasive. *National Association of Greeting Card Publishers v. U.S. Postal Service*, 569 F.2d 570, 595 (DC Cir. 1976), vacated on other grounds, 434 U.S. 884 (1977) (*NAGCP II*). The DC Circuit’s discussion is instructive on several levels. First, it agreed that a “plain reading” of section 3622 is proper, concluding that “‘postal services’ as used there is a generic term and was meant to include all the special services here at issue.”³¹ Second, finding the Postal Service’s construction of the Act “wholly unconvincing,” the court held, “[b]ut most of all, any reasonable examination of the purposes of the Act discloses Congress’ implicit design that the distinct functions of service provision and rate adjustment be divided between the Postal Service and the Rate Commission.”³² Third, the court also relied on the legislative history to conclude that repeal of the Postmaster General’s prior authority to establish special service fees unilaterally was not inadvertent.³³

prepayment of postage, and money orders. *ATCMU* at 1115.

²⁷ *Id.* at 1118.

²⁸ *Id.* at 1117. (“As indicated above, this interpretation appears to accord quite well with the common meaning of the term ‘postal services.’”)

²⁹ *Id.* at 1115. Observing that the majority of money orders sold at post offices were sent by mail, the court concluded that “[t]herefore, it appears safe to say that all of these services would be considered ‘postal services’ in ordinary parlance.”

³⁰ *Ibid.*

³¹ *NAGCP I* at 596–97.

³² *Id.* at 597.

³³ *Id.* at 597–98.

²⁴ Prior to the passage of the Private Express Statutes in 1845, intercity delivery services were offered by private carriers, principally railroads and steamboats. Private carriers operated within cities until barred by the Postal Code of 1872. *Cato Handbook for Congress*, <http://www.cato.org/pubs/handbook/hb105-34.html>.

²⁵ While no party suggests to the contrary, Parcel Shippers Association, perhaps out of caution, addresses the point, expressing relief that the Commission’s proposed definition encompasses packages. PSA Comments at 2.

²⁶ The special services included, among others, insurance, registry, forwarding and return service, furnishing of mailing list corrections, return receipt,

Finally, at the outset of its discussion, the court suggests an alternate theory available to the district court. Noting that the Commission "advances an interpretation of the Act quite at odds with that of the Service and fully in accord with the conclusion reached by the district court," the Court of Appeals states that "[t]he district court, in short, without expressly stating so might simply have deferred to the long-held and reasonable interpretation given the statute by the very agency whose jurisdiction is at issue."³⁴

The Commission's first substantive opportunity to address the jurisdictional implications of various special and other services occurred in Docket No. R76-1 following the *ATCMU* opinion.³⁵ While it discussed in detail the principles governing the scope of its jurisdiction regarding the services at issue in a separate appendix,³⁶ the Commission briefly restated its conclusions, providing a succinct definition.

Special postal services—that is, those which fall within the ambit of § 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.³⁷

Although none of the three remaining specific grants of power is defined in the Act, two are readily distinguishable because each is limited by the types of service that could possibly be offered. Philatelic services, section 404(a)(5), relate exclusively to philately; international mail, section 407, exclusively involves service between or among countries. There is no real controversy over what each service entails or, for that matter, whether either could be considered a jurisdictional postal service.³⁸ That is not the case concerning the Postal Service's authority to provide nonpostal services.

B. OCA/CA's Definition of the Term Nonpostal Is Flawed

Parties dispute the meaning of the term as well as the Postal Service's authority to provide certain services without prior Commission review. OCA/CA argue that "nonpostal" is a term of art under the statute limited to services provided by the Postal Service to other governmental agencies for which it is reimbursed.³⁹ They ask the Commission to reconsider its prior determinations that "'nonpostal' products and services can be commercial in nature."⁴⁰

In support of their position, OCA/CA cite the preexisting statute, the Kappel Commission Report, *The United States Postal Service* by Gerald Cullinan, and *ATCMU*. OCA/CA begin by pointing to section 2303 of former title 39, which references "nonpostal services, such as the sale of documentary stamps for the Department of the Treasury." They argue that this reference indicates, as manifest by the legislative history, that the term "nonpostal" is limited to services provided by the Postal Service to other governmental agencies.⁴¹ As confirmation, they cite the Kappel Commission Report's mention of nonpostal services within its larger discussion of "public service" costs.⁴² In addition, OCA/CA rely on the discussion of "nonpostal functions" found in *The United States Postal Service*.⁴³ Cullinan indicates that during World War I, the Post Office performed various war-related nonpostal functions, including selling Liberty bonds, war savings certificates, and registering enemy aliens.⁴⁴ In addition to these major nonpostal functions, the Post Office, over time, assumed various minor Federal functions as well. These included: alien address reporting, sale of U.S. savings bonds, sale of documentary and migratory-bird stamps, maintenance of wanted posters issued by the Federal Bureau of Investigation, and receiving and

transmitting funds for volunteer charities such as the March of Dimes.⁴⁵

Lastly, OCA/CA cite as most significant Judge Sirica's comment concerning the likely meaning of the term nonpostal.⁴⁶ Prefacing his comment with the observation that the exact meaning of nonpostal was uncertain, Judge Sirica stated that it likely encompassed activities such as selling U.S. savings bonds, maintaining an information service for civil service exams for government jobs, and conducting examinations for the Civil Service Commission.⁴⁷

Relatively early in its institutional history, the Commission characterized certain services provided by the Postal Service as nonpostal. Once the jurisdictional issue over special services was joined in Docket No. R76-1, the Postal Service submitted a lengthy list of services it provided apart from the carriage of mail.⁴⁸

The list included an assortment of services provided by the Postal Service, including those styled as follows:

- Domestic ancillary services, *e.g.*, address correction, certified mail, insurance;
- International ancillary services, *e.g.*, inquiry fee, storage charges, registry;
- Special user charges, *e.g.*, on-site meter settings, sale of philatelic products, photocopying service;
- Services performed for other government agencies, *e.g.*, passport applications, food stamps, civil defense;
- Community type services, *i.e.*, bulletin boards and postmasters in Alaska as notaries public; and
- Services for which a charge could be made, *e.g.*, demurrage charge, meter license.

Prior to considering the jurisdictional status of each service, the Commission distinguished between services provided by the Postal Service to the public and those it performed for other federal agencies. The Commission indicated that the latter included services such as "the distribution of migratory bird hunting stamps, the registration of aliens, and various forms of assistance to the Civil Service Commission."⁴⁹ Concerning such services, the Commission concluded that "[i]t is clear that they are in no sense 'postal' services, and we conclude that they are outside the ambit of § 3622."⁵⁰

The Commission assessed each service based on its relationship to the

³⁴ *Id.* at 595, n.110.

³⁵ Previously, the Commission had addressed and asserted its jurisdiction over changes in fees for special services in Docket No. R74-1. See PRC Op. R74-1, Vol. 2, Appendix F.

³⁶ See PRC Op. R76-1, Vol. 2, Appendix F.

³⁷ PRC Op. R76-1, Vol. 1, at 266-67 (footnote omitted).

³⁸ In Docket No. R76-1, the Commission found that the sale of philatelic products was not within its jurisdiction. PRC Op. R76-1, Vol. 2, Appendix F at 19-20; see also PRC Order No. 1075, September 11, 1995. Likewise, the Commission's rate jurisdiction does not extend to international mail. PRC Op. R76-1, Vol. 2, Appendix F at 17; PRC Op. R90-1, Vol. 1, para. 2105; see also *Air Courier Conference of America/International Committee v. U.S. Postal Service*, 959 F.2d 1213 (3rd Cir. 1992).

³⁹ Joint Initial Comments, *supra*, at 9. PostCom appears to agree with this position although not with OCA/CA's proposal. PostCom Reply Comments, *supra*, at 3-4.

⁴⁰ Joint Initial Comments at 9; see also *id.* at 11-12, and 15.

⁴¹ *Id.* at 10.

⁴² *Ibid.* In its discussion of public service costs (subsidies), the Kappel Commission included "unreimbursed non-postal services" which it described as "some relatively small but widespread services rendered to other Government agencies (*e.g.*, providing space for Civil Service examinations)." Kappel Commission Report at 137.

⁴³ Joint Initial Comments at 10.

⁴⁴ G. Cullinan, *The United States Postal Service* (1973) at 196.

⁴⁵ *Id.* at 198.

⁴⁶ Joint Initial Comments at 11.

⁴⁷ *ATCMU*, *supra*, at 1117, n.3.

⁴⁸ Docket No. R76-1, Tr. 4/503-08.

⁴⁹ PRC Op. R76-1, Vol. 2, Appendix F at 2.

⁵⁰ *Ibid.*

carriage of mail. "Those which can fairly be said to be ancillary to the collection, transmission, or delivery of mail are postal services within the meaning of § 3622."⁵¹ Among other things, the Commission found several special user charges were not jurisdictional, including the sale of philatelic products, photocopy service, record retrieval, the sale of postal related products, and vending stands and vending machines.⁵² In addition, the Commission disclaimed jurisdiction over community type services, specifically characterizing the provision of notary public services as "clearly non-postal."⁵³

The Commission's consideration of box rentals (lockbox service) in Docket R76-1 merits particular mention because, in addition to arguing that lockbox service was a special or similar service wholly within its authority, the Postal Service contended that box rentals were not "postal services" within the meaning of section 3622.⁵⁴ The Postal Service argued that lockbox service simply enabled a customer to use Postal Service property pursuant to a rental agreement. It characterized lockboxes as "a premium service to any customer who, for his own convenience, desires more than basic free delivery."⁵⁵ Furthermore, stating that the Commission's authority "extends only to 'postal services'" and characterizing the complaint as limited to postal services, the Postal Service asserted that the Commission lacked authority to hear the complaint.⁵⁶ Rejecting the Postal Service's argument, the Commission found that box rentals are closely related to the delivery of mail and, further, satisfy the criteria established for jurisdictional special services.⁵⁷

In addition to its analysis in Docket No. R76-1 Appendix F, the Commission

summarized its findings in the main body of its opinion, stating that "[m]any of these services are clearly nonpostal in character."⁵⁸ Thus, early on, the Commission found that its jurisdiction did not extend to what it characterized as nonpostal services, including in that rubric services other than those provided to other governmental agencies. OCA/CA would have the Commission adopt a narrow definition of the term limited to services performed by the Postal Service for other government agencies. Any other service provided by the Postal Service would, according to OCA/CA, be a postal service and thus subject to the Commission's rate and classification jurisdiction.

The Commission is unpersuaded by the arguments advanced by OCA/CA.⁵⁹ To be sure, nonpostal includes services provided by the Postal Service for other agencies, but even if limited as suggested by OCA/CA, the result would not cause all other activities to necessarily be considered postal. Historically, the Postal Service has performed various minor, miscellaneous services, including photocopying and community type services (maintaining bulletin boards and notaries public). Any claim that these services were postal would be tenuous at best. Rather, such services are provided more as a convenience to postal patrons than as commercial endeavors. Thus, for example, copying service may be available in a post office lobby as a minor benefit to mailers, enabling them to copy miscellaneous papers prior to mailing, e.g., tax returns.

The result urged by OCA/CA, that any service provided by the Postal Service that is not nonpostal (under their interpretation) would be subject to the Commission's jurisdiction, cannot be reconciled with the Act. Section 404(a)(6) authorizes the Postal Service "to provide, establish, change, or abolish special nonpostal or similar services." 39 U.S.C. 404(a)(6). OCA/CA's interpretation would render the

phrase "similar services" surplusage. If nonpostal is restricted to services provided only to other government agencies, no other service could be "similar," thereby making it meaningless.

Conceptually, under the OCA/CA's interpretation, the Commission would be charged with recommending rates for any service or product that is not provided exclusively to other governmental agencies. Thus, they would have the Commission recommend rates for miscellaneous minor services, such as photocopying, as well as those having no evident connection to the Postal Service's core mission.⁶⁰ The Commission does not read the statute so broadly. Had Congress intended to define "postal service" as urged by OCA/CA it would have been more explicit. Certainly, at a minimum, Congress would have been less obtuse than to do so by negative inference.

C. Postal Services Are Not Defined by the Postal Service's Interpretation of the Term Nonpostal

At the other end of the spectrum, the Postal Service's support for the proposition that it is authorized to engage in unlimited commercial, nonpostal activities is also unconvincing.⁶¹ First, it argues that section 411 authorizes the provision of services involving other government agencies. The Postal Service contends that since section 411 does not use the term nonpostal section 404(a)(6) must refer "at least to services other than those encompassed by section 411."⁶² The Commission agrees that the two sections refer to different services. It does not follow, however, that the Postal Service may unilaterally make available to the public whatever commercial service (or product) it may wish.

Section 411, which is entitled "Cooperation with Other Government Agencies," concerns the bilateral arrangements between the Postal Service and other federal agencies.⁶³

⁶⁰ Without prejudging the issue, but based on representations to date, the Unisite Antenna program, which involves leasing space for wireless communications towers located on postal property, would appear to be such an example.

⁶¹ While the Commission's jurisdiction does not extend to nonpostal services, it is necessary to address the Postal Service's interpretation because of its jurisdictional implications concerning postal services.

⁶² Comments of United States Postal Service on Consumer Action Petition, *supra*, at 15.

⁶³ Section 411 provides as follows: "Executive agencies within the meaning of section 105 of title 5 and the Government Printing Office are authorized to furnish property, both real and

⁵¹ *Id.* at 3.

⁵² *Id.* at 18-25.

⁵³ *Id.* at 25. The Commission also found that international ancillary services were beyond its jurisdiction. *Id.* at 17. It did not substantively address the final category, services for which a charge could be made. *Id.* at 25-26.

⁵⁴ PRC Op. R76-1, Vol. 1 at 281-82. The Postal Service's unilateral fee increase for box rentals was the subject of a separate complaint filed in July 1975. See Complaint of Stephen Moses, Docket No. C76-1. In its answer to the complaint, the Postal Service advanced similar arguments to those considered and rejected by the court in *ATCMU*. Docket No. C76-1 was terminated with the issues raised by the complaint transferred to the rate proceeding, Docket No. R76-1. PRC Order No. 85, October 9, 1975.

⁵⁵ PRC Op. R76-1, Vol. 1 at 282 (footnote omitted).

⁵⁶ United States Postal Service Answer to Complaint, Docket No. C76-1, August 11, 1975, at 3-4.

⁵⁷ PRC Op. R76-1, Vol. 1, at 282-83.

⁵⁸ *Id.* at 266.

⁵⁹ To some degree, OCA/CA appear to operate under the misimpression that the Commission has concluded that the Postal Service may engage in commercial nonpostal activities. See Joint Initial Comments at 9. ("Regrettably, therefore, OCA and CA must ask the Commission to reconsider its determination that 'nonpostal' products and services can be commercial in nature.") In Order No. 1389, the Commission expressly took no position on the Postal Service's claim that it had authority to provide commercial nonpostal services. PRC Order No. 1389, January 16, 2004, at 10. The phrase "commercial nonpostal activities" was used in Order No. 1394 solely to clarify the term "nonpostal service," not as an acknowledgement of their validity. PRC Order No. 1394, March 5, 2004, at 11.

These are services provided to or received from other agencies. Support for this is found in the statute and implementing regulations. Sections 403 and 409 specifically reference section 411, providing examples of the types of bilateral arrangements permitted under the latter. For example, section 409(d) provides that the "Department of Justice shall furnish, under section 411 of this title, the Postal Service such legal representation as it may require[.]" Similarly, section 403(a) permits the Postal Service, pursuant to sections 406 (concerning postal services at armed forces installations) and 411, to enter into arrangements concerning its duty to receive, transmit, and deliver non-domestic armed forces mail.

The regulations implementing section 411, 39 CFR 259.1, indicate that it is the Postal Service's policy to cooperate with other federal agencies when it will reduce the overall costs to the government. For its part, the Postal Service states that assistance will be provided "when the knowledge and abilities of postal employees are helpful." 39 CFR 259.1(a). It is notable that the Postal Service uses the term "nonpostal" to describe section 411 arrangements in its implementing regulations. 39 CFR 259.1(b). "The Postal Service establishes reasonable fees and charges for nonpostal services performed for agencies of the Federal as well as State governments." "Nonpostal" fairly characterizes the nature of these services and its use in these regulations undercuts the Postal Service's argument that the use of the term "nonpostal" in section 404(a)(6), but not section 411, is significant.

Overwhelmingly, available information supports the conclusion that, at a minimum, nonpostal services encompass services performed "mainly for other Government agencies (e.g., sale of documentary stamps, provision of custodial services for building space occupied by other Government agencies)." ⁶⁴ As discussed above, the Postal Service has historically performed other public service-type services, which, while not performed for another government agency, may reasonably be considered nonpostal in nature. Surely, in passing the PRA,

personal, and personal and nonpersonal services to the Postal Service, and the Postal Service is authorized to furnish property and services to them. The furnishing of property and services under this section shall be under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate."

⁶⁴ Kappel Commission Report, Annex II, at 6-7; *id.* at 6-9 and 6-10; see also Kappel Commission Report at 136-138; and section 2303(a)(3) of former title 39, Pub. L. 86-682, September 2, 1960.

Congress was aware of the Postal Service's extensive history of providing these various nonpostal services.

The Postal Service's assertion that because Congress did not, in section 404(a)(6), "explicitly exclude any type of service," ⁶⁵ it may unilaterally engage in whatever commercial, nonpostal activities it chooses is utterly unconvincing.

By the Postal Service's logic, section 404(a)(6) authorizes it to engage in *any* type of commercial, nonpostal activity. Thus, it could operate, for example, donut shops or car dealerships as they are obviously nonpostal. The Postal Service's position, like that it espoused regarding special services, is premised on a "curious construction" of the term as well as the Act. ⁶⁶

Congress' "failure" to "explicitly exclude any type of service" cannot reasonably be interpreted as authorizing the Postal Service to engage in an unlimited variety of commercial, nonpostal activities. ⁶⁷ Rather, against the historical backdrop, it is the *absence* of any authority to engage in services other than traditional activities that is telling. Had Congress intended such a sea change in the meaning of the term nonpostal surely it would have elaborated on the point. It did not. And what scant legislative history exists supports a narrow reading of the term, one consistent with the historical perspective.

In discussing what became section 404 of the Act, the House Report states: "This section catalogs the specific powers of the Postal Service, which powers, in conjunction with the general powers granted in section [401], are to be used to carry out postal service duties." ⁶⁸ Significantly, there is no mention of expanding the Postal Service's authority regarding nonpostal services. Instead, the only emphasis concerning the Postal Service's powers is that they be "used in carrying out postal service duties." Plainly, nothing in section 404 or the legislative history suggests that the Postal Service may unilaterally undertake to offer a broad range of services to the public.

⁶⁵ Comments of United States Postal Service on Consumer Action Petition, *supra*, at 15.

⁶⁶ *NAGCPI*, *supra*, 569 F.2d at 596.

⁶⁷ It is the Postal Service's assertion that it has authority to engage in commercial, nonpostal services. The Commission takes no position on that contention other than as relates to commercial, communication services (or products) or those ancillary thereto which could, upon consideration, be classified as postal.

⁶⁸ H.R. Rep. No. 1104, 91st Cong., 2nd Sess. 33 (1970), *reprinted* in 1970 U.S. Code Cong. & Admin. News, Vol. 2, 3682 (hereinafter H.R. Rep. No. 91-1104 with page cites to U.S.C.C.A.N.).

Stating that it relies on more than "section 404(a)(6) to authorize the establishment of nonpostal services," the Postal Service alludes to its "statutory mission and functions." ⁶⁹ As support, the Postal Service cites generally to its "duty to provide mail services" and "incidental services appropriate to its functions and in the public interest." ⁷⁰ It concludes that "these provisions" authorize it "to develop mail and related services that contribute to a coherent, effective postal system." ⁷¹

The foregoing is a confounding rationale for the proposition advanced. The Postal Service attempts to justify its expansive interpretation of its authority to offer commercial, nonpostal services by reference to its postal duties and authority. Its argument is not persuasive. The Postal Service's undeniable authority to provide *postal* services, including related supporting activities, cannot legitimately be read to expand its limited statutory authority to provide *nonpostal* services. The two are unconnected.

The Postal Service's obligation to provide *postal* services has no bearing on its authority to provide nonpostal services. As a matter of policy, the Postal Service is to be "operated as a basic and fundamental service" and "have as its basic function the obligation to provide *postal* services to bind the Nation together through the personal, educational, literary, and business correspondence of the people." ⁷² Its general duties include planning, developing, promoting, and providing adequate and efficient *postal* services at reasonable rates. ⁷³ It has a universal service obligation. ⁷⁴ It is obliged to receive, transmit, and deliver "written and printed matter, parcels, and like materials and provide such other services incidental *thereto* as it finds appropriate to its functions and in the public interest." ⁷⁵ In addition, it is

⁶⁹ Comments of United States Postal Service on Consumer Action Petition, *supra*, at 16.

⁷⁰ *Id.* at 16-17.

⁷¹ *Id.* at 17.

⁷² 39 U.S.C. 101(a) (emphasis added). See also H.R. Rep. No. 91-1104, *supra*, at 3668. ("The Postal Service is—first, last and always—a public service.")

⁷³ 39 U.S.C. 403(a) (emphasis added).

⁷⁴ 39 U.S.C. 101(a).

⁷⁵ 39 U.S.C. 403(a) (emphasis added). In its argument above, the Postal Service excises the term "thereto" when referring to its authority to provide incidental services. The omission is not inconsequential. When read in context, the phrase "services incidental thereto" means that the incidental, which is to say subordinate or nonessential, services relate to the Postal Service's duty to provide mail services. This clause allows for ancillary and mail-related activities, but it does not authorize activities unrelated to providing postal services.

charged with, among other things, providing types of mail service to meet the public's needs.⁷⁶

The Act also grants the Postal Service certain general and specific powers to carry out these duties. The general powers enable the Postal Service to function as a business, an enumeration necessary since, under the Act, it would no longer operate as an executive department of the federal government.⁷⁷ The specific powers relate, for the most part, to matters involving postal operations, *e.g.*, the handling of mail, payment of postage, the need for post offices, and investigating postal offenses.⁷⁸

In contrast to the overriding emphasis on the Postal Service's obligations regarding postal services, the Act contains but two references to nonpostal services, sections 404(a)(6) and 2003(b)(1).⁷⁹ Certainly, Congress was aware that historically the Postal Service provided sundry nonpostal or nonmail services. Section 2303 of former title 39 specifically refers to nonpostal services, illustratively citing the sale of documentary stamps for the Department of the Treasury. As chronicled by Cullinan, the Post Office Department (POD), over time, performed numerous, miscellaneous nonpostal functions such as: Alien address reporting, selling U.S. savings bonds, maintaining "wanted" posters issued by the Federal Bureau of Investigation, and witnessing the marking of absentee ballots.⁸⁰

When the POD offered a commercial service unrelated to the mails it was based on specific congressional authorization, namely by an amendment to its then-existing statutory authority. The principal example is the postal savings system, which Congress established in 1910 and discontinued in 1966.⁸¹ In contrast, the PRA contains no explicit authorization enabling the Postal Service to offer commercial, nonpostal services.

In filings subsequent to its comments on the petition in Docket *2003, the

Postal Service elaborates on its assertion regarding its authority to provide commercial, nonpostal services, principally by quoting two sentences from the House Report on H.R. 17070. Before examining those excerpts, two preliminary observations are in order. First, as a general matter, the Postal Service's philosophy regarding nonpostal services is that it "only develops products and services to meet the needs of postal patrons[.]"⁸² Assuming the Service is referring to postal patrons in their capacity as consumers of postal products and not as a general description of all United States residents, the incongruity is apparent—products and services designed to meet the demands of postal patrons would appear, *ipso facto*, to be postal.

Second, in its Report on Nonpostal Initiatives, the Postal Service again alludes to its mandate regarding postal services to support its unilateral offering of various "nonpostal" services. It states: "To fulfill its universal service mandate and mission, the Postal Service must find ways to use existing resources to generate new revenue."⁸³ This statement, by itself, is unobjectionable, but it does not justify the unilateral offering of an unfettered range of commercial services as nonpostal. In the final analysis, the Postal Service can point to no statutory language supporting its expansive view of the term nonpostal.⁸⁴

The two excerpts from the House Report on H.R. 17070 are apparently cited for the proposition that the Postal Service can engage in whatever nonpostal activities it may wish. As approbation, such reliance is misplaced. The Postal Service quotes the following sentence as justifying its expansive definition of the term nonpostal: "The Postal Service is empowered to engage in research and development programs directed toward the expansion of present postal services and development of new services responsive to the evolving needs of the United States."⁸⁵

⁸² Answer of the United States Postal Service, Docket No. C2004-2, April 26, 2004, Attachment A at 1.

⁸³ Report on Nonpostal Initiatives, Docket *2003, March 10, 2003, at 1 (Report on Nonpostal Initiatives).

⁸⁴ In a similar vein, the Postal Service's desire "to leverage its existing resources as efficiently as possible" is entirely in keeping with its duties to provide postal services and to operate in a more business-like fashion. But, again, under the Act, this desire does not necessarily mean that it is free to undertake unilaterally to offer competitive, commercial services.

⁸⁵ Report on Nonpostal Initiatives, *supra*, at 1; citing H.R. Rep. No. 1104, 91st Cong. 2nd Sess. 9 (1970) at 3657; *see also* Answer of the United States Postal Service, Docket No. C2004-2, April 26, 2004, Attachment A at 1.

This one sentence, part of a larger discussion summarizing the bill, is preceded by statements underscoring the Postal Service's *postal* obligations, namely to develop adequate and efficient postal service, to maintain its universal service obligation, and to provide effective postal service in rural and urban communities.⁸⁶ It is followed immediately by a recitation of some of the Postal Service's specific powers, as reflected in section 404 of the Act, notably however, without any reference to its authority to provide special, nonpostal or similar services.⁸⁷ Thus, in context, the quoted language is simply part of an abbreviated recitation of the Postal Service's postal duties. Moreover, the specific language is nothing more than a variation of a basic purpose of the bill, namely to "[e]nable the *postal* service to continue to provide—and extend and improve upon—the present quality and scope of postal service * * *".⁸⁸ Thus, it was Congress' expectation that research and development would produce improvements in the present and future communications services provided to postal patrons.

While only inferred by its comments, the Postal Service apparently interprets the phrase "new services" to mean nonpostal. If so, this construction is wholly without support. The entire discussion is framed in terms of the Postal Service's postal obligations; there is no mention of its nonpostal authority, even when the subject turns to the Postal Service's specific powers; and finally, it would suggest, contrary to the carefully crafted balance reflected in the Act, that Congress granted the Postal Service *carte blanche* to engage in whatever "new services" it may wish without any opportunity for regulatory review or public input.

Nor does the second passage from the House Report provide any support for the Postal Service's interpretation of the term nonpostal. The sentence relied on reads as follows: "H.R. 17070 envisions a national postal service that is forever searching for new markets and new ways by which the communications needs of the American people may be served."⁸⁹ This statement is included in a discussion concerning procedures for changes in *postal service* under H.R. 17070, which provided for review of such changes by the regulatory body,

⁸⁶ H.R. Rep. No. 91-1104, *supra*, at 3657.

⁸⁷ *Ibid.*

⁸⁸ *Id.* at 3650.

⁸⁹ Report on Nonpostal Initiatives, *supra*, at 1; citing H.R. Rep. No. 1104, 91st Cong. 2nd Sess. 20 (1970) at 3668-69; *see also* Answer of the United States Postal Service, Docket No. C2004-2, April 26, 2004, Attachment A at 2.

⁷⁶ 39 U.S.C. 403(b)(2).

⁷⁷ 39 U.S.C. 401. These general powers include, for example, the power to sue and be sued, to contract, to determine its own system of accounts, and to acquire property.

⁷⁸ 39 U.S.C. 404. To the extent the Postal Service may rely on section 401(a)(10) for authority to engage in commercial, nonpostal activities, the Commission believes such reliance to be misplaced.

⁷⁹ The latter provides that revenues from postal and nonpostal services are to be deposited in the Postal Service Fund.

⁸⁰ *The United States Postal Service, supra*, at 196-99.

⁸¹ *See* Act of June 25, 1910, ch. 386, 36 Stat. 814 and Act of March 28, 1966, 80 Stat. 92; *see also* *The United States Postal Service, supra*, at 193-95.

namely the Postal Regulatory Board.⁹⁰ The discussion makes it clear that while the Postal Service, as a public service, should be operated "on a businesslike basis," H.R. 17070 provided a mechanism for public input in the form of regulatory review.

In establishing the Postal Service on a businesslike basis, H.R. 17070 provides significant assurance that the postal management will in fact be responsive to the people to a greater degree than has heretofore been known. But in addition, H.R. 17070 contains specific provisions requiring justification and review of changes in service. Following procedures comparable to those for proposed rate changes, operating management would submit proposals relating to changes in service to the Rate Board with public notice and opportunity for comment. The Board would have discretion as to whether to hold public hearings. Written submissions would be permitted in any case.⁹¹

Again, there is no suggestion in this discussion (or elsewhere) that the "new markets and new ways by which the communications needs of the America people may be served" refer to anything other than postal services as they may evolve over time.⁹² The heading for the entire discussion is "Procedures for changes in postal service".⁹³ Moreover, that the "communications needs" refers to postal services is confirmed by the House Report's description of section 101(a) of H.R. 17070, concerning the "postal policy" underlying what became the Act.⁹⁴ "[T]he United States Postal Service shall be operated as a basic communication service provided to all the people by the Government of the United States[.]"⁹⁵

Furthermore, the Postal Service's construction is flawed for another reason. It fails to consider the independent role reserved for the Commission under the Act. In *United Parcel Service*, *supra*, the court observed:⁹⁶

Management was vested in the Postal Service, rate and classification supervision in

the Postal Rate Commission. We recognize and weigh heavily the congressional goal of greater managerial flexibility, but also recognize another congressional purpose that finds its incarnation in the Postal Rate Commission. The Commission's existence insures that an agency independent of the Postal Service will provide for public notice and hearing input of those affected by the proposed action and full and on the record, *see* 39 U.S.C. 3624(a), consideration of pertinent factors and congressionally imposed goals before certain types of decisions are made.

In ceding its ratemaking authority, Congress established procedures for the review of Postal Service rate, classification, and service changes. Among other things, it was mindful of the need for the Commission to consider competitive concerns.⁹⁷ The Act thus reflects a careful balance between allowing the Postal Service to operate in a more business-like manner (and free of politics) while affording the public reasonable protections, including the opportunity for public input. In contrast to this carefully constructed scheme, the Postal Service interprets nonpostal expansively to justify the provision of any type of service to the public, commercial or not, that it classifies as not postal. Section 404(a)(6) is simply too thin a reed to support such a reading. It suggests that Congress would be unconcerned with the competitive implications of putative nonpostal services, while, at the same time, it expressly considered them concerning postal matters. A fair reading of section 404(a)(6) within the context of the Act suggests that the term nonpostal has a more limited reach.

D. Flamingo Industries Did Not Address the Meaning of the Term Nonpostal

In their initial comments, OCA/CA assert that the Supreme Court's statements in *Flamingo Industries*⁹⁸ concerning nonpostal lines of business operated by the Postal Service and its predecessor the Post Office Department are irrelevant to issues in this proceeding.⁹⁹ Among other things, OCA/CA contend that the Court used the term "nonpostal" in a non-technical sense and further that the authorities it cites do not support the statements made.¹⁰⁰ In its Reply Comments, the Postal Service notes, without

elaboration, the Court's observation that "[t]he Postal Service does operate nonpostal lines of business, for which it is free to set prices independent of the Commission, and in which it may seek profits to offset losses in the postal business."¹⁰¹

The question presented in *Flamingo Industries* was whether the Postal Service is a "person" under Federal antitrust laws. In holding that the Postal Service is not a person separate from the United States itself, the Court relied, in large measure, on the Service's statutory designation as "an 'independent establishment of the executive branch of the Government of the United States.'" ¹⁰² In support of its conclusion, the Court cited the Postal Service's "nationwide, public responsibilities" that distinguish it from private enterprise, including its breakeven requirement, universal service obligation, and national security responsibilities. The Court also noted that the Postal Service possesses powers more characteristic of Government than private enterprise including its statutory monopoly, the power of eminent domain, and the power to conclude international postal agreements.¹⁰³ Further, the Court observed that because the Postal Service lacked the power to set prices, "[i]t lacks the prototypical means of engaging in anticompetitive behavior."¹⁰⁴ The Court concluded that these "public characteristics and responsibilities indicate [the Postal Service] should be treated under the antitrust laws as part of the Government of the United States, not a market participant separate from it."¹⁰⁵

The Court then proceeded to discuss the Postal Service's "nonpostal lines of business,"¹⁰⁶ an issue that arose only because, in its brief to the Court, *Flamingo Industries* raised the collateral argument that the Postal Service was authorized to engage in commercial activities, citing section 404(a)(6).¹⁰⁷ It offered this argument, notably without any analysis of the term nonpostal, in support of its ultimate position that the Postal Service should be perceived as a person subject to federal antitrust laws, contending that such activities demonstrate that the Postal Service operates like private industry in the commercial world.

⁹⁰ H.R. Rep. No. 91-1104, *supra*, at 3668.

⁹¹ *Ibid.* Based on the record, the Board would issue an initial decision that would become final unless modified or revoked by the Commission on Postal Costs and Revenues.

⁹² As with the prior excerpt, one can only infer that the Postal Service interprets the phrase "new markets and new ways" to mean nonpostal. For the reasons discussed above, if that is its position, it, too, is wholly unsupported. Examples of new markets and new ways to communicate were manifest shortly after passage of the Act in the form of Electronic Computer Originated Mail and Mailgrams.

⁹³ H.R. Rep. No. 91-1104, *supra*, at 3668 (emphasis in original).

⁹⁴ *Id.* at 3671.

⁹⁵ *Ibid.*

⁹⁶ *United Parcel Service*, *supra*, 455 F. Supp. at 869.

⁹⁷ *See* 39 U.S.C. 3622(b)(4) and (b)(5).

⁹⁸ *United States Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004) (*Flamingo Industries*).

⁹⁹ Joint Initial Comments at 13-15.

¹⁰⁰ *Id.* at 13-14. Given their proposed definition of the term nonpostal, OCA/CA take issue with the Court's statement that the Postal Service may set prices and earn profits on some products or services offered to the public. *Id.* at 14-15.

¹⁰¹ Postal Service Reply Comments, *supra*, at 6, citing *Flamingo Industries*, slip op. at 10.

¹⁰² *Flamingo Industries*, slip op. at 9.

¹⁰³ *Id.* at 10.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Id.* at 10-11.

¹⁰⁷ *See* Brief for Respondents, Case No. 02-1290, September 15, 2003, at 22-23.

The Court's observations concerning the Postal Service's "nonpostal lines of business" were not offered as dispositive of the meaning of the term nonpostal. Nor, parenthetically, does the Postal Service contend this. Rather, the observations, largely *dicta* in character, simply indicate that the (unspecified) lines of business do not demonstrate that the Postal Service should be viewed as separate from the Government under antitrust laws. Thus, other than perhaps as suggested by Pitney Bowes, *Flamingo Industries* has no bearing on issues before the Commission in this proceeding.¹⁰⁸

In sum, nothing in either the statute or the legislative history provides support for the Postal Service's position. Prior to the enactment of the PRA, the Post Office Department's provision of miscellaneous nonpostal services was well recognized. In the main, the Post Office Department served as a surrogate for the government providing relatively minor services unrelated to the mails. Nor is it insignificant that the legislative history of the Act contains no substantive discussion of the term "nonpostal." Against this considerable backdrop, it is unreasonable to suggest that the simple reference to "nonpostal" in section 404(a)(6) can be read to empower the Postal Service to offer unilaterally to the public whatever service, commercial or otherwise, it might wish. Such a reading is too at odds with the statute, legislative history, and historical operations to be credible. Had Congress intended something more, it would have been explicit, as it was when it detailed the Postal Service's postal functions.

Recognizing that the differences between its and the Commission's interpretations may need to be resolved judicially, the Postal Service states that until that happens the Commission "cannot authoritatively impose its own formulation and interpretation on the Postal Service's conduct[.]"¹⁰⁹ That is neither the intent nor purpose of the rule. The Commission properly is acting to clarify the scope of its own jurisdiction. To reiterate, the Postal Service remains free to offer whatever services are consistent with its statutory mandate. Nothing in the rule affects the lawfulness of the Postal Service

initiatives that are not postal. As the Commission has noted previously, it lacks equitable powers to enjoin Postal Service actions. Thus, the lawfulness of Postal Service's nonpostal activities is not an issue before the Commission.¹¹⁰ However, the prices for postal services must be set in accordance with section 3624.

V. Definition of the Term Postal Service

Early consideration of what constituted a "postal service" was limited perforce to hard copy mail. That, after all, simply reflected the state of Postal Service operations at the time. One of the issues now before the Commission is whether services relying on new technology, such as electronic services, fall within the ambit of postal services under the Act. As elaborated on below, the Commission concludes that those services in which the Postal Service receives, transmits, or delivers correspondence constitute postal services. This conclusion is drawn from the Act and its legislative history.

Section 403 sets out the general duties of the Postal Service, beginning with the duty to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees."¹¹¹ It is required to "receive, transmit, and deliver * * * written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest."¹¹² Its responsibilities also include maintaining an efficient delivery system and providing types of service to meet the needs of different users.¹¹³

There are no limitations inherent in these broad general duties, or elsewhere in the Act, which would suggest that the Postal Service should not consider technological advances when carrying out its functions. Section 101(a) instructs that the Postal Service "shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people." In describing this section, the House Report states that the "Postal Service shall be operated as a basic communications service provided to all the people by the Government of the United States[.]"¹¹⁴ The policy that the Postal Service is to be operated as "a

basic communications service" can only be fulfilled if the Postal Service can avail itself, consistent with the Act, of technological innovations effecting communications. The Act does not require the Postal Service to ignore innovations, and to remain, in essence, the equivalent to the best buggy whip manufacturer it can be.

The House Report confirms that Congress envisioned that postal services would change over time as influenced by, among other things, technological, economic, and social growth. In reforming the then-existing postal system, Congress intended to "[c]reate a lasting foundation for a modern, dynamic, and viable postal institution that is both equipped and empowered at all times to satisfy the postal requirements of the future technological, economic, cultural, and social growth of the Nation."¹¹⁵

Comments by competitors raise legitimate concerns about the Postal Service's unilateral offering of commercial, "nonpostal" services.¹¹⁶ These comments demonstrate that many of these services have a substantial public effect. Congress envisioned that a "modern, dynamic, and viable postal institution" would satisfy the Nation's postal needs by harnessing technological and economic changes. In short, not surprisingly, Congress anticipated that postal services would evolve over time. Moreover, by bifurcating the authority under the Act between the Commission and the Postal Service, Congress provided a mechanism to ensure that legitimate public interests would continue to be protected. As described by the court in *United Parcel Service, supra*, the Commission "was designed as a sort of sunshine mechanism to avoid undue political influence and to assure the public is heard from and the public interest represented before rate, classification, and significant service changes are made."¹¹⁷

The careful balancing of authorities between the Commission and the Postal Service under the Act reflects Congress' concern that the public be adequately protected once congressional control of the Post Office Department was relinquished. In light of the safeguards built into the Act, there was no pressing need to define the term "postal service," particularly since, as discussed above, the entire thrust of the Act concerns the

¹⁰⁸ In its comments, Pitney Bowes contends that in reaching its conclusion that the Postal Service was not subject to federal antitrust laws the Court relied, in part, on the Commission's role in providing regulatory review of services and products offered by the Postal Service. Thus, according to Pitney Bowes, "there is all the more reason to assure that the Commission's oversight remains strong and effective." Pitney Bowes Comments, *supra*, at 3, n.1.

¹⁰⁹ Postal Service Initial Comments at 4.

¹¹⁰ See, e.g., PRC Order No. 724, December 2, 1986, at 11; PRC Order No. 1239, May 3, 1999, at 13.

¹¹¹ 39 U.S.C. 403(a).

¹¹² *Ibid.*

¹¹³ 39 U.S.C. 403(b)(1) and (b)(2).

¹¹⁴ H.R. Rep. No. 91-1104, *supra*, at 3671.

¹¹⁵ *Id.* at 3650.

¹¹⁶ See, e.g., Pitney Bowes Comments, *supra*, at 2-4, UPS Comments, *supra*, at 1-2, and Lifetime Addressing Comments, *supra*, at 2.

¹¹⁷ *United Parcel Service, supra*, 455 F. Supp. at 869.

Postal Service's postal mission.¹¹⁸ The need only arises now, as discussed in Order No. 1389, because the spate of recent services introduced unilaterally by the Postal Service has created uncertainty and controversy regarding the postal character of those services. Codifying the term in the Commission's rules should alleviate those problems by providing guidance to the Postal Service and the public concerning services that are subject to sections 3622 and 3623 of the Act. As a general matter, the Commission concludes that services offered by the Postal Service that provide an alternative to more traditional mail services, such as electronic communication services, would fall within the proposed definition. With that elaboration, the Commission proposes to adopt new rule 5(s) to read as follows: *Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services supportive or ancillary thereto.

This definition employs statutorily linked terms descriptive of the Postal Service's duties and mission. The Postal Service has a duty to plan, develop, and provide adequate and efficient postal services. To fulfill that duty, it is required to "receive, transmit, and deliver * * * written and printed matter, parcels, and like materials[.]"¹¹⁹ As its "basic function," it is obligated "to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people."¹²⁰ Neither its duties nor obligations are predicated on preconceived notions of what "postal services" might be. Nor are they framed by reference to mail or the then existing mailstream, e.g., letters, publications, etc. Rather, the statute uses generic terms to describe application of the Postal Service's mission to "correspondence" and "written and printed matter, parcels, and like materials." As evidenced by the legislative history, the statute anticipates the influence of technological, economic, and social change on the provision of postal

services. Accordingly, it is appropriate to utilize the statutorily derived terms.

The benefit of focusing on the statutory functions of the Postal Service can be shown through the following hypothetical. Assume the Postal Service assigns every American a permanent e-mail address, and charges individuals an annual fee to access e-mails sent to those addresses. The Service would be accepting, transmitting and delivering business and personal correspondence. Under the proposed definition this would be a postal service, even though no tangible hard copy changed hands. The private express statutes do not, and should not apply to e-mail, but the Postal Service would be competing with private firms and its own products in a healthy industry, and its rates and fees should be fair and nondiscriminatory.

The terms of the proposed definition are easily understood and their meaning clear. The term "receipt" is the act of receiving something; "transmission" covers the act of transmitting, that is sending or conveying something to a destination or recipient; and "delivery" is the act of transferring, turning over, or making available the item(s) transmitted to the recipient. Collectively, these terms encompass the related activities associated with postal services, e.g., acceptance, collection, verification, and processing.

It is appropriate to reflect electronic services in the definition of the term postal service. Postal services have continually evolved over time with changes in technology. For example, stagecoaches, which were initially used to transport the mails, were supplanted by railroads which, in turn, gave way to trucks and airplanes. In considering the evolutionary effects of technology, the Commission has observed:¹²¹

It is not merely that these technological advances provided for improved service, rather they gave rise to wholly new forms of "postal service." Examples include airmail service, Express Mail services, as well as electronic mail. In addition, technology has given rise to many new types of special postal services such as Confirm, and delivery and signature confirmation.

Indeed, the Postal Service has recognized the role of technology in shaping the nature of postal services. Commenting on its Electronic Computer Originated Mail (E-COM) proposal in Docket No. MC78-3, the Postal Service characterized its entry into the electronic mail field as "a natural progression of technology," by using "electronics to move the mail" instead

of a surface or air carrier.¹²² Moreover, regarding its proposal, the Postal Service maintained the position that E-COM messages, while in electronic form, were deemed "'in the mails.'" ¹²³ Similarly, concerning Mailing Online Service, a Postal Service witness characterized the bits of electronic data that would ultimately be reduced to hard copy messages "as mail pieces."¹²⁴ There are other contemporaneous indications that the Postal Service has considered electronic service offerings as an extension of traditional mail services. For example, upon review of new products offered by the Postal Service, the General Accounting Office reported that the Postal Service "views its entry into the electronic commerce market as an extension of its core business—the delivery of traditional mail. According to Service officials, electronic mail has the same attributes as traditional mail * * *."¹²⁵

The Postal Service use of technology to develop new types of postal service is entirely consistent with its statutory mandate "to provide postal services to bind the Nation together" by "provid[ing] prompt, reliable, and efficient services to patrons in all areas * * *."¹²⁶ The Postal Service's central mission is to "plan, develop, promote, and provide adequate and efficient postal services * * *."¹²⁷ Furthermore, it is instructed to "promote modern and efficient operations" while refraining from any practice "which restricts the use of new equipment or devices which may reduce the cost or improve the quality of postal services[.]"¹²⁸ Consistent with these mandates, the Postal Service has employed technology in the pursuit of more efficient and modern postal services.

This rulemaking is not the appropriate forum for the Commission

¹²² Initial Brief of the United States Postal Service, Docket No. MC78-3, November 9, 1979, at 9. In that proceeding, the Postal Service argued that "E-COM service fits squarely within the scheme of transmitting messages envisioned by the Postal Reorganization Act. * * * The E-COM proposal keeps pace with advances in technology * * * by utilizing electronics to move mail, instead of utilizing [a surface or air carrier]." *Ibid.*

¹²³ PRC Op. MC78-3, December 17, 1979, at 172 (footnote omitted).

¹²⁴ Docket No. MC98-1, Tr. 7/1718.

¹²⁵ General Accounting Office Report, Development and Inventory of New Products, GAO/GGD-99-15 (November 24, 1998) at 36. See also 61 FR 42,219 (1996) (Electronic services "will provide security and integrity to electronic correspondence and transactions, giving them attributes usually associated with First-Class Mail.")

¹²⁶ 39 U.S.C. 101(a).

¹²⁷ 39 U.S.C. 403(a); see also 39 U.S.C. 403(b)(2) (The Postal Service shall "provide types of mail service to meet the needs of different categories of mail and mail users.")

¹²⁸ 39 U.S.C. 2010.

¹¹⁸ This represents a marked contrast to postal legislation currently pending before Congress. The Senate bill, S. 2468, limits the term "postal service" to physical deliveries whereas the House bill, H.R. 4341, employs the phrase "carriage of." Both would delete current section 404(a)(6), with the Senate bill appearing to preclude all such services other than under section 411, while the House bill would grandfather service provided as of May 12, 2004.

¹¹⁹ 39 U.S.C. 403(a).

¹²⁰ *Id.* § 101(a).

¹²¹ PRC Order No. 1389, January 16, 2004, at 8.

to address the jurisdictional status of specific services, such as those identified in Consumer Action's petition, that the Commission has not had an opportunity to consider fully. To provide some guidance as to the application of the new rule, however, the Commission will, for illustrative purposes, refer to several services no longer offered by the Postal Service.

In Docket No. C99-1, the complainant contended that the Postal Service was providing a new service, Post Electronic Courier Service (Post ECS), in violation of the Act.¹²⁹ Post ECS service, a pilot program available only to licensees, offered an all-electronic means of transmitting documents securely via the Internet. Briefly, licensees could transmit documents to a Postal Service Electronic Commerce Server whereupon the Postal Service would notify the addressee by e-mail that the document was available at a specified URL address. To retrieve the document, the addressee would access the site, enter the appropriate password, and, if desired, download the document.

The Postal Service moved to dismiss the complaint arguing, first, that the Commission lacked authority to determine the status of the service as either postal or nonpostal, and second that, even assuming the Commission had authority to determine the status of Post ECS service, the complaint should be dismissed as beyond the Commission's authority because the service is neither postal nor domestic.¹³⁰ The Commission denied the motion, finding that its mail classification authority empowered it to review the status of services proposed or offered by the Postal Service.¹³¹ Nor was the Commission persuaded, based on the record developed to that point, that the service did not include domestic operations or that it was nonpostal. Ultimately, however, the issue whether Post ECS was, or was not, a postal service was not reached as the complaint was subsequently dismissed as moot.¹³²

Recognizing that the proceeding concluded without benefit of a hearing,

but assuming that Post ECS service included some wholly domestic transactions, all indications suggest that Post ECS would be a postal service under the new rule. In that proceeding, the Commission did not find it dispositive that service did not entail hard copy mail.¹³³ As the Commission noted in Order No. 1239, "a colorable claim [was made] that [Post ECS service] not only is very closely related to the carriage of mail, it is the delivery of mail because it accomplishes by electronic means all the functions that would otherwise be performed by conveying a physical message or document."¹³⁴

The Postal Service offers various ways to receive and pay bills. These currently include First-Class Mail, Priority Mail, and Express Mail. Until earlier this year, it also offered online payment services, consisting of USPS eBillPay, USPS Send Money, and USPS Pay@Delivery.¹³⁵ These services were discontinued May 1, 2004.¹³⁶

USPS eBillPay enabled customers to receive, review, and pay their bills via the Postal Service's Web site. The Postal Service described it as an all electronic service, except for any payments mailed at standard rates of postage.¹³⁷ It would appear that USPS eBillPay operated simply as a surrogate for more traditional means of receiving and paying bills. Some payments utilized the mails. In this regard, there are obvious parallels to money orders, currently a jurisdictional special service. Thus, under the statute, based on currently available information, this service would likely be considered a postal service.¹³⁸

In the recent past, the Postal Service offered a stored value card, LibertyCash, for use in purchasing postage and related products. Consideration was also given to the possibility of using it as a means to provide refunds to postal customers.¹³⁹ Apparently, the Postal Service did not charge a separate fee for the card, but only the value of the

postage encoded on it. The card is no longer offered for sale.¹⁴⁰ Based on publicly available information, it would appear that LibertyCash was designed to give postal patrons a different payment option for purchasing postage or related products. Recognizing that the outcome would be dependent on the facts, two scenarios can be hypothesized for illustrative purposes. On the one hand, the card may have properties analogous to an advance deposit account, some of which are subject to an annual accounting fee recommended by the Commission. In that case, it likely would be viewed as an ancillary postal service. On the other hand, the card may have characteristics more analogous to a gift card, available to purchase Postal Service merchandise (mugs, etc.) as well as postage. In that event, it likely would not be considered an ancillary postal service.

VI. The Parties' Comments Regarding the Proposed Rule

The breadth of comments received in response to the proposed rulemaking was useful in the Commission's deliberations. They range from a suggestion that the Commission do nothing to one defining postal services based on a narrow meaning of the term nonpostal. Each of the comments has been carefully considered. In the final analysis, the Commission determination not to adopt either the proposed rule or variations suggested by commenters is predicated on its conclusion that it would be preferable to link the definition of the term "postal service" to the Postal Service's statutory duties rather than by reference to specific activities that the Postal Service may or may not perform.

Of the seven sets of initial comments received, four suggest revisions to the proposed rule. Each is addressed below. Two of the remaining three commenters support the proposed rule, although for different reasons. In brief comments, the Parcel Shippers Association endorses the proposed rule, expressing its support for the treatment of the delivery of packages as a core postal service.¹⁴¹ Pitney Bowes advocates that the Postal Service should focus on its core mission, which it describes as maintaining universal physical mail service.¹⁴² To the extent that the Postal Service engages in non-core activities, Pitney Bowes argues that regulatory oversight is imperative given the Postal Service's statutorily defined monopoly

¹²⁹ PRC Order No. 1239, *supra*, at 15-21.

¹³⁴ *Id.* at 19 (emphasis in original).

¹³⁵ Report on Nonpostal Initiatives, *supra*, at 8-9.

¹³⁶ http://www.usps.com/payment/services/ops_discontinued.htm; see also Update to Report on Nonpostal Initiatives, Docket *2003, November 14, 2003.

¹³⁷ Report on Nonpostal Initiatives, *supra*, at 9.

¹³⁸ Moreover, these efforts by the Postal Service to harness technology are precisely what the statute has in mind with respect to postal services, namely to plan, develop, and provide adequate and efficient postal services and to bind the nation together through, in these instances, business correspondence. The Commission's rules provide various options for expedited review of such proposals. See 39 CFR 3001.67 *et seq.* and 3001.161 *et seq.*

¹³⁹ Report on Nonpostal Initiatives, *supra*, at 5.

¹⁴⁰ Update to Report on Nonpostal Initiatives, *supra*, at 1.

¹⁴¹ PSA Comments at 1-2.

¹⁴² Pitney Bowes Comments at 1.

¹²⁹ See Complaint of United Parcel Service, Docket No. C99-1, October 5, 1998. UPS's complaint was based on three claims: (a) That the service may only be established pursuant to sections 3622 and 3623 of the Act; (b) that the provision of the service at no charge violates sections 3622(b)(3) and 3622(b)(4); and (c) that Post ECS represents a change in the nature of postal services affecting service on a nationwide or substantially nationwide basis.

¹³⁰ Motion of the United States Postal Service to Dismiss, Docket No. C99-1, November 5, 1998.

¹³¹ PRC Order No. 1239, May 3, 1999, at 12.

¹³² PRC Order No. 1352, November 6, 2002. The Postal Service terminated Post ECS service and moved to dismiss the complaint as moot.

and service obligation.¹⁴³ While it would prefer a legislative solution to the issue, Pitney Bowes endorses the proposed rule as sufficiently expansive to ensure necessary regulatory oversight.¹⁴⁴

The last of the remaining commenters, Lifetime Addressing, asserts that “[t]he public interest is best served by a broad definition of jurisdiction.”¹⁴⁵ In addition, it contends that the proper role for the Postal Service, as a government entity, is to deliver physical mail, not to provide services available from the private sector.¹⁴⁶ In its reply comments, Lifetime Addressing urges the Commission to adopt a broad definition of the term “postal service” to protect the public interest and endorses the definitions proposed by OCA/CA.¹⁴⁷

Postal Service comments.

Conceptually, the Postal Service does not oppose including a definition of the term postal service in the Commission’s rules, characterizing it as “a logical addition to the rules.”¹⁴⁸ The Postal Service suggests the rule would be improved if it referenced *NAGCP I*, ostensibly to clarify that the effect of the definition is “merely to restate prevailing law.”¹⁴⁹ In addition, the Postal Service would define postal service to mean “the carriage of letters, printed matter, or mailable packages, including acceptance, collection, processing, delivery, or other services supportive or ancillary thereto.”¹⁵⁰ This alternative differs from the Commission’s in several respects.

First, the Postal Service proposes to define postal service in terms of “carriage of” mail rather than “delivery of” mail, arguing that “as far back as Docket No. R76–1 * * * [the Commission] has focused on the “carriage of mail.”¹⁵¹ The Commission will not adopt this suggestion as it appears to overlook that the term “carriage of mail” is shorthand for the collection, transmission, and delivery of mail matter.¹⁵² Hence, including the

“carriage of” terminology in the definition of postal service would not serve to clarify its meaning. To the extent the Postal Service was posing a definition that overly emphasizes the delivery function, the definition proposed herein avoids that concern.

Second, the Postal Service would eliminate reference to the maximum weight of packages, noting that the statutory maximum was deleted in 1982.¹⁵³ It proposes that, in lieu of including a set maximum weight limit, the definition simply refer to “mailable” packages.¹⁵⁴ This is a useful suggestion and will be incorporated into the definition. The virtue of the proposal is its simplicity. It incorporates the concept of eligibility while eliminating the need to make conforming changes to the definition should the maximum weight limit be revised subsequently.¹⁵⁵

Third, in a revision to the definition it originally proposed, the Postal Service would delete reference to “transmission.”¹⁵⁶ This revision was prompted by PostCom’s suggested alternative to the proposed rule. For the reasons discussed below, the Commission declines to adopt it.

PostCom comments. PostCom contends that the Commission should not proceed with this rulemaking, citing indications that the Postal Service may have curtailed its “nonpostal” activities and potential legislative reform.¹⁵⁷ Alternatively, it suggests a definition limiting postal services to physical deliveries, “including acceptance, collection, verification, sorting and transportation, and directly related services and functions.”¹⁵⁸

The initial appeal of its argument that the Commission do nothing wanes on consideration.¹⁵⁹ Doing nothing would perpetuate the status quo, a result that, under the circumstances, is not in the public interest. Further, the mere prospect of relief via potential

which is ancillary to one or more of these three steps.” *Ibid.*

¹⁵³ Postal Service Initial Comments at 5.

¹⁵⁴ *Ibid.*

¹⁵⁵ The same would not be the case concerning PostCom’s proposed definition, which contains no reference to maximum weight or mailability. PostCom Initial Comments at 4. PostCom’s suggestion has rate and classification implications and could, if adopted, create some confusion concerning the eligibility to mail items in excess of 70 pounds.

¹⁵⁶ Postal Service Reply Comments at 3.

¹⁵⁷ PostCom Initial Comments at 1–2.

¹⁵⁸ *Id.* at 4.

¹⁵⁹ In its reply comments, PostCom states its belief that a comprehensive definition of the term “postal services” can only be undertaken by Congress. PostCom Reply Comments at 1. Even accepting this statement at face value, however, does not negate the Commission’s responsibilities under the current statute.

legislative reform is insufficient to dissuade the Commission from addressing this controversy. The need to define the term arises precisely because uncertainty exists whether what the Postal Service calls “initiatives” are “postal services.” Those filing complaints with the Commission contesting this point are entitled to a reasoned response. The proposed rule is intended to provide guidance to the Postal Service and the public concerning services that fall within the ambit of sections 3622 and 3623 of the Act.

PostCom’s alternative proposal is designed to remove “electronic delivery mechanisms” from the definition.¹⁶⁰ Among other things, PostCom proposes to substitute the term “transportation” for “transmission,” expressing concern that “transmission” may be construed to include electronic rather than only physical delivery.¹⁶¹ The Commission will not adopt PostCom’s proposed alternative definition. As discussed above, the current statute contemplates that the Postal Service will avail itself of technological advances in providing postal services. The term “transmission” derives from the statute and has been used historically by the Commission. Among its general duties, the Postal Service “shall receive, transmit, and deliver throughout the United States, its territories and possessions, * * * written and printed matter, parcels, and like materials * * *.” 39 U.S.C. 403(a). Furthermore, the Commission has employed the term “transmission” for almost 30 years. In Docket No. R76–1, the Commission determined that special postal services were those “ancillary to the collection, transmission, or delivery of mail.”¹⁶² It is a standard invoked in other proceedings as well. *See* PRC Order No. 1128, July 30, 1996, at 10; PRC Order No. 1145, December 16, 1996, at 8; and PRC Order No. 1239, May 3, 1999, at 16 and 19.

Nor will the Commission adopt PostCom’s suggestion to substitute “directly related services and functions” for “other services supportive or ancillary thereto.” While PostCom is mildly critical of the terms “ancillary” and “supportive,” it offers no support for the term “directly related” other than to assert that it is “more precise.”¹⁶³ Again, the terms used in the proposed rulemaking trace to Docket No. R76–1 where the Commission described special services as ancillary to

¹⁶⁰ PostCom Initial Comments at 4.

¹⁶¹ *Ibid.*

¹⁶² PRC Op. R76–1, Vol. 2, Appendix F at 3.

¹⁶³ PostCom Initial Comments at 4–5.

¹⁴³ *Id.* at 2–3.

¹⁴⁴ *Id.* at 3–4.

¹⁴⁵ Lifetime Addressing Comments at 2.

¹⁴⁶ *Ibid.*

¹⁴⁷ Lifetime Addressing Reply Comments at 2. Lifetime Addressing filed a motion for late acceptance of its initial comments. Motion for Late Acceptance of Comments of Lifetime Addressing, Inc., March 16, 2004. The motion is granted.

¹⁴⁸ Postal Service Initial Comments at 3.

¹⁴⁹ *Id.* at 4–5, citing *NAGCP I*, *supra*, 569 F.2d at 595–98.

¹⁵⁰ Postal Service Reply Comments at 3.

¹⁵¹ Postal Service Initial Comments at 5.

¹⁵² PRC Op. R76–1, Vol. 1, at 266, n.1. The use of the conjunctive does not imply that the term is contingent on all three functions being performed by the Postal Service. As the Commission explained, “[a] special postal service is thus one

the collection, transmission, or delivery of mail.¹⁶⁴ Restating its conclusions, the Commission described special services as “supportive or auxiliary” to the collection, transmission or delivery of mail because they enhance the value of service of one of the substantive classes of mail.¹⁶⁵

The Postal Service, which opposes PostCom’s suggestion, confirms that the Commission’s proposed language “tracks the approach used consistently for decades.”¹⁶⁶ In sum, PostCom’s suggestion represents no improvement over the long-used terms.

OCA/CA comments. As discussed above, OCA/CA propose a revamped definition of the term postal service based on the view that postal services are any service or product retained by the Postal Service that is not provided to another government entity. Accordingly, they propose to define postal service in terms of activities undertaken by the Postal Service that, for example, significantly affect the cost or value of existing services, put significant Postal Service revenues at risk, or have a significant adverse effect on the existing market.¹⁶⁷ They also propose that the Commission’s rules be amended to include a definition of nonpostal service, namely, services provided by the Postal Service on behalf of other governmental agencies.¹⁶⁸ In addition, OCA/CA discuss various services offered by the Postal Service, including de facto services, pilot tests, strategic alliances, and electronic services, which they believe should be deemed to be postal services.¹⁶⁹

OCA/CA list a set of conditions which would trigger a finding that a Postal Service activity is subject to sections 3622 and/or 3623. For example, an activity would be deemed a postal service if one of the following conditions applies: (a) It significantly affects the intrinsic cost of an existing class, subclass or rate category or the relative costs of existing classes, subclasses or rate categories; (b) it grants a significant preference to any person; or (c) it deviates significantly from established methods of providing a service.¹⁷⁰ This set of conditions offers, at best, a cumbersome means for

identifying a postal service and, in any event, is not free from ambiguity. A conclusion that a particular activity is a postal service or not would be dependent on a factual inquiry, e.g., whether the activity had a significant effect on an existing rate category, Postal Service revenues, or a competitor, etc.

This would appear to be a problematic way to define the term postal service. Interested persons would have to speculate how the Commission might view the nexus between the Postal Service activity and its impact on other services, classes of mail, or entities. Because of this, it would be unlikely to reduce uncertainty, a major goal of this rulemaking.

OCA/CA also propose to include a definition of the term nonpostal in the Commission’s rules and further urge the Commission not to employ the term “nonpostal” as proposed in a companion proceeding, Docket No. RM2004–2.¹⁷¹ The Commission finds it unnecessary to define the term nonpostal in this proceeding. The need only arises under OCA/CA’s proposal because the term nonpostal defines, by negative implication, the term postal service. Likewise, the request that the Commission refrain from using the term nonpostal in proposed rule 54(h)(1)(i) need not be addressed in this proceeding. The Commission will consider that issue in Docket No. RM2004–2, where OCA/CA have also raised it.

Finally, OCA/CA discuss other services which they believe qualify as postal services and urge the Commission to encompass these services in its rules.¹⁷² They identify the following types of services:

(a) De facto classification and service changes implemented without a recommended decision from the Commission. As examples, OCA/CA cite a new carrier pickup service and Electronic Tracking Confirmation service.¹⁷³

(b) Pilot tests, described as experimental services, but including trials or other types of tests. They suggest that the definition of the term postal service include “changes to the rates or terms of service for any mailer that deviates from the classification language contained in the DMCS or from the evidentiary record that established the terms of service[.]”¹⁷⁴

(c) Services provided through a strategic alliance or contract with one or more parties. As an example, OCA/CA cite NetPost CardStore. They contend that the Service’s “interactions and representations to the

public are the main determinant for concluding that a service or product offered through a partnership arrangement that leverages the Postal Service’s “brand” is a Chapter 36 “postal service.”¹⁷⁵

(d) Electronic services. They advocate that the rule explicitly state that services provided in whole or in part by electronic means are postal services.¹⁷⁶

In its reply comments, the Postal Service “urges the Commission to refrain from addressing the merits of CA/OCA’s arguments and conclusions regarding any current or future Postal Service activities” cautioning that any attempt to do so “would be prejudicial, unwise, and potentially invalid.”¹⁷⁷

OCA/CA’s discussion of various services offered by the Postal Service is germane to consideration of the term postal service. This does not mean, however, that this rulemaking is the appropriate forum for determining whether a specific service mentioned is a postal service or not. Facts necessary to make that determination are not available on this record. Moreover, it is unclear which services or their permutations the Postal Service continues to offer.

Nonetheless, the Commission anticipates that the Postal Service will file the appropriate requests for a recommended decision to the extent that services of this type fall within the rule ultimately adopted.¹⁷⁸

The Postal Service’s apparent increasing use of alliances with private sector companies to provide services to the public merits brief mention. Such arrangements are not determinative of whether a service is or is not a postal service. That determination is dependent on the nature of the service provided. To the extent it substitutes for traditional mail service or is offered in fulfillment of the Postal Service’s core mission, it may reasonably be considered to be a postal service. Illustratively, two examples may clarify the point. Pay@Delivery, a service no longer offered by the Postal Service, provided for the release of the buyer’s funds to the seller after delivery via Priority Mail is confirmed by Delivery Confirmation. As a variation of collect on delivery, this service would appear to have the hallmarks of a postal service. On the other hand, any connection of

¹⁶⁴ PRC Op. R76–1, Vol. 2, Appendix F at 3.

¹⁶⁵ PRC Op. R76–1, Vol. 1, at 266–67. While this restatement uses the term “auxiliary,” an acceptable meaning of that term, as PostCom recognizes, is ancillary. See PostCom Initial Comments at 5. (“The plain meaning of the term ‘ancillary’ implies services which are auxiliary or subordinate to other postal services provided.”)

¹⁶⁶ Postal Service Reply Comments at 2.

¹⁶⁷ Joint Initial Comments at Appendix A.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Id.* at 6–8; 23–39.

¹⁷⁰ *Id.* at Appendix A.

¹⁷¹ *Id.* at 15.

¹⁷² *Id.* at 6.

¹⁷³ *Id.* at 23–32.

¹⁷⁴ *Id.* at 34–35. They indicate that such changes would constitute de facto classification changes subject to the Commission’s jurisdiction. *Id.* at 35.

¹⁷⁵ *Id.* at 37.

¹⁷⁶ *Id.* at 38–39.

¹⁷⁷ Postal Service Reply Comments at 9.

¹⁷⁸ Previously, the Postal Service evaluated postal services in terms of processing of mail. A new service not involving mail is characterized as nonpostal. Report on Nonpostal Initiatives at 4. Implicitly, this evaluation is predicated only on hard copy mail. The Postal Service should reassess its conclusions in light of the rule ultimately adopted herein.

First-Class Phone Cards to postal service would appear to be tenuous at best.¹⁷⁹

United Parcel Service comments. UPS proposes that the term postal service be defined to mean “the acceptance, collection, processing, transmission, or delivery of letters, printed matter, or packages weighing up to 70 pounds (including, but not limited to, partially or wholly electronic services), and other services supportive or ancillary thereto.”¹⁸⁰ This proposal differs from that advanced by the Commission in Order No. 1389 in two ways. First, UPS reads the Commission’s proposed definition as possibly contingent on actual delivery by the Postal Service. Consequently, UPS would define postal service to encompass the various activities performed by the Postal Service, e.g., acceptance, transmission, etc., to preclude the argument that such services, if provided by the Postal Service exclusive of delivery, are not postal services. Second, UPS would explicitly include services that are either wholly or partially electronic.¹⁸¹

UPS raises a valid, if largely theoretical, point. Its alternative, however, could be construed as overly broad. Entities other than the Postal Service collect, process, and transmit mail prior to its deposit with the Postal Service. The definition suggested by UPS would expand the term postal service to include activities performed by entities, such as presort bureaus and consolidators, not subject to the Commission’s jurisdiction. Inserting the phrase “by the Postal Service” after the term “delivery” would foreclose this construction and, as so modified, would represent an improvement over the definition proposed by the Commission. In lieu of adopting this language, however, the Commission concludes, for reasons previously discussed, that it would be preferable to define the term postal service based on statutorily derived terms.

VII. Comments

Because it declines to adopt either its initially proposed rule or those suggested by any commenter, the Commission concludes that it would be appropriate to provide any interested person an opportunity to comment on the revised proposed rule. Accordingly, comments are due December 15, 2004. Reply comments may be filed on or before January 12, 2005. It is the Commission’s expectation to review

such comments expeditiously and thereafter amend its rules as may be appropriate.

Ordering Paragraphs

It is ordered:

1. The Commission proposes to amend its Rules of Practice and Procedure by inserting new rule 5(s), 39 CFR 3001.5(s) as follows: *Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services supportive or ancillary thereto.

2. Interested persons may submit comments by no later than December 15, 2004. Reply comments may also be filed and are due no later than January 12, 2005.

3. The Motion for Late Acceptance of Comments of Lifetime Addressing, Inc., March 16, 2004, is granted.

4. Proposed revisions suggested by commenters not adopted herein are deemed denied.

5. The Secretary shall arrange for publication of this Order in the **Federal Register**.

Dated: November 12, 2004.

By the Commission.

Steven W. Williams,
Secretary.

List of Subjects in 39 CFR Part 3001

Administrative practice and procedure, Postal service.

For the reasons discussed above, the Commission proposes to amend 39 CFR part 3001 as follows:

PART 3001—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 3001 continues to read as follows:

Authority: 39 U.S.C. 404(b); 3603; 3622–24; 3661, 3663.

Subpart A—Rules of General Applicability

2. Amend § 3001.5 by adding new paragraph(s) to read as follows:

§ 3001.5 Definitions.

* * * * *

(s) *Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services supportive or ancillary thereto.

[FR Doc. 04–25567 Filed 11–17–04; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 041108311–4311–01; I.D. 110204B]

RIN 0648–AR52

Fisheries of the Northeastern United States; Proposed 2005, 2006, and 2007 Fishing Quotas for Atlantic Surfclams, Ocean Quahogs, and Maine Mahogany Ocean Quahogs

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule.

SUMMARY: NMFS proposes quotas for the Atlantic surfclam, ocean quahog, and Maine mahogany ocean quahog fisheries for 2005–2007. Regulations governing these fisheries require NMFS to publish the proposed specifications for the 2005–2007 fishing years and seek public comment on such proposed measures. The intent of this action is to propose allowable harvest levels of Atlantic surfclams and ocean quahogs from the Exclusive Economic Zone and an allowable harvest level of Maine mahogany ocean quahogs from Atlantic waters north of 43° 50′ N. lat.

DATES: Comments must be received no later than 5 p.m., eastern standard time, on December 20, 2004.

ADDRESSES: Written comments on the proposed specifications should be sent to:

- Email /mailbox address: The mailbox address for providing email comments is 0648AR52@noaa.gov. Include in the subject line of the email the following document identifier: “Comments on Surfclam/Ocean Quahog Proposed Specifications.”
- Federal e-Rulemaking Portal: www.Regulations.gov

- Mail address for mailing paper, disk, or CD-ROM comments: Patricia A. Kurkul, Regional Administrator, Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298. Mark on the outside of the envelope, “Comments on Surfclam/Ocean Quahog Proposed Specifications.”

- Fax number: Facsimile (fax) to (978) 281–9135. Comments on this proposed rule may be submitted via email.

Copies of supporting documents, including the Environmental Assessment, Regulatory Impact Review, Initial Regulatory Flexibility Analysis

¹⁷⁹ As the name suggests, this card is simply a prepaid phone card. The card, which is a product of an alliance between the Postal Service and AT&T, is sold at postal facilities.

¹⁸⁰ UPS Comments at 2.

¹⁸¹ See *id.* at 2–4.