

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

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1

REPLY BRIEF OF THE UNITED STATES POSTAL SERVICE

UNITED STATES POSTAL SERVICE

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INTRODUCTION

In its Initial Brief, the Postal Service discusses its interpretation of the proper scope of section 404(e) of title 39, and justifies those “nonpostal services” whose continuation should be authorized by the Commission pursuant to that provision. Additionally, the Postal Service requests the addition of several previously unregulated services to the “product lists” because they fall within the definition of “postal service” set forth in the Postal Accountability and Enhancement Act (PAEA).

Seven other parties filed initial briefs. Two briefs (those of Digistamp and EPostmarks) concentrate entirely on whether Electronic Postmark (EPM), whose status as a “nonpostal service” under section 404(e) is uncontested, should be continued. This issue is discussed in Section VI of this brief. Two other briefs similarly focus on the continuation of a specific revenue-generating activity: Pitney Bowes discusses and justifies the appropriateness of the Mover’s Guide, and ASC, Inc. discusses and justifies the appropriateness of Official Licensed Retail Products and philatelic services. As discussed previously, the Postal Service believes that these activities should be continued, and are outside the scope of this proceeding.

The briefs of three parties (the Public Representative, PostCom et al., and Valpak) address broader legal issues concerning the proper interpretation of section 404(e). These briefs are discussed by the Postal Service in Sections I through IV of this brief. The Public Representative also filed proposed MCS language, a topic which is discussed in Sections II and V of this brief.

I. THE PUBLIC REPRESENTATIVE’S CLAIM THAT THE DEFINITION OF “NONPOSTAL SERVICE” IS CLEAR AND UNAMBIGUOUS IGNORES THE ENTIRE STATUTORY CONTEXT

The Public Representative argues that the statutory term “nonpostal service” is “clearly defined” and “unambiguous.”¹ Specifically, he argues that the statute unambiguously indicates that all “services” offered by the Postal Service that are not “postal services” must be “nonpostal services,” and that the “rules of construction dictate” that the Commission must apply this “plain meaning.”²

The Public Representative’s discussion of the “plainness” of section 404(e)(1) inappropriately focuses only on the language of that provision, without considering the language of the entire statute. Certainly, if one looks at section 404(e)(1) in complete isolation, it seems superficially clear: any “service” that is not a “postal service” is by definition a “nonpostal service.”³ However, as a unanimous Supreme Court in *Robinson* discussed, the “plainness or ambiguity of statutory language” is determined not only “by reference to the language itself,” but also to “the specific context in which the language is used, and the broader context of the statute as a whole.”⁴ In coming to the conclusion that section 404(e)(1) is “plain” and “unambiguous,” the Public Representative does not consider the broader statutory context, and instead focuses solely on the fact that

¹ Initial Brief of the Public Representative at 6, 9 (*hereinafter* “PR Brief”). In this respect, he echoes the tentative conclusion of the Commission in Order No. 74. See Order No. 74 at 8-9 (noting that the definition of “nonpostal service” is “straightforward”).

² See PR Brief at 9-10.

³ This clarity is, of course, undercut by the fact that one must still define the term “service,” which as discussed below the Public Representative fails to do properly.

⁴ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). See also *National Rifle Ass’n of America, Inc. v. Reno*, 216 F.3d 122, 127 (D.C. Cir. 2000) (“In evaluating these arguments, we must not confine [ourselves] to examining a particular statutory provision in isolation. The meaning-or ambiguity-of certain words or phrases may only become evident when placed in context.”) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)) (internal quotation marks omitted).

section 404(e)(1) employs expansive language.⁵ The broader context is, however, relevant to interpreting this language, even if one adheres to the view that the text of a statute is the only appropriate guide to statutory interpretation. In other words, the Public Representative cannot claim that section 404(e)(1) has a “plain meaning” by focusing solely on the language of section 404(e)(1).

When one steps back from focusing solely on the language of section 404(e)(1) itself and considers that provision in the context of the entire statutory scheme, an ambiguity arises. While Congress expressly repealed the authority of the Postal Service to provide “nonpostal services” pursuant to former section 404(a)(6), it made no changes in other provisions of the law granting the Postal Service the authority to engage in various revenue-generating activities, including activities expressly identified by the statute as “services.” This raises the question of whether section 404(e) applies to such “services.” This question cannot be answered simply by looking at the bare language of title 39, because section 404(e)(1) seems to indicate that it does, whereas sections 404(a)(5) and 411 seem to indicate that it does not.⁶

Thus, it is *the text of the statute* that makes the definition of section 404(e)(1) ambiguous, and it is thus the text of the statute that “make[s] the inquiry more difficult” than the Public Representative would prefer.⁷ As such, the Public Representative’s claim at page 9 of his Brief that the Postal Service’s

⁵ PR Brief at 9.

⁶ Neither section 404(a)(5) nor section 411 contemplate any limitation on the Postal Service’s authority to conduct the activities authorized therein, nor do they contemplate a role for the Commission over such activities. For example, the language of section 411 states that the Postal Service may provide “personal and nonpersonal services” to other federal agencies “under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.”

⁷ See PR Brief at 10.

interpretation of the statute inappropriately fails to consider the text of the statute before considering other factors such as the legislative history does not withstand scrutiny. As discussed extensively in the Postal Service's Initial Brief, and further here, the statutory text is itself ambiguous, which in turn makes a consideration of the legislative history relevant.⁸

Finally, a statute is considered ambiguous "when it is capable of being understood by reasonably well informed persons in two or more different senses."⁹ In this regard, while the ambiguity of a statute provision is not proven simply by the fact that parties in a proceeding have advanced different interpretations of that provision (those alternative interpretations must be reasonable for there to be true ambiguity), it is still noteworthy that so far in this proceeding at least three different ways to interpret the scope of section 404(e)(1) have been advanced: 1) the apparent interpretation of Order No. 74, which appears to be endorsed by the Public Representative, that "nonpostal service" essentially means all revenue sources of the Postal Service that are not "postal services"; 2) the interpretation of the Postal Service that "nonpostal service" means those services that are not "postal services" and that were previously authorized by former section 404(a)(6); and 3) the interpretation of Valpak that "nonpostal service" means "those activities of the Postal Service that

⁸ See, e.g., 2A SINGER SUTHERLAND STATUTORY CONSTRUCTION § 46.04 (2000) ("When a statute contains latent ambiguities despite its superficial clarity, the court may turn to the legislative history or other aids for guidance.").

⁹ *Id.* at § 46.04. See also, e.g., *AFL-CIO v. FEC*, 333 F.3d 168, 173 (D.C. Cir. 2003) (noting that "a statute is ambiguous if it can be read in more than one way"); *DeGeorge v. United States Dist. Ct. for the Central Dist. of California*, 219 F.3d 930, 939 (9th Cir. 2000) (noting that a statute is ambiguous if it is subject to more than one reasonable interpretation).

are regularly made available to the public,” and that are not “postal services.”¹⁰ PostCom et al. also proffer a unique interpretation of section 404(e) that appears consistent with the apparent interpretation of Order No. 74 as to the scope of this proceeding, but reaches a different conclusion as to the result of authorizing nonpostal activities to continue.

II. TITLE 39 UNAMBIGUOUSLY DEMONSTRATES THAT “SERVICE” IS NOT A TERM ENCOMPASSING ALL REVENUE-GENERATING ACTIVITIES OF THE POSTAL SERVICE

The Public Representative’s view that his interpretation of the statute is mandated by the facially “clear” and “unambiguous” definition of “nonpostal service” is further undercut by his failure to properly apply the central term in that definition—the word “service.” In his Brief, the Public Representative presents suggested MCS language (which he describes as comprising “an appropriate workable draft list which classifies and categorizes the Postal Service’s nonpostal services”)¹¹ that includes activities that do not fall within any common sense understanding of “service,” and which are unambiguously excluded from that term by the language of title 39. Indeed, his proposed MCS language suggests that his conception of the term “service” seems to be just as expansive as that tentatively employed by the Commission in Order No. 74.¹²

¹⁰ Initial Brief of Valpak Direct Marketing Systems, Inc., and Valpak Dealers’ Association, Inc. at 4-8 (*hereinafter* “Valpak Brief”).

¹¹ PR Brief at 23.

¹² The word “seems” is used in the sentence above because the Public Representative’s views on the meaning of “service” are rather opaque. At various points in his Brief, he is careful to say that section 404(e) applies to “services,” rather than using the broader language employed in Order No. 74. *Id.* at 4. Indeed, in a footnote he seems to dissent from the viewpoint of Order No. 74 by noting that the “disposal of [Postal Service] property” may not be a “service” when it “does not entail an ongoing business relationship.” *Id.* at 16 n.15. At the same time, however, his proposed MCS language is very broad, and does not employ this “ongoing business relationship” standard as a means of limiting the scope of his proposed “Management of Real and Tangible Property”

If there is one aspect of this proceeding that is quite clear, however, it is that the broad interpretation of section 404(e) tentatively suggested by Order No. 74 is an untenable construction of the statute.¹³ In Order No. 74, the Commission responded to an earlier statement by the Postal Service that section 404(e) does not apply to activities that generate revenue but are not “services” by asserting that there “is no provision [under the PAEA] for a third category of services which is neither ‘not postal’ nor ‘not nonpostal,’ or, as the Postal Service would have it, not services at all but merely sources of revenue,”¹⁴ and that “[e]very revenue generating arrangement executed by the Postal Service entails either a postal service or nonpostal service.”¹⁵ Thus, the Commission appeared to conflate all revenue-generating activities with the term “service.” As the Postal Service discusses extensively in its Initial Brief, however, such an interpretation cannot be sustained, because title 39 makes clear that there are revenue-

product. See *id.* at 26. Indeed, his MCS language for that product even includes the *acquisition* of property, which is broader than even the language of Order No. 74. Overall, there seems to be little if any difference between the Public Representative’s view of “service,” and the tentative view set forth in Order No. 74.

¹³ The Public Representative asserts in his brief that “the Commission’s interpretation of § 404(e) is entitled to *Chevron* deference.” *Id.* at 7. Why he feels the need to make this point is unclear, since as even he notes (at page 6 of his Brief) *Chevron* applies to the *judicial* review of administrative interpretations of statutes, and plays no role in the conduct of the administrative proceeding itself. Thus, his entire discussion is premature, and there is no valid reason to discuss or adjudicate the finer points of the *Chevron* doctrine here. The Postal Service simply notes that the applicability of *Chevron* to any judicial review of this proceeding is certainly not clear, and depends fundamentally on the ultimate interpretation of section 404(e) adopted by the Commission. Most significantly, *Chevron* does not serve to immunize an interpretation from being overturned if that interpretation is demonstrably inconsistent with unambiguous statutory language. See, e.g., *Whitman v. American Trucking Associations*, 531 U.S. 457, 481 (2001) (finding a statute ambiguous, but overturning an agency interpretation that “goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear.”); *MCI Corp. v. AT&T*, 512 U.S. 218, 229 (1994) (holding that an agency’s interpretation should be denied deference if the proffered interpretation “goes beyond the meaning that the statute can bear”). Nor is *Chevron* deference available to an interpretation that invokes the outer limits of Congress’ power, in the absence of a clear statement from Congress that it intended such a result. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001).

¹⁴ Order No. 74 at 7.

¹⁵ *Id.* at 11.

generating activities that are neither “postal services” under section 101(5) nor “nonpostal services” under section 404(e), including activities constituting a *quid pro quo* between the Postal Service and a third party (which was a definition of “service” suggested by Order No. 74).¹⁶

Valpak also notes that the interpretation advanced by Order No. 74 is flawed. As Valpak points out, the statute refers to “services,” not “revenue-generating arrangements.”¹⁷ It then asserts that the ordinary meaning of “service” relevant to this inquiry is “those activities of the Postal Service that are regularly made available to the public,” a definition which it says is reinforced by:

- the criteria of section 404(e)(3), which speaks to the “public need” and the ability of the private sector to meet that “public need”
- the fact that “nonpostal services” will be subject to rate regulation under chapter 36, which are provisions “designed with regularly-offered, publicly-available retail products in mind, and are not tailored for incidental business services that happen to be considered revenue-generating activities”

¹⁶ Postal Service Initial Brief at 43-53 (citing 39 U.S.C. 401(5), 401(7), 411, 2003(b), 2011(b)). The connection between section 102 of the PAEA, and section 2003 of title 39, is further demonstrated by the fact that in earlier reform bills that eliminated the authority of the Postal Service to provide “special nonpostal or similar services” without a grandfather clause, the reference to “nonpostal” in section 2003(b)(1) was also eliminated in the same provision. See H.R. 4970, 107th Cong., § 102(b)(2); S. 2468, 108th Cong., § 102(b)(2); S.1285, 108th Cong., § 102(b)(2); S. 662, 109th Cong., § 102(b)(2); H.R. 22, 109th Cong., § 102(b)(2) (as passed by Senate). This shows that Congress did not read the term “nonpostal” in section 2003(b)(1) as including philatelic services or services provided to other federal agencies.

¹⁷ Valpak Brief at 6.

- the fact that categorization as market-dominant, competitive, or experimental “would appear to make sense...only if applied to services offered to the general public”¹⁸

Valpak’s views are consistent in many respects with those of the Postal Service.¹⁹ As the Postal Service noted in its Initial Brief, a logical reading of the term “service” should take into account the fact that they are characterized by the statute as all “services” that are not “postal services.”²⁰ This suggests some degree of comparability between “postal services” and “nonpostal services,” especially considering that “nonpostal services” are to be regulated as “products” under the provisions of chapter 36.²¹ Thus, it would seem that “nonpostal services” should have characteristics such that they are similar to the “products” offered by the Postal Service (*i.e.*, commercial services offered to the public at a price established or negotiated by the Postal Service), and that the term does not apply to activities in which revenue is raised through mechanisms other than through rates that the Postal Service sets.

A. “Nonpostal Service” Does Not Include the Disposal of Tangible Property

Based on its definition, Valpak argues that “service” does not include the selling of real estate, the renting of excess space, or the selling of surplus

¹⁸ *Id.* at 6-8. Valpak would require that the service be provided to the “general public.” This would seem to exclude certain services provided solely to other federal agencies, such as EEOC support. See Donahoe Statement at 21.

¹⁹ Admittedly, Valpak does argue against the Postal Service’s view that certain types of “services” do not fall within the scope of section 404(e), on the grounds that “section 404(e)(1) provides for only two categories of services, not three.” Valpak Brief at 5.

²⁰ Postal Service Initial Brief at 21.

²¹ See 39 U.S.C. 404(e)(5). Postcom et al. advance a different interpretation of this provision, which is discussed in Section IV below.

personal property.²² This understanding—that “service” does not as a matter of ordinary usage involve dispositions of property—is reflected in the language of title 39, which as discussed by the Postal Service in its Initial Brief makes a clear distinction between “services” and “property.”²³ The Public Representative, however, includes in his proposed MCS language a product called “Management of Real and Tangible Property,” which includes “the acquiring, leasing, and disposal of such property.”²⁴ In arguing that these activities constitute a “service,” he notes that the language of section 401(5) authorizes the Postal Service “to provide services in connection with” its real and personal property.²⁵ This is of course true, but it does not serve to rebut Valpak’s and the Postal Service’s point that the disposition of “property” is not a “service.” Rather, section 401(5) explicitly distinguishes between “holding, maintaining, selling, leasing, or otherwise disposing” of property by the Postal Service, and the provision of “services” by the Postal Service in connection with its property.²⁶ Thus, section 401(5) makes clear that when the Postal Service “sells, leases, or otherwise disposes” of its “property or any interest therein,” it is not providing a “service.”

²² Valpak Brief at 6.

²³ Postal Service Initial Brief at 49-53.

²⁴ PR Brief at 26. The inclusion of “the acquiring...of such property” in this product is wholly improper, and is even more expansive than the view expressed by Order No. 74, since the acquisition of property involves the *spending* of revenue, rather than the *generation* of revenue.

²⁵ *Id.* at 16.

²⁶ Specifically, section 401(5) authorizes the Postal Service “to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefore.”

In a footnote, the Public Representative seems to concede this point to a certain extent, by noting that “the disposal of [Postal Service] property” may not be a “service” when it “does not entail an ongoing business relationship.”²⁷ This “ongoing business relationship” standard is not, however, part of his MCS product description for “Management of Real and Tangible Property.”²⁸ Furthermore, even if his MCS product were qualified in this manner, it would still be inconsistent with the statute, since section 401(5) distinguishes between the “leasing” of property and “services” performed in connection with such property, and the leasing of property by the Postal Service entails the maintenance of an “ongoing business relationship” between the Postal Service as lessor and the party leasing the property. Thus, his standard is not an appropriate means of clarifying the scope of the term “service.”

B. “Nonpostal Service” Does Not Include the Disposal of Intellectual Property

The Public Representative also includes a product entitled “Licensing and Assignment Programs for Intangible Assets,” which encompasses Postal Service “arrangements to license or assign its patents, trademarks, copyrights, or other similar rights to third parties.”²⁹ The Public Representative asserts that the licensing or assigning of Postal Service intellectual property is not an exercise of the Postal Service’s authority to “sell, lease, or otherwise dispose” of its property under section 401(5).³⁰ This argument is incorrect. Section 401(5), in granting the Postal Service the power to own and dispose of its “personal or real

²⁷ See PR Brief at 16 n.15.

²⁸ *Id.* at 26.

²⁹ *Id.*

³⁰ *Id.* at 16-17.

property,” applies to *all types* of property, because real property and personal property are the only two types of property. Property that is not realty, is personalty.³¹ Intellectual property is thus “personal property.”

Patents and copyrights are clearly personal property under statute and case law. The Patent Act states specifically and quite simply at 35 U.S.C. 261 that patents are personal property.³² The Court of Appeals for the Federal Circuit, which has sole jurisdiction to hear patent appeals, recently recognized that patents constitute property as much as a parcel of land.³³ Copyrights enjoy the same solid classification as personal property under the Copyright Act of 1976, which declares at 17 U.S.C. 201(d)(1) that copyrights are personal property: “the ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass *as personal property*.”³⁴ The Supreme Court has also characterized copyrights as personal property.³⁵

³¹ See BALLENTINE’S LAW DICTIONARY 942 (defining “personal property” as “*all objects and rights which are capable of ownership except freehold estates in land*”) (citing 42 AM. JUR. 1ST *Property* § 23) (emphases added).

³² See 35 U.S.C. 261 (“Subject to the provisions of this title, patents shall have the attributes of personal property.”)

³³ See *800 Adept, Inc. v. Murex Securities, Ltd*, 539 F.3d 1354, 1370 (Fed. Cir. 2008). The court cited to 35 U.S.C. § 261, which notes that “patents shall have the attributes of personal property,” the decision of the Supreme Court in *Consol. Fruit-Jar Co. v. Wright*, 94 U.S. 92, 96 (1876), which noted that a “patent for an invention is as much property as a patent for land,” and its earlier decision in *Kearns v. Gen. Motors Corp.*, 94 F.3d 1553, 1555 (Fed. Cir. 1996), which noted, “By statutory and common law, each patent establishes an independent and distinct property right.”

³⁴ Emphasis added.

³⁵ See *Stewart v. Abend*, 495 U.S. 207, 219 (1990) (“[U]nlike real property and *other forms of personal property*, [a copyright] is by its very nature incapable of accurate monetary evaluation....”) (citing 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 9.02 (1989)) (emphasis added). See also *Ebay, Inc v. Mercexchange, L.L.C.*, 547 U.S. 388, 392 (2006) (“Like a patent owner, a copyright holder possesses “the right to exclude other from using *his property*”) (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)) (emphasis added).

Not just patents and copyrights, but all forms of intellectual property are personal property. For example, the right of publicity, that is, the right to the commercial value of one's name and likeness (including voice as well as physical likeness) receives protection under many states' laws as property.³⁶ In addition, the bankruptcy law has also long recognized intellectual property (e.g., patents, copyrights, and trademarks) as a category of assets that the bankrupt might list in his schedule of personal property.³⁷

"Ownership" is the sum and substance of the concept of property.³⁸ A thing that can be owned can be disposed of (for example, sold or given away). Ownership of rights provides the capability for selling/assigning and licensing/leasing patents and copyrights.³⁹ Thus, one can dispose of intellectual property rights through "sale." Likewise, one can license or lease intellectual property rights. Software, for example, which is protected by both copyrights and patents, is subject to leasing as well as licensing.⁴⁰ Thus, there is no question

³⁶ See, e.g., *Waits v Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992) ("Waits' voice misappropriation claim is one for invasion of a personal property right: his right of publicity to control the use of his identity as embodied in his voice.")

³⁷ See, e.g., *R.S. Howard Co. v. Robertson*, 12 F.2d 827, 830 (1926) (noting that the "schedules in bankruptcy, duly verified by the Howard Company were filed, in which among other things appearing in the list of personal property, was 'L. patents, copyright, and trade-marks, none.'").

³⁸ See, BLACK'S LAW DICTIONARY 1094 (5th Ed. 1979) ("The term is said to extend to every species of valuable right and interest. More specifically, ownership; . . .").

³⁹ See, e.g., *eBay*, 547 U.S. at 392 (To be sure, the Patent Act also declares that "patents shall have the attributes of personal property," § 261, including "the right to exclude others from making, using, offering for sale, or selling the invention," § 154(a)(1).") (citing 35 U.S.C. 261 and 154(a)(1)). See also 17 U.S.C. 106 (Copyright Act).

⁴⁰ See, *Thoroughbred Software International, Inc. v. Dice Corporation*, 488 F.3d 352 (6th Cir. 2007) (considering whether to use copyrighted software-owner's lost license fees or infringer's software lease fees as measure of damages); *Image Software, Inc., v. Reynolds and Reynolds Company*, 459 F.3d 1044, 1056 (10th Cir. 2006) (awarding a lease of software).

that the owner can *dispose of* intellectual property in any appropriate transactional form.⁴¹

Services, in contrast, are performed rather than owned. They do not “exist” until one starts performing them, and they cease to exist once performance stops. Since services cannot be owned, they cannot be sold, leased, or otherwise disposed of. Thus, sheer logic demonstrates the essential difference between intellectual property, which is owned, and services, which are performed, not owned.

The Public Representative thus errs in stating that intellectual property “are not analogous to real and tangible property.”⁴² As such, contrary to his arguments, there is no question that the Postal Service’s authority under section 401(5) encompasses the authority to license, assign, distribute, and otherwise exercise every intellectual property right it currently has, or acquires, as a means of generating revenue in the ordinary course of business.

C. “Nonpostal Service” Does Not Include Law Enforcement Activities or Investment Interest

Other “products” proposed by the Public Representative are similarly inconsistent with the language of title 39. For instance, one purported “service” is “Law Enforcement and Litigation Activities,” which he describes as activities “which may result in the Postal Service acquiring property or other assets through asset forfeiture, civil penalties, restitution, fines, or other payments.”⁴³

⁴¹ See *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179,194-95 (1995) (“Generally the owner of personal property—even a patented or copyrighted article—is free to *dispose of* that property as he sees fit.”) (Emphasis added.).

⁴² PR Brief at 17.

⁴³ *Id.* at 24-25.

Yet, as section 2003 clearly shows, revenue derived from these types of sources is not accrued through the provision of a “service.”⁴⁴ The same is true of his proposed “Interest/Sale of Items in Financial Portfolio,” which comprises revenue accrued through the financial management of the Postal Service’s “investment portfolio.”⁴⁵ As sections 2003 and 2011 demonstrate, however, such revenue is distinct from the revenue earned through the provision of “postal services” and “nonpostal services.”⁴⁶ Furthermore, claiming that the Postal Service is performing a “service” when it receives interest from the investment of its excess funds stretches the term “service” beyond any rational understanding of the term.

III. THE PUBLIC REPRESENTATIVE FAILS TO REBUT THE FACT THAT THE WEIGHT OF RELEVANT FACTORS CLEARLY INDICATES THAT THIS PROCEEDING IS LIMITED TO THOSE “SERVICES” PREVIOUSLY OFFERED UNDER SECTION 404(A)(6)

As discussed above, the statutory term “service” is not an all-encompassing term that applies to all Postal Service activity that generates revenue, to all Postal Service activity that generates revenue through a *quid pro quo* arrangement with a third party, or, as the Public Representative would possibly have it, all Postal Service activity that entails an “ongoing business relationship” with a third party. Thus, there is a sphere of revenue-generating activity unambiguously outside the scope of the term “service.” At the same time, the Postal Service engages in a number of “not-postal” activities that *are* fairly characterized as “services” (whether that term is explicitly used or not), which are

⁴⁴ See 39 U.S.C. 2003(b)(7)-(9).

⁴⁵ PR Brief at 27.

⁴⁶ See 39 U.S.C. 2003(b)(4), 2011(b)(3).

either explicitly authorized by title 39,⁴⁷ or are explicitly authorized by other titles of the U.S. Code.⁴⁸ The question becomes whether such “services” fall within the scope of section 404(e).

Of course, the statute does, at a superficial level, lend itself to the view that all “services” that are not “postal” in nature must be considered a “nonpostal service” subject to review and possible termination under section 404(e). Both the Public Representative and Valpak take this position. Valpak argues that “section 404(e)(1) provides for only two categories of services, not three.”⁴⁹ Similarly, the Public Representative argues that the definition of “nonpostal service” in section 404(e) clearly establishes a dichotomy in which all “services” are either “postal” or “nonpostal.”⁵⁰ He therefore suggests that the MCS contain products, entitled “Fees for Providing Statutorily Authorized Nonpostal Services to the Public,” and “Arrangements with Government Entities,” encompassing “services” authorized by statutory provisions other than section 404(e).⁵¹

Valpak’s Brief focuses on enunciating a common sense understanding of the term “service,” as discussed above, and does not delve into the interpretative ambiguities created when one reads the term “nonpostal service” to include “services” expressly authorized by other statutory provisions. In this respect, its analysis is incomplete. In contrast, the Public Representative focuses on rebutting the Postal Service’s view that the weight of the relevant factors clearly

⁴⁷ See 39 U.S.C. 404(a)(5) (philatelic services); 411 (“services” provided to other federal agencies pursuant to agreement); 3010 (provision of Sexually Oriented Advertising List).

⁴⁸ See 5 U.S.C. 552 (FOIA copying fees); 552a (Privacy Act copying fees).

⁴⁹ Valpak Brief at 5.

⁵⁰ PR Brief at 5.

⁵¹ *Id.* at 24, 25.

demonstrates that this textual ambiguity should be resolved by concluding that such activities do not fall within the scope of section 404(e), which is instead properly limited to those “services” previously authorized by section 404(a)(6). These arguments are addressed below.

A. There is a Clear Linkage between Section 404(e) and Former Section 404(a)(6)

The Postal Service has argued that the structure of section 102 of the PAEA, which first repeals the Postal Service’s authority contained in former section 404(a)(6) to initiate “nonpostal services” (section 102(a)(1)), and then directs the Commission to review existing “nonpostal services” in order to determine whether they should continue (section 102(a)(2)), clearly indicates that section 102 was intended to only implicate those “services” previously authorized under section 404(a)(6).⁵² The Public Representative claims, in contrast, that the “fact that Congress decided to place the amendatory language in the PAEA for § 404(e) near the amendatory language repealing § 404(a)(6) is no consequence to the interpretation of that provision.”⁵³

However, the PAEA did not simply place the provision repealing former section 404(a)(6) “near” the provision creating section 404(e), but put them in the same *subsection* of the Act: section 102(a). To claim that “this is of no consequence” ignores the rule that the meaning of statutory language is to be interpreted by reference to its placement in the statute.⁵⁴ The relatedness of two

⁵² Postal Service Initial Brief at X.

⁵³ PR Brief at 10.

⁵⁴ See, e.g., *American Mining Congress v. EPA*, 824 F.2d 1177, 1185 (D.C. Cir. 1987) (noting that “a statutory provision cannot properly be torn from the law of which it is a part; context and structure are, as in examining any legal instrument, of substantial import in the interpretive exercise.”).

provisions of the same law seems particularly true when the statutory language appears in the very same subsection.

Furthermore, the Public Representative cites no authority for his quite remarkable claim that it is improper to discern the meaning of an amendatory law by reference to the language of the law it amends.⁵⁵ Certainly, however, the interpretation of a statutory provision is appropriately aided by a consideration of the language which it amends or replaces, especially when they deal with the same subject matter.⁵⁶ As the Supreme Court long ago noted:

In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment, but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted.⁵⁷

For instance, the Commission itself has supported its interpretation of the various aspects of the new pricing regime by comparing its provisions to the situation as it existed under the PRA ratemaking provisions.⁵⁸

The appropriateness of interpreting section 404(e) by reference to the structure of section 102 is further reinforced by the fact that section 102(a)(1) expressly repealed former section 404(a)(6). Under the reading advanced by the

⁵⁵ PR Brief at 10 (“Just as it would be inappropriate to assume that Congress intended amended sections 3621 and 3622 to be interpreted with reference to former section 3621 and 3622 merely because Congress immediately followed repeal of those sections with the establishment of a new modern system of rate regulation, it would be inappropriate to do so with respect to § 404(e).”).

⁵⁶ See, e.g., SUTHERLAND STATUTORY CONSTRUCTION §§ 22.29, 22.30, 22.31, 22.32, 22.33, 22.34, 22.35 (discussing rules of construction for amendatory laws that require consideration of the language of the original act).

⁵⁷ *United States v. Wong Kim Ark*, 169 U.S. 649, 653 (1898). See also *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984) (noting in interpreting an amendatory act “[t]he original act and the circumstances surrounding its enactment should be considered”).

⁵⁸ See, e.g., Order No. 26 at 71; Order No. 66 at 25-26.

Public Representative and Order No. 74, this action on the part of Congress was completely superfluous, as there is no substantive difference between section 102(a)(2)'s treatment of services previously authorized by section 404(a)(6), and other "not-postal" services authorized by independent, and unamended, statutory provisions (e.g., philatelic services, government services). Since the repeal of former subsection 404(a)(6) was the only purpose for PAEA subsection 102(a)(1), it makes no sense to suggest that these other types of services should be treated no differently from the services previously authorized under that provision, as that would suggest that Congress had no real reason to have enacted section 102(a)(1).

Clearly, however, Congress desired to ground the Postal Service's legal authority to continue providing "nonpostal services" in section 404(e)(2), which authorizes the Postal Service to provide "nonpostal services" if they were being offered on January 1, 2006, and are approved by the Commission. As such, Congress expressly repealed section 404(a)(6), and transferred the authority to provide the services previously offered pursuant to that provision to section 404(e)(2). Congress did not, however, repeal sections 404(a)(5) or 411, or any other provision of title 39 relating to "revenue-generating arrangements." This shows that Congress did *not* desire to transfer the legal authority to perform such activities to section 404(e), and that the provisions of section 404(e) do not apply to such activities.

The Public Representative's belief that the Commission can terminate the Postal Service's authority to conduct activities pursuant to statutory authority that

is independent of section 404(e), on the basis that such activities do not meet the standards of section 404(e), is further belied by the fact that statutory provisions are deemed to be effective unless expressly or impliedly repealed, and repeals by implication are strongly disfavored.⁵⁹ Essentially, the Public Representative is suggesting that Congress impliedly repealed provisions such as section 411, and transferred the authority to conduct the activities previously authorized by those provisions to section 404(e)(2).⁶⁰

B. The Title of Section 102 Does Not Undercut the Postal Service's Interpretation

The Public Representative claims that the title of section 102 ("Postal Services"), and its placement within the structure of the PAEA (Title I), signifies that Congress intended section 404(e)(1) to apply to all "services" that are not "postal services." He argues:

If anything can be deduced from the placement [of section 404(e)] within the "Definitions; Postal Services" title heading of the PAEA [Title I of the PAEA] and further within § 102 entitled "Postal Services," it is that Congress views nonpostal services as the opposite of postal services. Had Congress sought to create more than a dichotomy with respect to nonpostal services, it would have titled § 102 "Nonpostal Services" or "Other Services." Its use of title heading "Postal Services" in a section that addresses Congress's concerns with respect to nonpostal services shows that Congress thought that nonpostal services was [sic] the logical inverse of postal services.⁶¹

⁵⁹ See, e.g., *FTC v. Ken Roberts Co.*, 276 F.3d 583, 592 (D.C. Cir. 2001).

⁶⁰ It seems difficult to conclude that at the same time Congress *expressly* transferred the authority of the Postal Service to provide section 404(a)(6) services to section 404(e)(2), it also *impliedly* transferred the authority to provide other types of statutorily authorized "services" to section 404(e)(2).

⁶¹ PR Brief at 11. While the Public Representative also points to the heading of Title I of the PAEA to support his position, that heading has no substantive significance, because it simply repeats verbatim the titles of section 101 and 102. Thus, his argument is based entirely on the title of section 102 itself.

The Public Representative ignores the fact that section 102's title ("Postal Services") was unchanged from prior versions of postal reform, all of which were limited in scope to those "services" previously offered under former section 404(a)(6), as even the Public Representative admits.⁶² In particular, the "nonpostal" provisions of the "Postal Accountability and Enhancement Act" bills (H.R. 4970 in the 107th Congress; H.R. 4341, S. 1285, and S. 2468 in the 108th Congress; H.R. 22 and S. 662 in the 109th Congress) were all entitled "Postal Services."⁶³ Since these provisions clearly did not implicate services authorized independently of section 102 (and thus would not have created the purported "dichotomy" that the Public Representative believes the PAEA creates), this shows that the Public Representative reads too much into the title of section 102.

C. Legislative History of the PAEA Exists, and is Logically Read as Supporting the Postal Service's Interpretation

The Postal Service's interpretation of section 404(e) is based in part on the legislative history of section 102 of the PAEA, which reveals a consistent intent over nearly a decade of postal reform to eliminate the "nonpostal" authority granted by former section 404(a)(6), rather than to implicate other activities.⁶⁴

The Public Representative seeks to rebut this view in two ways. First, he argues that the prior reform bills cited by the Postal Service are not valid legislative

⁶² See *id.* at 12. Perhaps this oversight is because the Public Representative adopts the fallacious view that these prior bills do not constitute legislative history of the PAEA. See Section III.C below.

⁶³ H.R. 4970, 107th Cong. § 102 (2002); H.R. 4341, 108th Cong. § 102 (2004); S. 1285, 108th Cong. § 102 (2003); S. 2468, 108th Cong. § 102 (2004); H.R. 22, 109th Cong. § 102 (2005) (as passed by the House); S. 662, 109th Cong. § 102 (2005); H.R. 22, 109th Cong. § 102 (2006) (as passed by Senate). In addition, the section heading of the Postal Modernization Act, which as discussed in the Postal Service's Initial Brief had a different structure than these later bills, but like those bills was limited in scope to section 404(a)(6) "services," was entitled "Postal and Nonpostal Products." See H.R. 22, 106th Cong. § 205 (1999).

⁶⁴ Postal Service Initial Brief at 29-40.

history of the PAEA, and that there is in fact “no...official legislative history” of the PAEA.⁶⁵ Second, he attacks the Postal Service’s interpretation of the legislative history on the merits, as in fact showing that Congress did not mean to tie section 404(e) to former section 404(a)(6).⁶⁶

The Public Representative’s claim that no legislative history of the PAEA exists is fallacious. He casually dismisses the postal reform bills that preceded H.R. 6407 as “several prior postal-related bills” with apparently no relationship (or, “at best,” a “marginal” relationship) to the PAEA itself.⁶⁷ However, despite the Public Representative’s belief to the contrary, the PAEA did not materialize out of thin air in the closing days of the 109th Congress; rather, it was the culmination of nearly a decade of deliberation on the part of the Congress, involving a number of iterations of bills, most of which were entitled the “Postal Accountability and Enhancement Act.” This is confirmed by statements made on the floor of the Congress at the time that the PAEA was passed into law (statements that the Public Representative overlooks, but would presumably fall within even his strict definition of “official legislative history”).⁶⁸ For instance, Rep. Tom Davis noted that the PAEA was “the culmination of more than a decade of hard work and study,”⁶⁹ while Sen. Collins, reflecting the fact that the

⁶⁵ PR Brief at 11 n.9.

⁶⁶ *Id.* at 12.

⁶⁷ *Id.* at 11-12. The Public Representative does not explain why the prior reform bills could be “marginally” useful to an understanding of the PAEA if in fact they do not even constitute legislative history of the PAEA.

⁶⁸ See, e.g., *Blair-Bey v. Quick*, 151 F.3d 1036, 1040 (D.C. Cir. 1998).

⁶⁹ 152 CONG. REC. H9,179 (daily ed. December 8, 2006) (statement of Rep. Tom Davis). See also *id.* at H9,180 (statement of Rep. McHugh) (noting that “Members of the House have worked for over a decade to reform [the Postal Service]”).

Senate did not enter the postal reform picture until the 108th Congress, noted that the PAEA “represents the culmination of a process that began back in 2002.”⁷⁰

The Public Representative’s position is particularly untenable in claiming that H.R. 22 and S. 662, the bills considered by the House and the Senate in the 109th Congress, are not relevant legislative history.⁷¹ It was simply for reasons of procedural expediency that Rep. Tom Davis introduced a clean bill (H.R. 6407) for the House to pass and then to send to the Senate, rather than having the House pass another amended version of H.R. 22. Such a procedural technicality does not obscure the basic point that H.R. 6407 was the direct result of negotiations and compromise between the House and the Senate concerning the two versions of H.R. 22 that were passed by the respective Chambers during the 109th Congress. For example, Representative Danny Davis specifically noted that H.R. 6407 was “the combination of the Senate and House versions of H.R. 22.”⁷² Furthermore, the Congressional Record also specifically identifies the House Committee Report with respect to H.R. 22 as constituting “additional

⁷⁰ 152 CONG. REC. S11,674 (daily ed. December 8, 2006). See also *id.* at S11,675 (statement of Sen. Carper) (noting that the PAEA resulted from the Congress “hammering out a difficult compromise over the last 4 years.”).

⁷¹ H.R. 22 was passed by the House, and S. 662 was passed by the Senate, styled as an amendment to H.R. 22.

⁷² 152 CONG. REC. E2,244 (daily ed. December 27, 2006). See also *id.* at H9,179 (statement of Rep. Tom Davis) (noting that the PAEA “is the product of months of negotiation between the House and the Senate and the administration.”); H9,179 (statement of Rep. Danny Davis) (noting that the bill was subject to the “give-and-take that is so necessary to make bipartisan, bicameral legislation a reality”); H9,180 (statement of Rep. McHugh) (“This bill is truly a consensus document, having built upon H.R. 22 as it passed the House...and then the Senate”); E2,244 (statement of Rep. McHugh) (noting that “H.R. 6407 is the blended result of the two Chamber’s versions of H.R. 22”); S11,675 (statement of Sen. Collins) (identifying the bill as “compromise legislation”).

legislative history on H.R. 6407.”⁷³ Indeed, the Commission itself in Order No. 74 specifically cited this House Report.⁷⁴

Addressing the merits of the legislative history as it regards the proper interpretation of section 102, the Public Representative points to the fact that the language of section 102 changed from earlier versions of the postal reform bills, and states that by changing the term “special nonpostal or similar services” to “nonpostal service” in the enacted bill, Congress “clearly intended for § 404(e) to be broader than the reach of former § 404(a)(6).”⁷⁵ Certainly, the legislative history shows that Congress changed the phrasing of section 102, though not only in the limited manner highlighted by the Public Representative; Congress also added a significant amount of new language concerning the grandfathering of nonpostal services, their review by the Commission, and the results of that review (*i.e.*, termination, or regulation as a “product”). The question becomes what was intended by Congress when enacting this heavily revised section 102.

As the Postal Service has discussed previously in this proceeding, the Congress simply was creating a compromise between the House-passed bill, which included a grandfather clause, and the Senate-passed bill, which did not.⁷⁶ The issue of grandfathering was the *only* substantive difference between the two bills.⁷⁷ Furthermore, Congress’ motivation in originally including section 102 was to address the Postal Service’s authority to offer far-ranging commercial,

⁷³ 152 CONG. REC. E2,244 (daily ed. December 27, 2006) (statement of Rep. McHugh); *id.* (statement of Rep. Davis).

⁷⁴ See Order No. 74 at 9 n.17.

⁷⁵ PR Brief at 12.

⁷⁶ Postal Service Initial Brief at 34-35.

⁷⁷ The only other difference—the fact that the Senate bill specifically exempted section 411, while the House bill did not—was as discussed previously earlier not a substantive difference. See *id.* at 37-40.

nonpostal services pursuant to the grant of authority found in former section 404(a)(6), rather than discrete and uncontroversial services such as philatelic services and government services.⁷⁸

It simply is far-fetched to conclude, as the Public Representative does, that Congress suddenly decided, at the very end of a nearly decade long process in which Congress did nothing to suggest that it harbored concern about such activities (and, furthermore, clearly indicated its intent *not* to affect the Postal Service's section 411 services), to question the Postal Service's continued ability to provide such discrete and uncontroversial types of services. This point can be made even more strongly with respect to routine business activities such as selling excess real and personal property, which according to the Public Representative are also subject to this proceeding. In particular, one would expect some indication that Congress decided to so fundamentally change its mind, especially considering that this view of congressional intent would empower the Commission to nullify the legal force and effect of statutory provisions, and would constitute a dramatic extension of the Commission's jurisdiction into areas of routine business activity in which it has never had a role. These issues are discussed further in Section III.E below.

D. The Public Representative Cannot Demand a “Plain Reading” of Section 404(e) While Ignoring the Fact that Section 404(e)(2) Only Applies to Activities Authorized under Section 404

In his discussion of how the language of section 102 changed in the enacted bill from the prior postal reform bills, the Public Representative ignores

⁷⁸ *Id.* at 34-35. The Public Representative admits that the language of these earlier bills “may be read to be tied to former § 404(a)(6) as the Postal Service suggests, since it used the same terminology.” See PR Brief at 12.

the fact that the scope of the provision changed from originally stating that nothing in “title 39” could be considered as authorizing “nonpostal services,” to stating that nothing in “this section” could be considered as authorizing “nonpostal services.”⁷⁹ If the Public Representative wishes to claim that Congress “[c]learly...meant something different when it decided to change the term ‘special nonpostal or similar services’ to ‘nonpostal service’ in the enacted statute,”⁸⁰ he must also conclude that Congress “clearly meant something different” when it changed “title” to “section.” Yet, the Public Representative claims that Congress “specifically chose” not to exempt section 411 from the scope of section 404(e).⁸¹ He cannot have it both ways.

Section 404(e)(2) prohibits the Postal Service from providing a “nonpostal service” pursuant to section 404, except for “nonpostal services” provided as of the grandfather date (January 1, 2006). This prohibition does not extend to the offering of “services” pursuant to provisions other than section 404, including those offered pursuant to section 411. In turn, this indicates that Congress had no desire to subject such services to the remainder of section 404(e), which sets forth a mechanism to review and either terminate or regulate those “nonpostal services” whose only statutory basis for continued existence is the grandfather clause of section 404(e)(2).

⁷⁹ Compare H.R. 22, 109th Cong., § 205 (“Nothing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar service...”) with section 404(e)(3) (“Nothing in this section shall be considered to permit or require that the Postal Service provide any nonpostal service...”).

⁸⁰ PR Brief at 12.

⁸¹ *Id.* at 12 n.10.

At the same time, however, it is no more appropriate to focus on this change in language in order to discern the scope of section 102 than it is to focus on the change in language highlighted by the Public Representative. For instance, reading the statute in this manner would still require a conclusion that “philatelic services” are subject to possible termination under this provision.⁸² When enacting the PAEA, Congress did not amend section 404(a)(5), which has long been understood to give the Postal Service “broad and unilateral discretion over philatelic operations.”⁸³ In addition, there is simply no basis in the history of postal reform to conclude that Congress intended section 102 to implicate the Postal Service’s offering of philatelic services, a long-standing activity that has never raised concerns as to whether the Postal Service was inappropriately inserting itself into commercial areas better suited for the private sector.

In response to the Postal Service’s point that treating “philatelic services” as a “nonpostal service” subject to termination would potentially render that provision a nullity, the Public Representative argues that “there are several ways to harmonize the plain meaning of the term ‘nonpostal service’ with § 404(a)(5) without rendering it a nullity.”⁸⁴ First, he argues that “philatelic services” should be considered a “postal service” under the statutory meaning of that term. In support of this position, the Public Representative notes that the Commission’s determination in Docket No. R76-1 that philatelic services were not postal services “in no way relates to the term postal services as defined in the PAEA”

⁸² Furthermore, under the interpretation of Order No. 74 and the Public Representative, other “revenue-generating arrangements” conducted pursuant to section 404 would also be implicated.

⁸³ See Order No. 1145 at 9 (citing *Unicover v. Postal Service*, 859 F. Supp. 1437 (D. Wyo. 1994); *Morris v. Runyon*, 870 F. Supp. 362 (D.D.C. 1994)).

⁸⁴ PR Brief at 13.

because “Congress specifically choose to statutorily override the Postal Rate Commission’s earlier definition of postal services in its passage of the PAEA.”⁸⁵ However, this argument ignores the fact that in Docket No. R76-1 the Commission was *not* employing the definition of “postal service” that was adopted by the Commission in Docket No. RM2004-1, and subsequently overridden by the PAEA. Rather, the Commission in that docket employed a definition of “postal service” that was very similar to the definition set forth in the PAEA.

Specifically, in Docket No. R76-1 the Commission determined the “postal” character of various activities by determining whether it could “fairly be said to be ancillary to the collection, transmission, or delivery of mail.”⁸⁶ This definition was closely related to the definition employed by the district and circuit courts in the *ATCMU* case,⁸⁷ and was also the original definition proposed by the Commission in RM2004-1, but subsequently abandoned in the final rule for a more expansive definition that covered electronic correspondence.⁸⁸ Its similarity to the statutory definition of the PAEA is also clear. Indeed, the House Report for a prior postal reform bill (H.R. 4341), which included a definition of “postal services” nearly identical to the one contained in the PAEA, stated that the definition was “modeled” after the Commission’s original definition in RM2004-1.⁸⁹

⁸⁵ *Id.*

⁸⁶ See PRC Op., R76-1, Appendix F, page 3.

⁸⁷ See *Associated Third Class Mail Users v. United States Postal Service*, 405 F. Supp. 1109, 1115 (D.D.C. 1975), *affirmed sub. nom. National Association of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570, 595-96 (D.C. Cir. 1976).

⁸⁸ See Order No. 1424 at 4; Order No. 1449.

⁸⁹ See H.R. Rep. No. 108-672, pt. 1, at 4 (2004).

In addition, the Public Representative's argument also misses the point that there is nothing in the definition of "postal service" adopted by the Commission in RM2004-1 that would lead one to conclude that it did not include philatelic services, whereas the statutory definition of the PAEA does. The primary substantive difference between the two definitions was that the definition adopted in RM2004-1 encompassed purely electronic correspondence. Philatelic services do not, however, involve correspondence, much less electronic correspondence. Thus, the fact that the PAEA adopted a different definition of "postal service" than did the Commission in RM2004-1 has no bearing whatsoever on whether "philatelic services" falls within that definition.

Furthermore, during the period in which the Docket No. R76-1 and *ATCMU* definition of "postal service" was utilized, the Commission consistently concluded that "philatelic services" were separate and distinct from "postal services,"⁹⁰ and that section 404(a)(5) conferred "broad and unilateral discretion" on the part of the Postal Service to provide services under that section.⁹¹ In Docket No. R76-1, the Commission considered the issuance of commemorative stamps to be outside of the realm of "postal services," noting that while they "represent purchase of postage just as regular stamps do," they are "offered primarily for reasons other than the payment of postage."⁹² In Docket No. C95-1, furthermore, the Commission held that the shipping and handling charges for

⁹⁰ See, e.g., Order No. 1424 at 13 (philatelic services are not "postal"); Order No. 1145 at 12; PRC Op., Docket No. R76-1, at App. F, page 19-20 (philatelic services are not "postal").

⁹¹ See Order No. 1145 at 9.

⁹² See PRC Op., Docket No. R76-1, at App F, pages 20-21.

orders placed with the Philatelic Fulfillment Service Center were not closely related to the delivery of mail, and thus were not “postal services.”⁹³

Philatelic services have thus always been seen as distinct from “postal services” for the fundamental reason that philatelic materials are not primarily designed to enhance or support the delivery of mail.⁹⁴ There is also nothing to indicate that this legal situation has now changed, considering the definition of “postal service” in the PAEA is substantively similar to the definition of “postal service” employed during most of the PRA regime. It is therefore disingenuous for the Public Representative to claim that the Postal Service has “simply no basis” in presuming that philatelic services would be treated as “nonpostal” under the PAEA.⁹⁵

The Public Representative next suggests that the existence of section 404(a)(5) “does not hinder the Commission’s ability to use the plain meaning of the term nonpostal services” because the Postal Service is not required to provide philatelic services, but is simply empowered to do so.⁹⁶ The Public Representative is apparently saying that the Commission can harmonize section 404(e)(1) with provisions such as section 404(a)(5) (that authorize the Postal Service to perform certain revenue-generating activities) by concluding that

⁹³ See Order No. 1075 at 5. See also Order No. 1145 at 9 (noting that Docket No. C95-1 involved “philatelic services”).

⁹⁴ It is for this reason that it is in no way “counterintuitive,” as the Public Representative argues, for the Postal Service to interpret “postal service” as encompassing ReadyPost, but not philatelic services. See PR Brief at 14 n.13. The very purpose of ReadyPost is to be mailed; on the other hand, philatelic materials are not designed to be mailed.

⁹⁵ See *id.* at 14.

⁹⁶ *Id.* (stating that “none of the powers listed in § 404(a) are those that the Postal Service is required to do; they are activities which are authorized by Congress, and as such, may be subject to statutory limitations found in another applicable statute.”).

because the Postal Service is not “required” to perform those activities, it is permissible for the Commission to conclude, on the basis of section 404(e), that they are no longer authorized and must be terminated.

Yet, this purported harmonization would do nothing to change the fact that the language of section 404(a)(5) would be rendered a nullity. In this regard, it makes no difference whether the statutory language *requires* the Postal Service to perform an activity, or *authorizes* the Postal Service to do so. The essential point is that the statute empowers the Postal Service to perform an activity, and the Commission is asserting the authority to tell the Postal Service that, despite the existence of such statutory language, its authorization no longer exists. Thus, the statute says: “Postal Service, you are authorized to provide philatelic services”; and the Commission is asserting the authority to say: “No, Postal Service, you are not.”

E. Interpreting Section 404(e) as Giving the Commission the Authority to Nullify the Force and Effect of Statutory Language Raises Serious Constitutional Questions

As discussed by the Postal Service in its Initial Brief, the claim that section 404(e) allows the Commission to revoke the Postal Service’s authority to undertake activities expressly authorized by other statutory provisions is tantamount to a claim that Congress has delegated to the Commission the authority to repeal the legal force and effect of statutory provisions.⁹⁷ This raises potential constitutional concerns, even if the Commission disclaims any intent to actually exercise its claimed statutory authority to repeal.⁹⁸ Rather, the

⁹⁷ Postal Service Initial Brief at 25-29.

⁹⁸ *Id.*

appropriate course is for the Commission to properly conclude that section 404(e) does not authorize it to review and terminate activities authorized by unconditional and independent statutory provisions.

The Public Representative claims that no such constitutional issues arise from such an interpretation of the statute, because the Act sets forth standards in section 404(e)(3) to guide the exercise of the Commission's discretion. He cites a number of cases that establish the general principle that delegations of authority to agencies are constitutionally permissible under the nondelegation doctrine when they are accompanied by standards, or "intelligible principles," which guide the policy choices of the agency.⁹⁹ The delegation cases that he cites, however, involve Congress' conferral upon an agency to create new law through the rulemaking process. Thus, for example, EPA is empowered to set national air quality standards "at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air,"¹⁰⁰ and the Attorney General is empowered to designate a drug as a controlled substance for purposes of the criminal statutes when "necessary to avoid an imminent hazard to the public health."¹⁰¹ Of course, an agency's rules cannot conflict with statutory law enacted by Congress.¹⁰²

In Order No. 74, on the other hand, the Commission tentatively claimed the authority to *repeal* the force and effect of various statutory provisions of title

⁹⁹ See PR Brief at 19-20.

¹⁰⁰ *Whitman v. American Trucking Associations*, 531 U.S. 457 (2002).

¹⁰¹ *Touby v. United States*, 500 U.S. 160 (1991).

¹⁰² See, e.g., *U.S. v. Shumay*, 199 F.3d 1093, 1107 (9th Cir. 1998) (noting that "Administrative agencies lack authority effectively to repeal [a] statute in regulations.")

39, rather than an authority to *promulgate* new law consistent with the statute. For example, under the reasoning set forth in Order No. 74, the Commission purports to have the authority to terminate the Postal Service's authority to offer government services on behalf of other agencies to the public, because it characterizes those services as "nonpostal" under section 404(e)(1).¹⁰³ This is so even though section 411 expressly authorizes the Postal Service to provide such services, and seems to provide the Commission with no role over the terms and conditions under which those services are provided. In the same manner, Order No. 74 claims the authority to terminate the Postal Service's ability to conduct routine business activities, such as selling its excess real or personal property. And, because these provisions are limited in scope to only the Postal Service, eliminating the Postal Service's ability to act pursuant to those provisions would necessarily cause them to entirely lose their legal force and effect.

In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Supreme Court invalidated the Line Item Veto Act of 1996 (LIVA), which allowed the President to "cancel" certain types of statutory provisions after they had become law,¹⁰⁴ on the grounds that it improperly delegated to the President the unilateral authority to repeal the "legal force and effect" of statutory provisions passed through the procedures of Article I.¹⁰⁵ In *Clinton*, the President had used his authority under

¹⁰³ "Nonpostal services" are to be reviewed and potentially terminated pursuant to sections 404(e)(3) and (4).

¹⁰⁴ Specifically, the President was allowed to cancel "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; and (3) any limited tax benefit." *Clinton*, 524 U.S. at 436. This authority occurred after the bill became law. *Id.* at 439.

¹⁰⁵ *Id.* at 436-441.

LIVA to “cancel” provisions of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997, leaving the remaining provisions of those statutes intact.¹⁰⁶

The Court reasoned that this power violated the Presentment Clause of the Constitution. The Court noted:

In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. Repeal of statutes, no less than enactment, must conform with [Article] I [of the Constitution]. There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.¹⁰⁷

The Court held that the President’s authority under LIVA constituted a repeal of the “legal force and effect” of the “cancelled” provisions even though the provisions retained real-world budgetary effect. Specifically, LIVA “prevent[ed] Congress and the President from spending the savings that result[ed] from the cancellation,” requiring instead that the savings be used for reduction of the deficit.¹⁰⁸ The Court noted that this residual effect did not change “the fact that by canceling the items at issue in these cases, the President made them entirely inoperative as to appellees.”¹⁰⁹ The Court noted further that, “The cancellation of one section of a statute may be the functional equivalent of a partial repeal even if a portion of the section is not canceled.”¹¹⁰

Clinton thus stands for the rule that a statute may only be permanently amended or repealed pursuant to “finely wrought” procedures of Article I,¹¹¹ and thus that it is not proper for Congress to delegate to an executive official or

¹⁰⁶ *Id.* at 437-38.

¹⁰⁷ *Id.* at 438 (internal quotations and citations omitted).

¹⁰⁸ *Id.* at 440-41 & n.31.

¹⁰⁹ *Id.* at 441.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 440.

agency the power to permanently and irreversibly eliminate the “force and effect” of statutory language.¹¹² Thus, just as an agency has no power to enact rules that are inconsistent with the statute, an agency has no authority to unilaterally repeal the “legal force and effect” of statutory provisions. Yet, interpreting section 404(e) to apply to activities expressly authorized by statutory provisions other than section 404(e) would give to the Commission the unilateral authority to render statutory language in title 39 permanently and irreversibly of “no legal force or effect.”

For example, consider the consequences of concluding that government services provided to the public fall within the scope of this proceeding. Order No. 74 intimates that the relevant “nonpostal service” to be analyzed under section 404(e) would be service agreements with other federal agencies in general, rather than each individual agreement, such that the relevant “product” would be akin to “services provided to other federal agencies pursuant to agreement.”¹¹³ This is also the approach advanced by the Public Representative.¹¹⁴ In such a case, a conclusion that the criteria of section 404(e)(2) did not justify the continued offering of section 411 services would clearly nullify its legal force and

¹¹² The decision in *Clinton* was based on Presentment Clause grounds, rather than nondelegation doctrine grounds, or broader separation-of-powers grounds, both of which the Court found no need to discuss. See *id.* at 447-48. However, it is noteworthy that while the decision was not predicated on the nondelegation doctrine, much of the Court’s opinion discussed nondelegation issues.

The district court had held LIVA to be unconstitutional on separation of powers grounds as well as Presentment Clause grounds. See *City of New York v. Clinton*, 985 F. Supp. 168, 178-81 (D.D.C. 1998). Specifically, the district court noted that by authorizing the President to “permanently extinguish laws,” which could not be “revived even if the President (or his successor) feels that they are needed” except through the passage of subsequent legislation, LIVA had “impermissibly attempt[ed] to transfer non-delegable legislative authority to the Executive Branch.”

¹¹³ See Order No. 74 at 10.

¹¹⁴ PR Brief at 25.

effect, because all existing services previously entered into under section 411 would be terminated, and the Postal Service would have no authority to enter into new agreements under section 411.¹¹⁵ In addition, the only way the Postal Service would be able to regain that authority would be through passage of a law by the Congress and the President.

The fact that the Commission may decide to allow the Postal Service to continue entering into such agreements under section 404(e)(3) is not relevant to this analysis. As discussed previously, the constitutional question raised by the tentative interpretation of Order No. 74 cannot be cured by stating that while the law gives the Commission constitutionally questionable authority, the Commission will not exercise that authority as a matter of discretion.¹¹⁶ Thus, it is no answer to say that the Commission would decide not to exercise its authority, on the grounds that the criteria of section 404(e)(2) are satisfied. Instead, the mere fact that the Commission interprets the statute to give it the authority to permanently and irreversibly repeal the legal force and effect of statutory language is enough to raise questions under *Clinton*. Thus, the Commission should reject any claim of having such an authority and conclude that the statute in fact does not subject services authorized by independent statutory provisions to review under section 404(e)(2), which is the reading best supported by the weight of the interpretative evidence.

¹¹⁵ The same would be true if each individual agreement with another federal agency was deemed to be the relevant “nonpostal service” for purposes of section 404(e). In such a case, the Postal Service would by operation of the grandfather clause be prevented from entering into any new agreements, and all existing agreements would be terminated. As such, the legal force and effect of section 411 would be completely nullified as a prospective and retrospective matter.

¹¹⁶ Postal Service Initial Brief at 27-29.

Furthermore, even if the Commission concluded that the Postal Service could continue to offer services to other federal agencies, section 411 would still have no legal force and effect, because the legal authority to provide such services would flow not from section 411, but from section 404(e)(2). In other words, the legal authority of the Postal Service to provide services to other federal agencies would be transferred to section 404(e), and section 411 would cease to have any legal force and effect of authorizing the Postal Service to provide “personal and nonpersonal services” to other federal agencies “under such terms and conditions...as the Postal Service and the head of the agency concerned shall deem appropriate.”¹¹⁷ Section 411 would therefore be downgraded from a statutory provision providing substantive legal authority, to simply being one piece of evidence for the Commission to consider in determining whether such activities meet the criteria of section 404(e)(2). Any such residual effect on the discretionary decision-making of the government is of no moment, as *Clinton* shows.¹¹⁸

As the *Clinton* court noted, there have historically been a variety of statutory provisions conferring upon an executive official or agency the authority to counteract the effect of statutory language in particular circumstances. The Court paid particular attention to the provision in the Tariff Act of 1890 that was upheld in *Field v. Clark*, 143 U.S. 649 (1892); that provision gave the President “the power...and the duty,” beginning roughly a year and a half after the

¹¹⁷ The Postal Service would still be able to provide property to other federal agencies under section 411, but the Postal Service’s authority to provide “services” pursuant to that provision would be irreversibly nullified. *Cf. Clinton*, 524 U.S. at 441.

¹¹⁸ *Id.* at 440-41 & n.31.

enactment of the Act, to “suspend...for such time as he shall deem just” the provisions of the Act which exempted certain commodities from import duties whenever the President determined that the country producing and exporting those products was imposing “reciprocally unequal and unreasonable” duties on U.S. exports.¹¹⁹ Administrative agencies also have similar authority. For example, section 160 of title 47 allows the Federal Communications Commission (FCC) to “forbear from applying any regulation or any provision of [the Communications] Act to a telecommunications carrier or a telecommunications service,” and section 628 of title 29 allows the Equal Employment Opportunity Commission (EEOC) to “establish such reasonable exemptions to and from any or all provisions of [the Age Discrimination in Employment Act (ADEA)] as it may find necessary and proper.” The Secretary of Homeland Security has also been given the power to “waive” the applicability of any and all federal laws to the construction of the U.S.-Mexico border fence if such a waiver is “deemed necessary to ensure expeditious construction” of the fence.¹²⁰

Such authority is distinct from the authority that the Commission would have under the interpretation of section 404(e) tentatively suggested by Order No. 74, and endorsed by the Public Representative. Provisions allowing an agency to provide “exemptions” to statutory language, or to “suspend” statutory language, essentially amount to the conferral of authority not to enforce certain elements of an Act in a limited manner. They do not have the effect of permanently eliminating the “legal force and effect” of the relevant statutory

¹¹⁹ Clinton, 524 US at 442; *Field*, 143 U.S. at 680.

¹²⁰ See 8 U.S.C. 1103 note.

language, such that the only way to reverse the decision of the agency is through the passage of a new law by Congress and the President.¹²¹ One way in which statutes subject to these types of provisions retain legal force and effect is by the fact that the agency can always reverse its decision. Here, the Commission would not have the authority to reverse its decision. The Commission is given two years to determine whether “nonpostal services” authorized under section 404(e)(2) should be continued; once that decision is made, and the two-year deadline expires, the Commission has no authority to revisit its determination, and to allow the Postal Service to start conducting terminated services again.¹²² The only way in which the Postal Service could undertake such activities again is if Congress and the President passed a new law authorizing it.

In addition, such authority is generally limited in scope, applying only to relieve otherwise applicable statutory requirements with regard to certain parties subject to the statute, rather than all parties. This means that the statute retains its force and effect with regard to the parties not subject to the “suspension” or “waiver.”¹²³ However, the provisions of title 39 authorizing the Postal Service to provide various “services” apply only to the Postal Service. Thus, eliminating the

¹²¹ *C.f. Raines v. Byrd*, 956 F. Supp. 25, 37 (D.D.C. 1997), *overturned on other grounds*, *Raines v. Byrd*, 521 U.S. 811 (1997) (noting that cancellation under LIVA “forever render[ed] a provision of federal law without legal force or effect, so the President who canceled an item and his successors must turn to Congress to reauthorize foregone spending.”).

¹²² Thus, the Commission could not, for example, decide in five years time to reverse a decision not to allow the Postal Service to continue providing government services to the public, because it perceived that a public need that could not be met by the private sector had developed.

¹²³ *See, e.g., Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d. 119, 124-25 (D.D.C. 2007) (finding the authority granted to the Secretary of Homeland Security to “waive all legal requirements” when “deemed necessary to ensure expeditious construction” of the U.S.-Mexico border fence not to be equivalent to the LIVA held unlawful in *Clinton* because whereas the provisions canceled by the President under LIVA would have no legal force or effect under any circumstances, the laws subject to waiver by the Secretary would only be inapplicable in a narrow circumstance (i.e., with regard to the border fence), and would otherwise be fully applicable).

Postal Service's authority to provide services pursuant to those provisions necessarily eliminates their force and effect.

In *Field v Clark*, the Court upheld the suspension power of the President under the Tariff Act on the grounds that the law required the President to act upon the ascertainment of a named contingency (*i.e.*, the occurrence of a particular subsequent event, namely the imposition of "reciprocally unequal and unreasonable" duties by another country).¹²⁴ The *Clinton* Court distinguished LIVA from the Tariff Act considered in *Field* on several bases, including the fact that "the suspension power was contingent upon a condition that did not exist when the Tariff Act was passed: the imposition of 'reciprocally unequal and unreasonable' import duties by other countries."¹²⁵ The Court contrasted this with LIVA, which required the President to act within five days, meaning the exercise of the President's cancellation authority "necessarily was based on the same conditions that Congress evaluated when it passed" a statute subject to LIVA.¹²⁶ The Court also pointed to the broad discretion given to the President under LIVA, as opposed to the Tariff Act, and to the fact that when the President acted under LIVA, he was necessarily rejecting the policy choice Congress made

¹²⁴ *Field*, 143 U.S. at 693. The legislation in *Field* was thus a type of legislation generally known as "contingent legislation," which is a law whose applicability is predicated on the occurrence of a future event. In such legislation, ascertainment of the occurrence of that event can be appropriately delegated to the Executive Branch.

¹²⁵ *Clinton*, 524 U.S. at 443. See also *id.* at 445 (noting that the various laws discussed in *Field* gave the President authority over the applicability of certain statutory provisions "upon the occurrence of particular events subsequent to enactment.")

¹²⁶ *Id.* at 443.

in implementing the “cancelled” spending item or tax benefit due to the fact that the President had to act so soon after the law was enacted.¹²⁷

Section 404(e), if interpreted in the manner suggested by the Public Representative and Order No. 74, seems more similar to the law invalidated in *Clinton* than the law upheld in *Field*. One difference is the fact that whereas Commission action would serve to permanently and irreversibly nullify statutory language, the law in *Field* simply allowed the President to “suspend” the applicability of statutory language for a limited period of time. In addition, the fact that section 404(e)(3) required the Commission to review the Postal Service’s “nonpostal services” within two years of enactment of the PAEA means that the Commission’s review will be “based on the same conditions that Congress evaluated when it passed” the PAEA. While two years is of course longer than five days, there was no basis for Congress to conclude that circumstances would have changed at any point during those two years from those existing in December 2006 in such a way so as to affect the application of the broad public policy considerations set forth in section 404(e)(3). In other words, unlike in *Field*, the authority granted to the Commission contemplated no subsequent change in circumstances for which ascertainment by an executive official was necessary. Furthermore, unlike the situation in *Field*, wherein it was found significant that the Act related to issues of foreign affairs,¹²⁸ application of the broad public policy considerations set forth in section 404(e)(3) to determine

¹²⁷ *Id.* at 443-444 & n.35. The Court also pointed to the fact that the law in *Field* related to foreign trade, in which the Executive is generally given a “degree of discretion...which would not be admissible were domestic affairs alone involved.” *Id.* at 445 & n.38.

¹²⁸ *Field*, 143 U.S. at 691.

whether the Postal Service should be allowed to continue providing, as a general matter, “government services to the public,” “philatelic services,” “the sale of real property,” etc., is not predicated upon the ascertainment of subsequent events or facts peculiarly within the expertise of the Commission.

Perhaps the most significant difference between the statutes discussed above and section 404(e) is that they expressly conferred upon the President or agency the authority to “waive,” “suspend,” or “exempt” the effect of statutory language. Even if one could argue that the unconstitutionality of the broad interpretation of section 404(e) tentatively suggested by Order No. 74 is not clear-cut, the fact that section 404(e) does not expressly confer upon the Commission the authority to terminate activities of the Postal Service notwithstanding any other provision of title 39 is of critical importance. Vesting an administrative agency with the power to repeal the “force and effect” of statutory law clearly skirts the edges of the Congress’s constitutional authority, and thus raises substantial constitutional questions.¹²⁹ Faced with a statutory interpretation by an agency that “invokes the outer limits of Congress’s power,” courts demand a clear statement from Congress in the statute being interpreted that it intended such a result.¹³⁰ As an appellate court noted, this rule is

¹²⁹ Even Justice Breyer, dissenting from the Court’s opinion in *Clinton*, noted that the Line Item Veto Act “skirts a constitutional edge.” See *Clinton*, 524 U.S. at 496 (Breyer, J, dissenting). See also *id.* at 465 (Scalia, J, dissenting) (noting that the limits on “executive reduction of congressional dispositions” “may be much more severe” than the limits on “executive augmentation of congressional dispositions.”).

¹³⁰ See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’s power, we expect a clear indication that Congress intended that result.”) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). See also *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (“First, as a general matter when a particular interpretation of a statute invokes the outer limits of Congress’ power,

predicated on the principle that “just as [a court] will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, [a court] will not presume from ambiguous language that Congress intended to authorize an agency to do so. At the core of *DeBartolo* lies the presumption that, if Congress means to push the constitutional envelope, it must do so explicitly.”¹³¹

No such clear indication of Congressional intent to allow the Commission to terminate the Postal Service’s authority to conduct activities expressly authorized by provisions of title 39 independent of section 404(e) is evident here. The statute does not expressly and unambiguously indicate that the Commission has such a power, in a manner similar to the statutes discussed above.¹³² The only express authority conferred upon by the Commission is the authority to terminate “services” that are provided by the Postal Service pursuant to the statutory authority provided to the Postal Service in section 404(e)(2) (which, of course, expressly limits the authority granted to the Postal Service therein on the basis of acceptance of the “service” by the Commission).¹³³ With respect to activities whose statutory basis is found elsewhere, however, there is no such

we expect a clear indication that Congress intended that result.”); *Bell Atl. Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (“Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.”).

¹³¹ *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997).

¹³² Indeed, to the extent that the Commission concludes that “nonpostal service” includes all “revenue-generating arrangements” of the Postal Service, including routine Postal Service business activities such as the sale of excess property, its constitutionally questionable interpretation is in fact unambiguously rebutted by the language of the statute.

¹³³ To be sure, the Commission appears to have the authority to order the Postal Service to stop providing certain “postal services.” See 39 U.S.C. 3642 (authorizing the Commission on its own initiative to remove a “product” from the product lists); 3662(c) (authorizing the Commission to order the Postal Service to “discontinue providing loss-making products”). In these circumstances, however, a Commission order that the Postal Service stop providing certain “postal services” does not serve to eliminate the “force and effect” of the statutory provisions authorizing the Postal Service to provide “postal services,” because numerous other postal services will still be authorized, and the Postal Service will still have the authority to implement additional postal services.

unambiguous conferral of authority. Rather, the Commission must take advantage of an ambiguity in the statute to assert this authority, predicated on a number of conclusions that are questionable from both a legal and practical standpoint.

Related to this “clear statement” requirement is the rule that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions-it does not, one might say, hide elephants in mouseholes.”¹³⁴ Here, the Public Representative, echoing the sentiments of Order No. 74, is claiming that section 404(e) mandates a dramatic extension of the Commission’s jurisdiction into a broad range of routine business transactions necessary to the rational, business-like function of a hardcopy delivery network, such as selling real and personal property. One would expect that if Congress had intended to mandate such a fundamental re-balancing of the regulatory relationship between the Postal Service and the Commission, it would have manifested that intent much more clearly and directly. In particular, considering that the need for the Postal Service to engage in business activities such as selling excess assets is self-evidently necessary if it is to operate in a business-like fashion, it seems odd that the Congress would choose to extend Commission jurisdiction over those activities by setting forth an undefined term (“service”) that as a matter of common usage does not seem to include such matters, in a provision whose ostensible purpose is to review whether the Postal Service should be providing certain types of “services” in the first place.

¹³⁴ See *Whitman*, 531 U.S. at 468.

Finally, it is no answer to say that the Commission would not actually require the Postal Service to stop providing any such activities or services, either because they are self-evidently necessary to the rational, business-like management of the Postal Service (such as the disposal of surplus equipment or real estate), or because they are authorized by Congress. This interpretation simply begs the question of why Congress would have made such activities a part of this proceeding in the first place, if there is no question as to the appropriateness of the Postal Service conducting those activities.

Congress clearly considered that there was an open question as to whether a “public need” existed for the Postal Service to continue offering “nonpostal services.” This is evident from the criteria of section 404(e)(3), which sets forth a review process that is the central purpose of this proceeding.¹³⁵ However, the interpretation advanced by the Public Representative—that routine business transactions such as the sale of excess assets fall within the scope of section 404(e), as do services provided by the Postal Service to other federal agencies—would render this review a mere formality.¹³⁶ In this way, the Public Representative shows that his primary concern is less to determine whether these activities are consistent with the criteria of section 404(e)(3), and more to ensure that the Commission can exercise regulatory jurisdiction, under section 404(e)(5), over as many of the activities of the Postal Service as possible.

¹³⁵ See PR Brief at 4.

¹³⁶ Furthermore, for many of these activities, the criteria of section 404(e)(3) cannot be meaningfully applied.

F. Claims that a Particular Interpretation of the PAEA Advances the Objective of “Accountability” Must Take Congress’s Action to Limit the Commission’s Complaint Authority into Account

The Public Representative also supports his interpretation of section 404(e) by reference to what he calls the “Congressional objectives of flexibility, transparency, and accountability.” Specifically, he argues:

A plain reading of the statute—which divides Postal Service services into postal services and nonpostal services—will give the Commission the power to achieve Congress’ objectives.¹³⁷ The Postal Service’s strained interpretation of the statute would inappropriately create a third, unreviewable category of services beyond the Commission’s authority to review and, therefore, would frustrate the Congressional objectives of flexibility, transparency, and accountability.”¹³⁸

In a general sense, the Public Representative’s view that the objectives of the PAEA included increasing the flexibility of the Postal Service, while also enhancing its transparency and accountability, is unobjectionable. However, this only takes one so far: simply because a particular activity may “increase flexibility,” “enhance transparency,” or “enhance accountability” does not mean that it is *per se* consistent with what Congress actually did in the PAEA. In particular, claims that a specific interpretation of the statute is appropriate because it serves to “enhance accountability” must take into account the fact that Congress expressly limited the Commission’s complaint jurisdiction during the course of its deliberations over the PAEA. Because Congress took this action, it is clear that it did not consider accountability *to the Commission* to be of

¹³⁷ Prior to this passage, the Public Representative claims that Congress’s objectives in passing the PAEA were to give the Postal Service increased flexibility to carry out its core mission, balanced against enhanced transparency and accountability. See PR Brief at 8.

¹³⁸ *Id.* The Public Representative does not explain how the Postal Service’s interpretation would violate the objective of “flexibility.” Indeed, it would seem to advance that objective.

transcendent importance. Otherwise, it would not have acted to narrow the Commission's complaint jurisdiction.

The Public Representative argues that the Commission's complaint jurisdiction and annual compliance review jurisdiction are "immaterial for purposes of this proceeding."¹³⁹ However, it seems obvious to take into account the fact that Congress deliberately narrowed the scope of the Commission's complaint authority in the PAEA when interpreting the meaning of another provision of the PAEA, whose interpretation would affect the scope of that complaint authority. This simply reflects the fact that Congress would not be expected to pass in one provision of a statute language that partially negates a deliberate decision made in another provision of that statute. Furthermore, reading the statute in this logical manner does not amount to a request that the Commission "opine on the scope of its complaint jurisdiction" in any inappropriately premature fashion, especially considering the clarity of section 3662(a) as regards that scope.

The Public Representative also claims that "certain nonpostal services under § 404(e) ultimately may fall outside of the Commission's complaint jurisdiction."¹⁴⁰ This ignores section 404(e)(5), which states that "nonpostal services" shall be regulated as a "product" under chapter 36. Thus, any activity deemed a "nonpostal service" will at the very least be subject to Commission complaint authority for its compliance with the standards of chapter 36.¹⁴¹

¹³⁹ *Id.* at 18.

¹⁴⁰ *Id.*

¹⁴¹ See Order No. 74 at 13-14 (footnote omitted).

Furthermore, and contrary to the view of the Public Representative, the Postal Service is not claiming that revenue-generating activities authorized by statutory provisions other than those enumerated in section 3662, and likewise not within the intended scope of section 404(e), are not otherwise subject to the objectives of “transparency” and “accountability.”¹⁴² Regarding transparency, the Commission is authorized by section 3654 to specify the format and content of financial reports, which includes information concerning all sources of revenue generation. Thus, it is simply incorrect to assert that a broad interpretation of section 404(e), as advanced by the Public Representative or Order No. 74, is necessary in order to achieve “transparency,” the touchstone of “accountability.”

Therefore, the issue for the Public Representative comes down squarely to one of “accountability,” and whether section 404(e) can be interpreted in such a way so as to maximize the Commission’s regulatory jurisdiction. Accountability can be achieved through means other than the Commission, however, such as through Congress, the GAO, the OIG, and, as Postcom et al. (and even the Public Representative) note, the courts. Thus, should someone conclude that the Postal Service is violating the statute through its acquisition of an apartment building, to use the example from Order No. 74,¹⁴³ there are ample avenues in which to pursue such a claim. One avenue that Congress clearly foreclosed, however, was a complaint to the Commission, and section 404(e) should not be interpreted so as to undercut that result.

¹⁴² See PR Brief at 15 (arguing that the Postal Service’s interpretation of section 404(e) manifests “an attempt to avoid oversight and accountability”).

¹⁴³ Order No. 74 at 11.

IV. WHILE THE END RESULT OF POSTCOM ET. AL'S STATUTORY INTERPRETATION PARALLELS TO SOME EXTENT THAT OF THE POSTAL SERVICE'S INTERPRETATION, THE REASONING USED TO ARRIVE AT THAT DESTINATION IS FAULTY

PostCom et al. ("PostCom") asserts that "the Postal Service's claim that certain non-postal services do not admit of classification as market dominant or competitive and are therefore unreviewable is ... without merit."¹⁴⁴ Later in the brief, that assertion is repeated, although at least in the second instance, acknowledgement is made that the Postal Service did not make the alleged claim "explicitly."¹⁴⁵ In fact, the Postal Service made no such claim, either explicitly or implicitly.

To begin to unravel this and other misstatements contained in the PostCom brief, it is first necessary to recognize that there are two allegations in play, rather than one. First, PostCom alleges that the Postal Service is making claims about "certain non-postal services" on the basis that they "do not admit of classification as market dominant or competitive." In reality, the Postal Service's position is that certain nonpostal *activities* are not activities initiated as "nonpostal services" under former section 404(a)(6), and thus are outside the intended scope of section 404(e). As part of its arguments regarding the intended scope of section 404(e), the Postal Service found support for its reading of that provision in the fact that many of the nonpostal activities authorized by provisions other than former section 404(a)(6) do not lend themselves to designation as either market-dominant or competitive, just as they do not lend themselves to

¹⁴⁴ Initial Brief of the Association for Postal Commerce, Direct Marketing Association and Mail Order Association of America ("PostCom et al") on Non-Postal Services at 2 (*hereinafter* "PostCom Brief").

¹⁴⁵ *Id.* at 7.

other aspects of the PAEA regulatory regime.¹⁴⁶ But the clear jurisdictional boundary for section 404(e) identified by the Postal Service is the statutory authority under which an activity has been (and is being) conducted, rather than suitability for classification within one of the two product groups.¹⁴⁷ Nonpostal activities authorized by statutory provisions other than former 404(a)(6), regardless of whether they can readily be classified one way or the other, are outside the intended scope of section 404(e), and nonpostal services authorized solely by former section 404(a)(6), regardless of whether they can readily be classified one way or the other, are within the intended scope of section 404(e).¹⁴⁸

Second, PostCom appears to be alleging that the Postal Service claims that those nonpostal activities which fall outside of the intended scope of section 404(e) are “therefore unreviewable.”¹⁴⁹ In fact, the Postal Service has made no

¹⁴⁶ See Postal Service Initial Brief at 59-71.

¹⁴⁷ The Postal Service agrees with PostCom (Brief at 13 n. 2) in the view that the option of designating a grandfathered “nonpostal service” as “experimental,” rather than as competitive or market dominant, is an option that is unlikely to be of much (if any) practical applicability.

¹⁴⁸ PostCom makes the surprising claim that “all that was necessary and sufficient to determine the scope of this Docket” was for the Commission to conclude that it has authority to review “each and every non-postal service offered by the Postal Service on the date of enactment.” PostCom Brief at 2. PostCom offers no substantive analysis to support this claim, however, and thus utterly fails to address even basic questions, such as what constitutes a “service,” or why Congress would delegate to the Commission the authority to repeal grants of authority contained in portions of the law untouched by the PAEA.

¹⁴⁹ *Id.* at 2, 7. On page 9 of its Brief, PostCom similarly claims that the “Postal Service asserts that [section 404(e)(5)] is a ‘compromise’ which would allow certain non-postal services to be exempted from designation under that subsection, and therefore unreviewable.” Like the statements on pages 2 and 7, this statement also badly misconstrues the Postal Service’s reading of the law. The “compromise” identified by the Postal Service was that between a House bill that automatically grandfathered all existing “nonpostal services” previously authorized by former section 404(a)(6), and a Senate bill that automatically terminated all existing “nonpostal services” previously authorized by former section 404(a)(6). See Postal Service Notice of Sworn Statement (March 19, 2008) at 22; Postal Service Initial Brief at 34-37. The compromise enacted was the grandfathering process allowing the Commission to determine which of the existing “nonpostal services” previously authorized by former section 404(a)(6) would continue. The “compromise,” therefore, involved how “nonpostal services” within the scope of section 404(e)

such broad claim. Rather, the Postal Service is claiming that, because the PAEA made no changes in the statutory provisions under which these activities are conducted, the Postal Service's authority to engage in these activities was and is unaffected by the passage of the PAEA. Likewise, the PAEA made no change in the degree to which these activities might be subject to review.

To the extent, for example, that PostCom takes the position that some amount of review is available with respect to these activities in federal court,¹⁵⁰ enactment of the PAEA would not have altered that situation. With respect to regulatory review as market-dominant or competitive products, moreover, since these activities fall outside the scope of section 404(e), the Postal Service will be no more subject to regulatory review regarding the "prices" relating to these activities, and the terms and conditions under which they are offered, than it was under the PRA. With respect to review by the Commission pursuant to a section 3662 complaint, while earlier versions of postal reform legislation might have extended complaint jurisdiction to encompass these activities,¹⁵¹ the PAEA as ultimately enacted did not. For transparency purposes, however, what the PAEA did change with respect to these activities was to grant the Commission broader authority to require that appropriate financial information regarding them be reported.

Therefore, in its unfounded assertions regarding alleged Postal Service claims of "unreviewability," PostCom is merely setting up a strawman to facilitate

would be treated going forward, but, contrary to PostCom's insinuation, had no direct bearing on which nonpostal activities would fall within the scope of that section.

¹⁵⁰ See PostCom Brief at 8-11.

¹⁵¹ See Postal Service Initial Brief at 54.

introduction of its own peculiar theory of “regulation” via federal court review. PostCom presents the rationale behind its theory on pages 7-12 of its Brief. Stripped to its essentials, the PostCom theory is that, in drafting the language of subsection 404(e)(5), which indicates that grandfathered nonpostal services “shall be regulated under this title” as market-dominant, competitive, or experimental products, the regulation that Congress intended was legal review in the federal courts. The closest PostCom comes to making this argument explicitly occurs in the following passage of the brief:

However, both the Commission and the Postal Service seem to have overlooked the fact that there is a venue outside of the Postal Regulatory Commission through which abuses of the Postal Service’s authority to continue to provide certain nonpostal services can be regulated. There is well-established precedent that if the Postal Service engages in actions which are ultra vires or otherwise violate provisions of the PAEA, injured parties can seek relief in the courts.¹⁵²

Fundamentally, this argument constitutes a none-too-subtle attempt to equate a Congressional intent to impose a *regulatory* scheme on grandfathered nonpostal services, with an alternative approach in which courts engage in passive *judicial review* of alleged abuses of statutory authority.

It is perhaps ironic that, in rejecting what it perceives to be proposed alternatives to its preferred reading of section 404(e)(5), PostCom complains first that those alternatives do not reflect “what the statute says.”¹⁵³ After well over a century of administrative regulation by agencies such as the ICC, the FPC, the SEC, the FTC, and numerous others, it seems inconceivable that Congress would have used language indicating that activities would be “regulated,” if what

¹⁵² PostCom Brief at 8.

¹⁵³ *Id.* at 9.

Congress really intended to convey was that specific actions taken with respect to such activities would be subject to *post hoc* review in federal court. The availability of judicial review certainly might constitute part of a regulatory scheme, but PostCom fails to cite any instance in which judicial review is the entirety of a regulatory scheme. The language of section 404(e)(5) simply cannot be stretched to support anything even remotely approaching the reading that PostCom advocates.

Moreover, as PostCom acknowledges at page 8 of its Brief, the type of court review which occurred in the primary case that PostCom cites (*Aid Association for Lutherans*) was limited to review regarding whether the Postal Service had engaged in *ultra vires* conduct. In other words, the court was asked to intervene to determine if the Postal Service had taken action beyond its statutory authority, and which it therefore had no statutory authority to take. Questions regarding potential *ultra vires* conduct, however, are much more limited than questions which routinely and necessarily arise in regulatory contexts, such as whether technical considerations and policy considerations have been adequately balanced to satisfy a broad range of potentially conflicting statutory factors. For example, in ratemaking, the standard question is not whether the Postal Service has the fundamental statutory authority to change postal rates, but rather whether specific rate changes conform to an entire panoply of substantive and procedural requirements. Any notion that review by a

court of alleged *ultra vires* activities could be viewed as commensurate with “regulation under [title 39]” is fanciful.¹⁵⁴

Equally perplexing is PostCom’s insistence, despite its proposed reading that “regulation” under section 404(e)(5) be conducted by the federal courts, that the designation by the Commission of a grandfathered nonpostal service as either market-dominant or competitive would nonetheless retain importance.¹⁵⁵ Under a natural reading of section 404(e)(5), the Commission’s designation of a grandfathered “nonpostal service” as either market-dominant or competitive would place the activity under the corresponding regulatory scheme for that particular product group. The regulatory schemes for both product groups are outlined in other provisions of the PAEA, and are further fleshed out in the rules established by the Commission in Docket No. RM2007-1.

PostCom, however, disputes that natural reading, denies that the Commission is intended to regulate grandfathered nonpostal activities at all, and therefore must struggle to identify some other purpose for the Commission to classify grandfathered nonpostal services when (in its view) any subsequent “regulation” will be conducted by the federal courts. PostCom argues that the

¹⁵⁴ In arguing (Brief at 11-12) that its reading of section 404(e) accords with the broader purposes of the PAEA, PostCom makes a curious claim. PostCom suggests that the fundamental purpose of both section 404(e) and PAEA section 102 was to repeal the Postal Service’s former authority under section 404(a)(6) regarding “nonpostal services,” a suggestion with which the Postal Service agrees. But, presumably to heighten the contrast with its interpretation of the intent of new section 404(e) to facilitate judicial review, PostCom further alleges that the grant of authority in former section 404(a)(6) allowed the Postal Service to act on nonpostal services “without any review whatsoever.” *Id.* at 12. Yet there is no apparent reason why the type of judicial review exemplified by the cases which PostCom has cited would have been any less available for actions taken under former section 404(a)(6) than under other statutory grants of authority. If PostCom is implying that any part of section 404(e) was necessary to improve the “reviewability” of nonpostal services by courts, such an argument does not appear to be well-founded.

¹⁵⁵ *Id.* at 11, 12, 14-15.

Commission's group designation "will affect the scope of the judicial review."¹⁵⁶ To elaborate on this, PostCom suggests that different types of issues would arise, depending on whether the challenged action involved a market-dominant or a competitive offering.¹⁵⁷ Yet it is distinctly unclear why the ability of a reviewing court to understand and resolve issues would in any way be enhanced by virtue of a prior designation by the Commission of the "nonpostal service" in question as either market-dominant or competitive, or why that designation would need to be afforded deference under the *Chevron* doctrine.¹⁵⁸ PostCom's assertions in this regard appear to be nothing more than an elaborate makeweight intended to obscure the reality that "regulation" by the federal courts cannot be reconciled to the language of section 404(e)(5), which calls each "nonpostal service" to be regulated in accordance with the regulatory scheme applicable to the product grouping in which the service is designated.

PostCom seems to be similarly off base when it alleges that:

Although Section 404(e)(5) requires the Commission to designate those nonpostal services that are to be continued as either market dominant, competitive or experimental, neither Section 404 *nor any other provision of the statute* establishes the standard the Commission is to apply in making the designations.¹⁵⁹

While section 404 itself does not establish those standards, and does not expressly refer to the section which does, such standards can readily be found in section 3642. In fact, without explicitly referring to that section of the statute, PostCom on the next page itself appears to refer to the standards presented in

¹⁵⁶ *Id.* at 14.

¹⁵⁷ *Id.* at 14-15.

¹⁵⁸ *Id.* at 11.

¹⁵⁹ *Id.* at 12 (emphasis added).

section 3642. It is not clear why PostCom chose to deny the existence of any provision in the statute establishing those standards, rather than simply citing the standards of section 3642.

PostCom is correct, however, in highlighting the difficulties created in interpreting section 404(e) by virtue of the explicit language in section 102(b)'s definition of "product," which limits a "product" to a "postal service."¹⁶⁰ At a minimum, as discussed previously by the Postal Service,¹⁶¹ the facial inconsistency between section 404(e)(5), indicating that grandfathered "nonpostal services" are to be either market-dominant or competitive "products," and section 102(b), indicating that only "postal services" can qualify as "products," is a further sign that proper interpretation of section 404(e) cannot proceed as if Congress had ironed out all of the potential drafting issues associated with efforts to express its true intent. Clearly, attention must be paid to the harmonization of section 404(e) with the rest of the statute.

The Postal Service submits the proper result of such harmonization is implicitly to extend the definition of product in section 102(b) to encompass not only "postal services," but "nonpostal services" grandfathered pursuant to section 404(e) as well. In that fashion, the difficulties that PostCom envisions because of the definitional limitation on "products" to "postal services" can reasonably be surmounted. Or, more specifically, they at least can be surmounted if the scope of section 404(e), and the nonpostal activities grandfathered thereunto, are limited to those nonpostal activities previously authorized by former section

¹⁶⁰ *Id.* at 4-5.

¹⁶¹ Postal Service Initial Brief at 22.

404(a)(6), now repealed. To the extent that PostCom, at pages 6-7 of its Brief, cites problems associated with treating as “products” certain activities authorized by other statutory provisions, such as real estate sales or leases, philatelic services, or section 411 agreements such as passport acceptance, the appropriate solution to those problems is application of a properly narrow scope to section 404(e), which would correctly leave those activities outside the purview of the grandfathering process entirely. In that instance, the question of how to sensibly treat those activities as “products” never arises.

Also regarding the topic of “products,” the following passage adds some potential confusion when trying to understand exactly what positions PostCom is espousing:

There is nothing in the Act that either expressly or by implication empowers the Commission to re-classify a “non-postal service” and convert it into a “postal product.” Non-postal services are by definition non-postal and remain so despite designation by the Commission under 404(e)(5).¹⁶²

Similar statements appear on page 2 of the PostCom Brief. Potential confusion interpreting these statements arises from the multiple historical usages of the term “nonpostal services” noted in the Postal Service’s Initial Brief at pages 1-3. To the extent that the term “nonpostal services” has at times in the past been used as a convenient generic shorthand for certain activities (other than international mail services) for which the Postal Service never sought recommendations from the Postal Rate Commission on rates or classifications, the Postal Service maintains that a portion of those historic activities fit within the statutory definition of “postal services.” Indeed, as discussed at length in the

¹⁶² PostCom Brief at 5.

Postal Service's Initial Brief at pages 91-109, the Postal Service is proposing that five such activities be added to the list of postal products in the MCS. Because, therefore, there is a statutory basis to conduct these activities (*i.e.*, as postal services) outside of former section 404(a)(6), these activities do not fit within the intended scope of the term "nonpostal services," as that term is used in section 404(e). To the extent that these activities are thus not "nonpostal services" as the Postal Service currently understands that term, treating them as "postal services" does not require the reclassification and conversion process to which PostCom objects. To the extent, however, that these activities were formerly considered "nonpostal services" under a prior usage of that term, perhaps one could conceivably view the Postal Service's current proposal regarding them as a reclassification/conversion exercise. Exactly where PostCom fits on this spectrum is not entirely clear.

To avoid potential confusion, therefore, the Postal Service believes it may be useful to focus on a single activity which the Postal Service is seeking to grandfather, rather than one which it seeking to have treated in the future as a postal service. The example thus chosen is Passport Photos. The Postal Service interprets the point PostCom is trying to make on pages 4-5 of its brief to suggest, in terms of our example, that there is nothing in the Act which empowers the Commission to reclassify Passport Photos and convert that activity into a "postal product." PostCom apparently advances that view to emphasize its line of reasoning that the Commission only regulates "products," "products" are limited to postal services, "nonpostal services" therefore cannot be

“products,” and “nonpostal services” therefore cannot be regulated. Or, in terms of our example, PostCom appears to be arguing that Passport Photo service could only be regulated if it were a “postal service,” which it is not, and that grandfathering the service does not change its status from nonpostal to postal.

If that is the point PostCom is trying to make, while the Postal Service does not share that conclusion (because of a greater willingness to implicitly expand the definition of “product,” as explained above), at least that argument does not implicate the Postal Service’s proposal to add certain activities to the list of postal products. To take a different example, however, this time from the set of activities which the Postal Service now wishes to see treated as postal, if PostCom is suggesting that Address Management Services (AMS) activities can never be added to the product list because they were not treated as “postal services” in the past, then the Postal Service must disagree. As long as AMS activities and the other four identified in the Postal Service’s proposal fit within the statutory definition of “postal services,” there is nothing within section 404(e), or any other portion of the law, which would preclude adding them to the list of postal products. PostCom offers no discernible argument to the contrary.

V. THE PUBLIC REPRESENTATIVE’S APPROACH TO CLASSIFYING THE DISPUTED ACTIVITIES DEMONSTRATES THAT CONGRESS DID NOT INTEND TO SUBJECT THESE ACTIVITIES TO THE SAME LIMITATIONS AS NONPOSTAL SERVICES

In Section IV of his Brief, the Public Representative presents his views on the application of the standards of sections 404(e)(3) and 3642 to unclassified revenue of the Postal Service. He criticizes the Postal Service for not providing classification language for each type of revenue listed in the General Ledger and

for failing to indicate whether each activity should be classified as market-dominant or competitive.¹⁶³ The Public Representative then presents a “workable draft list which classifies and categorizes the Postal Service’s nonpostal services for insertion into the MCS.”¹⁶⁴ This list contains the services that the Postal Service seeks to continue as grandfathered nonpostal services, as well as almost all of the disputed activities that the Postal Service maintains fall outside the scope of section 404(e). The Public Representative excludes from his list those revenue-generating activities that he maintains are not supported by the Witness Statements.¹⁶⁵ He also provides product descriptions for the “postal services” that the Postal Service has requested be added to the product lists, and supports the continuation of these activities.¹⁶⁶

The Postal Service agrees with the Public Representative in several respects. Setting aside for a moment the debate about the scope of the term “nonpostal service,” the outcome of this proceeding will result in the Commission adding the grandfathered nonpostal services to the product lists as market-

¹⁶³ The Postal Service notes that the Commission never requested specific MCS language. Also, the criticism about the lack of classification designation and language was made without the benefit of the Postal Service’s Initial Brief. The brief identified a product classification for each “postal service” as either market-dominant or competitive. The Postal Service also indicated that it would propose classification language for these services shortly. For the services it seeks to grandfather, the Postal Service had previously identified a classification category in its supporting Witness Statements, with the exception of EPM (which was an oversight). It also noted in its brief that if the Commission decides to grandfather the services, it would propose classification language. For the activities whose status is disputed, the Postal Service has argued almost none are capable of being classified as either market dominant or competitive. See Postal Service Initial Brief at 59-71.

¹⁶⁴ PR Brief at 23. In addressing the issues that arise from the Public Representative’s effort to apply the standards of sections 404(e), the Postal Service does not intend to engage in a line by line critique of each product description proposed by the Commission. It anticipates the precise wording of the classification language will be the subject of future submissions once the Commission has ruled on the scope of section 404(e).

¹⁶⁵ *Id.* at 23 n.25.

¹⁶⁶ *Id.* at 33-35.

dominant, competitive, or experimental products.¹⁶⁷ Any nonpostal services that are not grandfathered must be terminated and the Postal Service is not allowed to provide any new nonpostal services.¹⁶⁸

On the other hand, the Postal Service and the Public Representative clearly disagree on the scope of this proceeding. The Public Representative claims that all revenue of the Postal Service must be classified and regulated pursuant to section 404(e), including the revenue generated by the activities discussed in the Donahoe Statement. But his attempt to classify these activities underscores the fallacy and inappropriateness of classifying revenue sources that differ fundamentally from the services previously authorized under former section 404(a)(6).

A. The Public Representative Shows that Many of the Disputed Activities Cannot Logically Be Viewed as Discrete “Product” to Which the Standards of Section 404(e) Can be Meaningfully Applied

In tacit recognition that Congress did not intend to terminate the core business and government-related activities that Mr. Donahoe discusses, the Public Representative endeavors to ensure their continuation through several means. First, he employs very broad and all-encompassing “product” descriptions that do not delineate the revenue-generating activities in any discrete fashion. For example, the Public Representative lists “Strategic Partnerships” as a “product,” with a description that states, “The Postal Service may enter into arrangements with strategic partners to facilitate achieving the core mission.” This description would seem to permit almost any arrangement as

¹⁶⁷ See *id.* at 22.

¹⁶⁸ *Id.* at 22.

long as it is with a business “partner,” but recognizes that any description would have to be expansive in order to cover the myriad of prudent business arrangements that the Postal Service could conceivably enter into.¹⁶⁹

The Public Representative’s product descriptions are so broad that they inadvertently seek to expand the Commission’s authority far beyond activities that generate revenue. Several descriptions cover not only when the Postal Service receives revenue, but also when it pays for services, products, or property. For example, the description of “Arrangement with Government Entities” includes not only when the Postal Service provides services but also when it receives services from a government entity, and the description of the “Management of Real and Tangible Property” includes not only the leasing and disposal but also the acquiring of property. The description of the Strategic Partnership generically refers to the arrangement and is not limited to its revenue-generating aspect. However, since neither the Public Representative nor any other party has argued in support of this vast expansion of Commission power, one can assume that this was an unintentional consequence of overly broad descriptions.

This situation highlights the difficulty of drafting language that encompasses the complexity of the Postal Service’s business operations while satisfying the limitations of section 404(e). Under the Public Representative’s

¹⁶⁹ Even this sweeping language is not broad enough. The Strategic Partnership description does not appear to cover the transportation management arrangement that, as a by-product, generates revenues in the form of rebates. An agreement to purchase fuel and receive any rebates that may result would not meet the definition of “strategic partnership,” no matter how broadly defined.

approach of classifying all revenue, descriptions that are too narrow run the risk of prohibiting the Postal Service from engaging in prudent business arrangements outside the scope of the listed item. Descriptions that are overly broad can, however, create confusion about the extent of Commission jurisdiction. These perils can be avoided if “nonpostal services” are properly interpreted to mean those that were originally authorized by former 404(a)(6).

Second, the Public Representative justifies the “public need” for each of the disputed activities on the basis that they are “Congressionally mandated or authorized,” or through tautological statements of public benefits. The Public Representative concurs that Congress has mandated or authorized the Postal Service to 1) provide information related to the Freedom of Information Act, Privacy Act, and Sexually Oriented Advertising list pursuant to section 3010, 2) engage in law enforcement actions and litigation and 3) manage its property. The Public Representative also agrees that when the Postal Service manages its intellectual property or financial portfolio, or engages in strategic partnerships, there is a public benefit, and therefore there is a “public need” for the Postal Service to engage in these activities. Finally, the Public Representative recognizes that when the Postal Service provides services to the public on behalf of another agency, such as emergency assistance, there must be an inherent public need to do so.

The Public Representative’s use of broad “product” descriptions and sweeping justifications implicitly acknowledges that Congress never intended that these activities be terminated or limited. Recognizing this fact demonstrates that

these activities are not appropriately subject to this proceeding. In order to allow the Postal Service to continue providing these activities, the Public Representative recognizes that he must propose very broad product descriptions. This seems to be fundamentally inconsistent with section 102, which requires a review as to whether each “service” should continued to be offered. The standards of section 404(e) simply cannot be applied coherently to broad, generalized activities that the Congress never intended to constrain.

It is instructive to contrast the wording of the Public Representative’s product descriptions and justifications for the disputed activities with the ones for “nonpostal services” that the Postal Service seeks to grandfather (*i.e.*, passport photo service, photocopying service, notary public service, stored value cards and OLRP).¹⁷⁰ The descriptions and justifications are tailored to the discrete services that the Postal Service provides.¹⁷¹ For example, the passport photo service is justified as a convenience for the public to have photograph service at the same location as the passport acceptance facility, and the Public Representative notes that private sector is not able to meet the need in rural areas.¹⁷² To be consistent with the standards of section 404(e), product descriptions and justifications should be tailored to an actual identified “service” provided by the Postal Service.

¹⁷⁰ See PR Brief at 27-30.

¹⁷¹ The Postal Service believes, however, that the Public Representative’s product descriptions lack sufficient explanatory information to define the product (see 39 C.F.R. 3020 et. seq.).

¹⁷² PR Brief at 28.

B. The Public Representative’s Designations of the Disputed Activities as Market-Dominant or Competitive Do Not Make Sense Under the Statutory and Regulatory Scheme

The Public Representative’s attempt to classify every disputed activity as market-dominant or competitive also illustrates the inapplicability of the section 404(e) standards. He classifies arrangements with government entities as competitive because the private sector can “usually” perform these functions. With respect to passport service, however, there is no competitive market, and passports are not provided by the private sector.¹⁷³ The State Department has a government mandated monopoly; it controls not only the price but also the passport application locations. It is the State Department that is “market-dominant” in terms of pricing power. The Postal Service is simply operating as one of the State Department’s retail outlets and lacks pricing authority. Passport application service clearly does not meet the definition of either a competitive or market-dominant product. More generally, coherent regulation of many of the disputed activities as either market-dominant or competitive products is not feasible since the revenue generated from those activities is not from rates or prices that the Postal Service controls.¹⁷⁴

The Public Representative fails to discuss how the product regulations would apply to the disputed activities, even though this question logically flows from their addition to the product lists. The Public Representative would classify the provision of information under FOIA, the Privacy Act, or section 3010, and law enforcement and litigation activities as “market-dominant products.” When

¹⁷³ See Donahoe Statement at 21. See also <http://iafdb.travel.state.gov>.

¹⁷⁴ See Postal Service Initial Brief at 60-62.

the Postal Service is awarded damages in a civil settlement, what rules apply? How does one ensure compliance with a price cap or any other pricing rules, when there is no price? Assume *arguendo* that passports application fees are market-dominant and they are placed in the special services class. Will the current cap compliance rules apply? If the State Department changes the passport fees, will the Postal Service need to file for a cap compliance review? For those listings that the Public Representative would classify as competitive, troubling issues also arise.¹⁷⁵

The Postal Service asserts that at the time the Commission adds the grandfathered “nonpostal services” to the product lists, it must also indicate how the rules will apply to any subsequent changes in prices or classification (*i.e.*, product description) and to any reporting elements. The services that the Postal Service seeks to continue as grandfathered products (EPM, passport photo service, stored value cards, OLRP, photocopying service and notary services) are suitable for regulation under the Commission’s current rules relating to market-dominant and competitive products.¹⁷⁶ The disputed activities are, however, by and large not amenable to regulation under sections 3622, 3632, and 3633.¹⁷⁷ Furthermore, there is also an issue about how the revenues, costs, and volumes of each activity need to be reported for regulatory purposes. Currently the Postal Service has no means to segregate costs for many of these

¹⁷⁵ See Postal Service Initial Brief at 62-63.

¹⁷⁶ The Postal Service has also requested that five services be classified as “postal services”: AMS, greeting cards, ReadyPost, customized postage, and International Money Funds Transfer. The Postal Service expects that these “postal services” will be regulated under the Commission’s current rules for market-dominant or competitive products.

¹⁷⁷ See *generally* Postal Service Initial Brief at Section I.D..

activities. If the Commission classifies the disputed activities, the regulatory scheme would apply immediately and the Commission would need to address the pricing, classification, and reporting requirements for these activities.

These are not considerations that can be put off to some time in the future. As an initial matter, considering these issues helps to demonstrate the fact that chapter 36 is ill-suited to regulating many of these activities, and thus helps to inform the proper interpretation of section 404(e). In addition, if the activities are added to the product list, the Postal Service would need immediate guidance. If the current rules were to apply, then the Postal Service would need to incorporate immediate, comprehensive, and pervasive changes into many of its operational practices to accommodate regulatory review by the Commission. If the Commission were to amend its rules, the Postal Service would need notice to accommodate the new regulatory requirements. More fundamentally, however, the Postal Service is genuinely perplexed about how the rules under chapter 36, current or amended, could be applied to most of the disputed activities.

C. The Public Representative’s Attempt to Have Some Sources of Revenue Terminated Is Unsustainable

On a final note, the Public Representative posits that all “nonpostal activities” that the Postal Service has not clearly identified and supported through testimony on the record will be terminated by operation of law, and that any nonpostal service not listed on the MCS at the conclusion of this proceeding will be terminated.¹⁷⁸ The Postal Service has, however, clearly discussed and

¹⁷⁸ PR Initial Brief at 22-23 & n.25..

justified those activities that are properly the subject of this proceeding. Furthermore, it has gone further, by identifying and justifying the various revenue-generating activities that are *not* properly the subject of this proceeding, in a good faith effort to respond to Order No. 74. For instance, the Donahoe Statement covered all revenue-generating activities not otherwise discussed in the other witness statements.¹⁷⁹ The Postal Service also offered to provide additional information on its revenue-generating activities if any party requested it upon their review of the data provided in response to Order No. 74. It is therefore improper to conclude that any “nonpostal activity” could be terminated on the basis that it has not been properly taken into account by the Postal Service in this proceeding, even if this proceeding included the full range of Postal Service revenue-generating activities, as the Public Representative erroneously believes it does.

The Public Representative goes on to state that his “workable draft [MCS] list” is based on the Postal Service’s witness statements, and, to the extent that there are activities not listed, it is because those activities were not covered in the statements. While one could argue about whether some of the arrangements qualify as “strategic partnerships,” one clear omission from the Public Representative’s list is actually not an “activity” but rather revenue from various sources of unclaimed monies that the Postal Service acquires in the normal course of business. These include unclaimed monies found in letters and parcels at Mail Recovery Centers, unclaimed meter deposits, unused flexible spending, unidentified cash receipts and fees from employees for parking, and

¹⁷⁹ See Donahoe Statement at 1.

other items discussed in the June 9 filing.¹⁸⁰ It is unclear why this revenue source was not included since Mr. Donahoe specifically addressed it in his witness statement.

The exclusion of unclaimed money from the list would lead to an illogical result. It is hard to fathom how the Postal Service would “terminate” this activity since it acquires the revenue as passively as, for example, finding money in the couch. These funds will continue to exist without any action on the part of the Postal Service and it would be folly to suggest that the Postal Service could no longer keep the funds. But this simply begs the question as to why this revenue source would be considered a “nonpostal service” to begin with.

VI. THE RECORD IN THIS PROCEEDING CLEARLY ESTABLISHES THAT THE NONPOSTAL SERVICES THAT HAVE BEEN IDENTIFIED BY THE POSTAL SERVICE FOR GRANDFATHERING SHOULD BE AUTHORIZED BY THE COMMISSION

The Postal Service has requested that six currently unregulated services that it provides to the public, or allows to be provided to the public, be grandfathered and allowed to continue in the future. It has also requested that five currently unregulated services be added to the product list under section 3642. The evidence provided in support of these requests has raised little controversy, and, in general, the other parties in this proceeding have not objected. The only exception is the USPS EPM, where one party, Digistamp, has opposed grandfathering in the face of many commenters who support it. On the record evidence in this proceeding, the Commission should conclude that the Postal Service’s requests are appropriate.

¹⁸⁰ See *id.* at 18-19.

A. Passport Photo Service

The Postal Service has established that passport photo service, offered in connection with passport acceptance services authorized by the Department of State, was widely available before January 1, 2006, and is provided as a convenience to citizens who, often for the first time, are required to obtain passports.¹⁸¹ It benefits citizens in communities where there may be few options to obtain the photo required by the Department of State, and makes the passport application process easier for applicants who may find it intimidating and time-consuming.¹⁸²

The record in this proceeding shows, without dispute, that the Postal Service's passport photo service is a useful and popular adjunct to the passport application process and that it meets an otherwise unmet public need.¹⁸³ The Commission should find that it should be grandfathered as a nonpostal service.

B. Photocopying Services

The Postal Service has long offered photocopying services for the convenience of customers who need to make copies of documents before putting them in the mail.¹⁸⁴ Having photocopying service available at a post office makes sense for customers who do not wish to make multiple stops to accomplish their tasks, or in smaller communities where there are limited places to have copies made. Postal Service provision of photocopy service is helpful to postal patrons

¹⁸¹ Postal Service Initial Brief at 75.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 76.

mailing tax returns or bills, or who want a record of any other transaction.¹⁸⁵

Continuation of this useful and convenient service should be authorized by the Commission. No party in this proceeding has disagreed.

C. Notarial Services

The Postal Service has also traditionally permitted postal employees who are notary publics to provide that service, free of charge, in a very small number of post offices.¹⁸⁶ These services are not, strictly speaking, services offered by the Postal Service even if they take place in a post office.¹⁸⁷ They are authorized by the State, District, Territory, or Commonwealth which appoints the notary public.

Although this service is not provided under a federal program, or for a fee, the Postal Service, in an abundance of caution, chose to include it among those requested to be grandfathered as an indication of the Postal Service's intent to continue allowing its employees to engage in this activity.¹⁸⁸ The Postal Service submits that the most appropriate classification, if grandfathered, would be as market-dominant. However, it does not seem that these activities would fall under any definition of "postal services" or "nonpostal services," as they are not provided by the Postal Service. Regardless of how characterized, no party has objected to continued provision of these services.

¹⁸⁵ *Id.* at 77.

¹⁸⁶ This convenience is offered at only 192 post offices outside of Alaska.

¹⁸⁷ The Public Representative mistakenly describes notary public service as being provided by the Postal Service when he suggests their inclusion in the MCS. PR Brief at 29.

¹⁸⁸ Postal Service Initial Brief at 79-80.

D. Stored Value Cards

Postal customers need convenient access to payment alternatives that support their shipping and business needs. Stored value cards, such as phone cards, gift cards, and prepaid debit cards, offer that convenience.¹⁸⁹ No party to this proceeding has taken issue with this premise. The provision of stored value cards by the Postal Service should be authorized by the Commission as a non-postal service.

E. Official Licensed Retail Products

Official Licensed Retail Products (OLRP) are unique and sold only in post offices, or, in some cases, through other retail channels such as USPS.com or at off-site special events such as the National Postal Forum.¹⁹⁰ These products are designed to support customer mailing needs (e.g., scales), relate to other services provided at postal facilities (e.g., passport holders), or offer customers the convenience of being able to select an item which can then be mailed using ReadyPost or other Postal Service packaging.¹⁹¹

OLRP items are a significant source of postal revenue, and leverage both core postal activities as well as special events.¹⁹² ASC points out that these programs allow the Postal Service “to engage in its longstanding Philatelic activities and the freedom and *flexibility* to provide such products and services through the existing OLRP and/or Philatelic Services Programs...”¹⁹³ Other

¹⁸⁹ *Id.* at 81.

¹⁹⁰ *See id.* at 83.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Initial Brief Of ASC, Inc. On Philatelic Service And OLRP Product Issues at 3 (emphasis in original).

governmental agencies offer such items; in fact, such efforts are routine.¹⁹⁴ The holiday ornaments and other items available from the White House, Congress, and other governmental entities are obvious examples. The Commission should authorize the Postal Service to continue to offer these products.

F. USPS Electronic Postmark Service (EPM)

The record in this proceeding clearly establishes that the USPS EPM should be grandfathered under the PAEA. Most parties to this proceeding have supported this request.¹⁹⁵ The Postal Service describes in detail why the USPS EPM should be grandfathered in its Initial Brief.¹⁹⁶ The Public Representative has observed that “[t]he participants agree that there is a public need for the EPM service.”¹⁹⁷ The only participant who does not believe that the Postal Service should play a role has been Digistamp, Inc.

In his initial brief, Mr. Borges of Digistamp repeats the arguments he has made continually over the years to the Commission. He also asserts that the Postal Service has failed to rebut his argument because it has not devoted a sufficient number of sentences to his concerns.¹⁹⁸ However, this latter assertion overlooks the fact that there is very little more that needs to be said.¹⁹⁹ The Commission has before it an extensive record on the issues in this proceeding, and in the previous Complaint proceeding brought by Digistamp in Docket No.

¹⁹⁴ Postal Service Initial Brief at 84.

¹⁹⁵ See Initial Brief of Epostmarks; Comments of Epostmarks Inc., endorsed by Microsoft Corp, Striata, Goodmail System, Inc., GovDelivery, Inc., and Iconix, Inc.; Comments of Delegate Jeannie Haddaway-Riccio, of Maryland; Comments of State Representative Donna Stone of Delaware.

¹⁹⁶ Postal Service Initial Brief at 85-89.

¹⁹⁷ PR Brief at 31.

¹⁹⁸ Brief of Digistamp at 3 (*hereinafter* “Digistamp Brief”).

¹⁹⁹ The Public Representative has noted that the participants have “considerably narrowed the issues.” PR Brief at 31.

C2004-2. The record demonstrates that the Postal Service's continued offering of EPM fills a public need not met by the private sector.

Digistamp argues that the USPS EPM was not offered as of January 1, 2006, but the record is clear that the Postal Service began exploring the service in 1991,²⁰⁰ by 1995 began testing the concept, and provided the service commercially until 2001, when the Postal Service decided to continue the service under a different structure.²⁰¹ From 2001 to the present, an authorized EPM company provided the service to Postal Service customers. The way in which the service has been structured does not change the fundamental nature of the service. Clearly the Postal Service has offered the service continuously, although it has worked with different models to offer the service.

Despite DigiStamp's concerns about whether the USPS EPM conforms to any particular standard, it acknowledges that "[i]n addition to UPU's standards, there are many effective standards bodies and thousands of published standards."²⁰² This suggests that there is a very robust arena for different companies to explore different standards, and establishes that the issues in this proceeding are not about technical standards²⁰³ or competition. There are plenty of both.²⁰⁴

²⁰⁰ Foti Statement at 2.

²⁰¹ *Id.* at 2-3.

²⁰² Digistamp Brief at 14.

²⁰³ Starting at page 8 of its Initial Brief, DigiStamp discusses at length the standards pertaining to digital certificates. This is a red herring; the Postal Service uses digital certificates in the USPS EPM program, but does not offer such a service to the public.

²⁰⁴ On September 30, 2008, an organization called the Information Assurance Consortium (IAC) based in Arlington, Texas, and founded in 2005, IAC submission at 1, filed a letter repeating Digistamp's concerns about the Postal Service's ability to support a secure time and date stamp service, providing material on their activities in the spring and summer of 2006, and arguing in support of the X9.95 protocol. As far as the Postal Service knows this is the first time this

Perhaps DigiStamp's real concern is best shown by its statement that "[s]mall startup companies like Digistamp can not find investors who are willing to risk backing them when the sleeping giant – the Postal Service – the Postal Service [sic] has expressed its intent and may finally awaken at any moment and spend the tens of millions of dollars on its EPM service to finally do it correctly..." This is a telling admission. First, it contradicts DigiStamp's claim that the Postal Service inherently "operates in an extraordinarily unbusinesslike, technically and financially inept, culture."²⁰⁵ Digistamp clearly believes that the Postal Service is more than capable of fulfilling this role, even if he believes it has not in the past. Second, it reveals that Digistamp considers removal of the Postal Service from the service to be in the public interest simply because Digistamp anticipates that it will make it easier for Digistamp to find investors. This is hardly a complete analysis of the public benefit or detriment that might flow from the Postal Service's continued provision of EPM service. It is neither the Postal Service's nor the Commission's role in this proceeding to opine on the Digistamp business model, but the Commission's decision should not be based on the business interests of a single participant.

The record in this proceeding demonstrates that the USPS EPM is a potentially important service for American commerce which meets a public need that cannot be adequately served by the private sector, and should be authorized by the Commission as a nonpostal service. There is broad support by other

organization has approached the Commission. The Commission should not be dragged into a dispute over which of the thousands of standards should, or should not, be adopted. The point is whether the USPS EPM should be grandfathered as a competitive nonpostal service under the criteria of section 404(e).

²⁰⁵ Digistamp Brief at 13.

parties on this subject. Representatives of certain State legislatures concur. The Commission should allow the USPS EPM to continue as a grandfathered nonpostal service.

In addition, the Commission should designate the USPS EPM as competitive. The record is clear that the Postal Service has no monopoly on provision of time and date stamp services. Many companies provide methods of secure digital communications.²⁰⁶ Digistamp states that “the UPU exists in an ecosystem of Internet standards. In addition to the UPU’s standards, there are many effective standards bodies and thousands of published standards.”²⁰⁷ Many posts have initiated “e-postal” services.²⁰⁸ Clearly there is a robust and developing market, with a variety of providers and solutions, for authenticated time and date stamps. The fact that a number of USPS EPM applications are already on the market,²⁰⁹ only shows that the Postal Service is competing in this market, the future of which is unclear. The USPS EPM should be classified as a competitive, grandfathered, nonpostal service.

VII. THE RECORD ESTABLISHES THAT THE COMMISSION SHOULD ALSO ADD TO THE PRODUCT LISTS THOSE SERVICES NOT PREVIOUSLY REGULATED BY THE COMMISSION THAT FALL WITHIN THE STATUTORY DEFINITION OF “POSTAL SERVICE”

In this proceeding the Postal Service has identified five previously unclassified services that it now seeks to have classified as “postal services,” as that term is defined under current law. In each case the product meets the

²⁰⁶ Supplemental Statement of Rich Borges on behalf of Digistamp, Inc., at 4.

²⁰⁷ Digistamp Brief at 14.

²⁰⁸ Reply Comments of Maxim Lesur, Worldwide Postal Industry Managing Director for Microsoft Corporation, at 1.

²⁰⁹ Initial Brief of Epostmarks, Inc., at 3.

statutory definition of “postal service” in section 102(5) of title 39 and should be added pursuant to section 3642. No party opposes the continuation of these activities through their addition to the product lists (though there is a dispute as to whether certain activities should be deemed a “postal service” rather than a “nonpostal service”). Based on the record in this proceeding, the Commission should classify each service as a postal service.

A. Address Management Services

The Postal Service clearly established that one of the functions needed to support its core mission of delivering hardcopy mail is the maintenance of accurate addresses through the Address Management Services.²¹⁰ Those services have been described in great detail elsewhere.²¹¹ In their initial briefs, PostCom and the Public Representative both stated that all Address Management Services should be classified as market-dominant.²¹² The Postal Service agrees with respect to the vast majority of these services; however, three of them should be classified as competitive.²¹³ Specifically, the Postal Service believes that AEC Service, AMS API, and TIGER/ZIP + 4 File should be classified as competitive, because these three products either compete with products offered by other vendors, or because there are vendors in the market that have the ability to offer a similar product.²¹⁴ The Commission should classify all these services as “postal services,” and except for the three noted, should classify them as market-dominant.

²¹⁰ Postal Service Initial Brief at 92.

²¹¹ *Id.* at 92-97.

²¹² PostCom Brief at 12.

²¹³ Postal Service Initial Brief at 96-97.

²¹⁴ *Id.* at 96-97.

B. ReadyPost Program

ReadyPost offers customers at approximately 32,000 postal retail locations a Postal Service-branded line of shipping supplies designed for sale in postal retail locations to support customer mailing needs.²¹⁵ No party has disputed the authority of the Postal Service to offer these products to postal patrons. Indeed, the Public Representative states that “[t]he sale of shipping supplies to customers appears to be ancillary to acceptance of mailable [matter] at postal retail locations.”²¹⁶

ReadyPost items are ancillary to the delivery of mail and therefore meet the statutory definition of “postal service.”²¹⁷ Furthermore, packaging supplies are widely available from other sources. ReadyPost should be classified as a “postal service” in the competitive product category.

C. Greeting Card Program

The Postal Service has established that the Greeting Card Program should be classified as a postal service.²¹⁸ No party has disagreed. The Public Representative states in his Initial Brief that “[t]he sale of greeting cards appears to be ancillary to acceptance of mailable [matter] at postal retail locations.”²¹⁹

The Greeting Card Program should be classified as a postal service in the competitive product category.

²¹⁵ *Id.* at 97.

²¹⁶ PR Brief at 34. .

²¹⁷ See Postal Service Notice of Sworn Statement (March 19, 2008) at 8-10

²¹⁸ Postal Service Initial Brief at 99-101.

²¹⁹ PR Brief at 34.

D. Customized Postage

The Postal Service has established that the provision of Customized Postage is part of its core functions, 39 U.S.C. 101, DMCS § 3040.²²⁰ No party has disputed this. The Customized Postage program is ancillary to the delivery of mail, and terms under which it is offered are set by postal regulation. Therefore, it should be classified as a market-dominant “postal service.”

E. International Money Transfer Service

The Postal Service has established that both hardcopy and electronic International Money Transfer Service should be classified as a competitive postal service.²²¹ No participant disagrees with this position. Indeed, the Public Representative supports the Postal Service’s position by stating that “IMTS should be also be classified as a postal service. It should be classified as competitive since there are non-banking outlets throughout the nation that offer similar services.”²²² Consequently, the Postal Service respectfully requests the inclusion of IMTS as a competitive postal service.

²²⁰ Postal Service Initial Brief at 101-103.

²²¹ *Id.* at 103-08.

²²² PR Brief at 34.

CONCLUSION

The Postal Service requests that the Commission authorize the Postal Service to continue providing the “nonpostal services” discussed herein in Section VI. The Postal Service also urges the Commission to properly interpret section 404(e) as applying only to services previously authorized under former section 404(a)(6), rather than also to services (or activities) authorized by other, unamended statutory provisions. Such an interpretation best accords with the weight of the relevant interpretative evidence. Finally, the Postal Service requests that the Commission place on the product lists as “postal services” those services discussed herein in Section VII.

Respectfully submitted,

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