

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

Petition for Review of Unclassified Services)

*2003

CONSUMER ACTION/OFFICE OF THE CONSUMER ADVOCATE
REPLY TO POSTAL SERVICE COMMENTS AND REPORT ON
NONPOSTAL INITIATIVES
(April 18, 2003)

In Order No. 1364,¹ the Commission authorized members of the public to reply to the Postal Service's Report on Nonpostal Initiatives (hereinafter "Report"),² and to the Comments of any commenter, including the Postal Service.³ Consumer Action (CA) and the Office of the Consumer Advocate (OCA) hereby submit their joint comments in reply to the Postal Service's Comments and Report.

In the Report, Vice President of Product Development, Nicholas F. Barranca, lays out the decisionmaking process followed by Postal Service management in determining whether it is necessary to submit a request to the Commission under Chapter 36 of Title 39 before offering a new service. To a large extent, the determination is influenced by legal advice that is presented in the Postal Service's Comments in response to Order No. 1364. While CA/OCA disagrees with the conclusions reached by postal management in the Report, CA/OCA commend Mr.

¹ "Notice and Order Concerning Report Filed by the Postal Service," March 19, 2003.

² Filed March 10, 2003.

³ The Postal Service's Comments on the Petition of Consumer Action and OCA were filed on January 30, 2003, as were the Comments of other organizations. Generally, the Comments filed by other organizations favored an expanded role for the Commission in connection with the type of services addressed by the Petition.

Barranca and his staff for making the decisional choices more “transparent” than in earlier public statements of the Postal Service.

Nevertheless, the Postal Service’s attempts to present constructions of the PRA that are different from those presented by CA/OCA in their Petition for Review of Unclassified Services⁴ have failed. The CA/OCA interpretation remains solid and intact.

Section 411 of Title 39 addresses different government service arrangements than §404(a)(6). One of the Postal Service’s chief arguments in opposition to the CA/OCA interpretation of the PRA is based upon §411 of title 39.⁵ The Postal Service argues that

At the very least, one would expect section 411 to use the term that CA and the OCA argue Congress intended to associate with provision of governmental services. It does not. Rather, section 404(a)(6) must logically be interpreted to refer at least to services other than those encompassed by section 411.

The Postal Service contends that, in view of §411, the §404 reference “would be mere surplusage.”⁶

OCA agrees with this observation of the Postal Service that Congress described different services in sections 404(a)(6) and 411; but the Postal Service fails to grasp the

⁴ “Petition Of Consumer Action Requesting that the Commission Institute Proceedings to (1) Review the Jurisdictional Status of Fourteen Specified Services and Establish Rules to Require a Full Accounting of the Costs and Revenues of Non-Jurisdictional Domestic Services,” filed October 15, 2002.

⁵ Comments at 15: “Congress . . . explicitly authorized the provision of services involving other government agencies in a separate provision, 39 U.S.C. §411.” The Postal Service quotes §411: “Executive agencies within the meaning of section 105 of title 5 and the Government Printing Office are authorized to furnish property, both real and personal, and personal and nonpersonal services to the Postal Service, and the Postal Service is authorized to furnish property and services to them. The furnishing of property and services under this section shall be under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.”

⁶ Section 404(a)(6) delegates specific powers to the Postal Service, including the power “to provide, establish, change, or abolish special nonpostal or similar services.”

crucial difference between §§404 and 411. Section 411 describes the bilateral exchange of services between the Postal Service and other federal agencies, while section 404(a)(6) clearly refers to services *provided to the public on behalf of other federal agencies*.

The Postal Service's invocation of §411 actually reinforces the arguments framed by CA/OCA in the Petition and demonstrates Congress' consistent treatment of services provided to, and on behalf of, other federal agencies. CA/OCA readily concede that Congress did not intend the Commission's ratemaking and classification authority to be exercised over Postal Service-federal agency relationships. Services provided directly to other federal agencies are described in §411; services provided to the public *on behalf of* other federal agencies are addressed in §404(a)(6). The Postal Service has wide discretion to establish either type of service, under §411 or under §404(a)(6); but the phrase "nonpostal services" used in §404(a)(6) was used by the drafters of the PRA in the way it had been used in the antecedent postal statutes, i.e., "nonpostal services, such as the sale of documentary stamps for the Department of the Treasury."⁷ There can be no mistaking that "nonpostal services" are "public services" that are provided to the members of the public.⁸ The Postal Service provides them because of its presence in every community throughout the United States. It is an efficient, low-cost channel for

⁷ Documentary Stamps are: "revenue stamps used to pay a federal tax on certain transactions that are documented on paper. The stamps were attached to the documents. They were first used in 1862 to help pay for the Civil War." This is reproduced from the Glossary of Terms for the Collector of United States Stamps published by the United States Stamp Society at <http://glossary.usstamps.org/glossary14.html>.

⁸ Reflecting the common understanding of the phrase "nonpostal services" at the time of postal reorganization, the *Kappel Commission Report* (at 136) defines "nonpostal services" as "[p]ublic service costs associated with non-reimbursed services for other government agencies."

providing a number of federal (“public”) services. In its Comments, the Postal Service is unable to cite any authority for the proposition that “nonpostal services” refers to commercial services such as Phone cards, NetPost CardStore and the like.

CA/OCA ask the Commission not to lose sight of the importance of determining whether “nonpostal” services are those provided on behalf of federal agencies or whether commercial, retail activities fall within that term. Even the Report filed on March 10 is couched as a document concerning “*Nonpostal Initiatives*.”⁹ The Postal Service appears to rest its authority to provide the 14 services addressed in the Petition largely on the power to establish “nonpostal services” under §404(a)(6).¹⁰

The Postal Service’s Argument that it has “broad authority” to engage in these activities is also unavailing. The Postal Service contends that it has other sources of authority (outside of §404(a)(6) “nonpostal” authority) to offer the 14 subject services without Commission review:¹¹

The boundaries of the Postal Service’s authority to offer services also come from its statutory mission and functions. In general, the Postal Service has a duty to provide mail services throughout the United States for written and printed matter, parcels, and like materials, and to provide incidental services appropriate to its functions and in the public interest. Under these provisions, the Postal Service has very broad authority to develop mail and related services that contribute to a coherent, effective postal system.

⁹ Emphasis added.

¹⁰ The Postal Service quotes from the Commission’s opinion in Docket No. R76-1 that fees for “postal” special services require a recommended decision and that services outside that description are set unilaterally by the Postal Service. Comments at 19. OCA does not disagree with that view. “Nonpostal services,” i.e., public services provided on behalf of other governmental agencies (as cited in the *Kappel Commission Report*), are not subject to the ratemaking authority of the Commission. All other domestic services offered to the public are subject to the Commission’s ratemaking and classification authority.

¹¹ Comments at 16.

The structure and content of this argument is unexpected. The Postal Service states that the authority to offer such services comes from “its statutory mission and functions. . . . to provide mail services . . . and to provide incidental services appropriate to its functions.” Furthermore, “Under these provisions, the Postal Service has very broad authority to develop mail and related services”¹²

In these statements, the Postal Service states that the 14 challenged services are either part of the mission to provide *mail services* or services *incidental to mail services*. Likewise, the Postal Service states that the 14 challenged services are offered under the broad authority to provide *mail and related services*. One of CA/OCA’s main supports for Commission jurisdiction over the 14 challenged services is based on this very characterization.¹³ These Postal Service statements only strengthen the CA/OCA position.

The CA/OCA premise is that many of the 14 services are “postal services” under Subchapter II (of Chapter 36, Title 39) either because they function as mail services or because they are incidental, or closely related, to mail services.¹⁴ This position grows out of the District Court’s holding in *Associated Third Class Mail Users v. U.S. Postal Service*¹⁵ (*ATCMU*) that, “services . . . very closely related to the delivery of mail” are “considered ‘postal services’ in ordinary parlance.” The Commission applies the *ATCMU* doctrine by asserting jurisdiction over services that are “ancillary” to collection,

¹² Comments at 17.

¹³ Letter at 30-32.

¹⁴ Letter at 28-32.

¹⁵ 405 F. Supp. 1109, 1115 (D.D.C. 1975).

transmission, or delivery of mail.¹⁶ The Postal Service's concession that the 14 challenged services are offered under its statutory mission to provide mail services or services closely related, or incidental (or ancillary), to the provision of mail services triggers the Commission's jurisdiction under Subchapter II.

The Postal Service's Argument that the §404(a)(6) power to establish a nonpostal service implies the power to set rates free of Commission review is contrary to the articulations of three judicial opinions. The Postal Service contends that: "the authority to set prices for nonpostal services may be inferred from the authority to create them."¹⁷ Setting aside the Postal Service's mistaken belief that "nonpostal services" includes commercial, retail services, the Postal Service arrives at a second incorrect conclusion that the authority to set prices may be inferred from the authority to create them. Both the *ATCMU* and *Air Courier Conference of Am./Int'l Comm. (Air Courier)*¹⁸ courts clearly articulate that the delegation of power under §404(a)(6) to provide, establish, change or abolish a service does *not* imply the power to set a rate for the service free of Commission review.¹⁹ Rather, the *ATCMU* Court states:²⁰

the power to "change" these services includes the power to increase the fees for them. But this does not get the Postal Service very far. For any increases in these fees may still be subject to review by the Postal Rate Commission under Sec. 3622.

According to the *Air Courier* Court:

¹⁶ PRC Op. R76-1, App. F at 3.

¹⁷ Comments at 19.

¹⁸ 959 F.2d 1213, 1216 and 1221 (3d Cir. 1992).

¹⁹ 405 F. Supp. at 1117 and 959 F.2d at 1222, respectively.

²⁰ 405 F. Supp. at 1117.

section 404(a)(6) gives the Postal Service power only to "provide" or "establish" special services, not to set rates for special services once it decides to offer them.

The Third Circuit Court of Appeals, in *United Parcel Service v. U.S. Postal Service*, (*UPS*) held fourteen years ago that the Governors of the Postal Service (as opposed to the Postal Service) have the exclusive, nondelegable authority to establish classes of mail and rates of postage, "*but only after the Governors have received a recommended decision from the Postal Rate Commission.*"²¹ Also, the Court contrasted the roles of the Postal Service and the Commission:²²

The expertise of the Postal Service supposedly is in management, and its authority therefore reasonably extends to basic decisions pertaining to the provision of special, nonpostal and other services. The Postal Rate Commission, however, was created specifically to oversee the ratemaking process. Its expertise is in the setting of rates and fees that are fair and equitable, and its authority therefore reasonably extends to all aspects of such decisions, including review of budget estimates, allocation of postal costs, establishment of rates for postage, and, it would seem plainly, the setting of fees for those special services which management decides should be provided.

In Comments, the Postal Service rehashes stale arguments that were rejected by the Third Circuit appellate court in *UPS*. The Postal Service argues that, "Section 401(10) grants the Postal Service 'all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.'"²³ This construction was categorically rejected by the *UPS* Court, which held that:

The general powers provision of 39 U.S.C. §401(10) may well vest the Postal Service with authority to conduct marketplace experiments.

²¹ 604 F. 2d 1370, 1377 (1979) (Emphasis added).

²² 604 F.2d at 1379.

²³ Comments at 19. On page 20 of its Comments the Postal Service maintains that postal management has been given broad, general powers entrusted to its discretion.

Assuming Arguendo the existence of such authority, we are nevertheless constrained to reject the Postal Service's interpretation of a general grant of power as authorizing activities which necessarily are precluded by other sections of the Act (§§3622-23) specifically mandating the manner by which rates and mail classifications must be established. "(A) general powers provision like section (401(10) here at issue) many not ordinarily override a specific provision such as . . . Chapter 36 as here."

The Court also quotes with favor a statement of the district court in its opinion appealed to the *UPS* Court: "The very existence and function of the Postal Rate Commission bespeaks a limitation on postal management's freedom."²⁴

The Postal Service's argument that asserting jurisdiction over the 14 challenged services will lead to regulatory abuses by the Commission is a cynical attempt to sound false alarms. The Postal Service contends that if the Commission were to assert jurisdiction over the 14 challenged services, this would lead inescapably to regulatory oversight of philatelic services,²⁵ leases,²⁶ the licensing of intellectual property,²⁷ and finally, the extravagant charge that there would be rampant inquiry into "virtually any activities" and "second-guess[ing] [of] management decisions."²⁸

The Commission should not be deterred from exercising jurisdiction over the challenged services as a reaction to such hyperbole. CA/OCA have not asked the

²⁴ 604 F.2d at 1380, n. 14, quoting from 455 F. Supp. at 869.

²⁵ Comments at 18.

²⁶ Comments at 19.

²⁷ Comments at 19.

²⁸ Comments at 19 and 22.

Commission to set prices for leases and intellectual property licenses. Leases are nothing like the provision of services challenged in the Petition. Rather, the services challenged in the Petition are the offering to the public, on a nationwide (or widespread) basis, services at a stated price. Lessees, on the other hand, enter into a detailed, singular contractual arrangement for the leasing of real property. Lessees are often individually screened for credit worthiness and to preclude leases with individuals or entities likely to damage the leased property. Licensing of intellectual property is often accomplished through specific, detailed contractual arrangements. CA/OCA would not rashly reject the idea that such licenses *might* be subject to the Commission's ratemaking authority. CA/OCA have not included such arrangements formally in the Petition, but are amenable to conducting discovery on this matter to see whether these services are of a type that ought to be subject to Commission jurisdiction.

The individualized nature of a lease as compared with the public nature of services subject to the Commission's exercise of authority under Chapter 36 is a subject not unfamiliar to the Postal Service. In the *UPS* case, the Postal Service asked the Third Circuit appellate court to use the following definition from *Black's Law Dictionary* to distinguish "rates" from more limited types of financial and service relationships: "a rate is 'a charge to the public for a service open to all and upon the same terms.'"²⁹ This is a useful guide in judging whether an arrangement involves specific terms for a particular user versus a more widespread offering "open to all and upon the same terms."

CA/OCA have not taken a formal position on whether philatelic services are subject to the Chapter 36 ratemaking system. An argument can be made that, under

the doctrines of the *ATCMU*, *Air Courier*, and *UPS Courts*, the statutory power to provide philatelic services, like other §404 powers, may still be subject to §§3622 and 3623. CA/OCA are amenable to using discovery in a classification proceeding to develop facts that will be useful in deciding that issue.

The Postal Service's baseless speculation that exercise of jurisdiction over the challenged services will lead inevitably to unlawful efforts to control and second-guess "virtually any" management activities does not require a detailed response. After decades of operation under the Postal Reorganization Act, the Commission has not shown itself to be prone to conduct of this type. Frivolous attempts by litigants to urge the Commission to engage in such actions will be promptly and decisively dismissed.

Strategic alliances are not automatically exempt from Commission review. The Postal Service appears to take the position that none of its negotiated "strategic alliance[s]" are subject to review under Chapter 36. This is far from correct. It is the nature of the service offered to the public by means of a strategic alliance that will generally determine whether it is subject to the Commission's ratemaking and classification authority.

Some "strategic alliances" are clearly subject to the Commission's authority. For example, in Docket No. MC2002-2 (currently pending), the Postal Service requested the Commission to approve a specialized arrangement for volume discounts and electronic returns of Capital One Service's First-Class solicitation mailpieces. This was a strategic alliance between the Postal Service and Capital One involving an optional tariff for Capital One and a waiver of Address Correction fees established by means of a

²⁹ 604 F.2d at 1376, n. 6.

contract (or negotiated service agreement). The Postal Service indicates that other strategic alliances (contractual arrangements) of this type are under consideration.

In his Report, Mr. Barranca contrasts the Postal Service's recent approach to developing new products with its former methods:³⁰

In the past, the Postal Service took the approach of building services from the bottom up, with postal ownership of all assets and management of the service supported by standard postal purchasing contracts. . . . As a result of the recent review process, and its experience with developing new opportunities, the Postal Service recognized that new business models are essential and that these new business models must involve partnering with private sector companies to meet the quickly changing needs of customers.

From their descriptions,³¹ NetPost CardStore (NPCS), NetPost Certified Mail (NPCM), and USPS eBillPay appear to be products offered in a "partnering [arrangement] with private sector companies." Thus, they too are examples of strategic alliances.

The Report states that NPCS is a "private sector service offered by TouchPoint with Postal Service branding." It also is a strategic alliance involving a postal service. A February 2002 "Letter Contract" documents the respective obligations. The Report states that the Postal Service has "two roles." The Postal Service's website, usps.com, is the channel by which customers access NPCS; TouchPoint pays the Postal Service for this link. Next, the customer registers for NetPost at the Postal Service's website. The customer is then transferred to the CardStore website. If the transaction is completed, CardStore will print and mail the card as a First-Class mailpiece. This strategic alliance thus appears to the customer to be so intertwined with the usual mail services that it is, de facto, a postal service.

³⁰ Report at 2.

³¹ Report at 7.

The Report characterizes the purchase of a greeting card via CardStore as analogous to the placement of FedEx boxes on postal property and AOL software in postal lobbies. CA/OCA disagree. There are crucial differences between NPCCS and FedEx boxes and AOL compact discs. First, customers do not register with the Postal Service to place an item in a FedEx box or take a free AOL compact disc. It is obvious to the customer that (s)he is doing business with FedEx or AOL. By contrast, when a consumer purchases a card from NPCCS, the impression is unmistakable that (s)he is doing business with the Postal Service. A review of Attachment A³² demonstrates that the NPCCS purchaser will harbor no doubts that the entire NPCCS transaction is with the Postal Service. Every screen prominently displays the United States Postal Service® logo, including the distinctive eagle image in the upper lefthand corner of the screen. The lower lefthand corner of the screen displays the Postal Inspection Service motto throughout the transaction –

“POSTAL INSPECTORS
Preserving the Trust”

The distinctive Postal Inspection star appears alongside the motto.

The first screen lists Greeting Cards as one member of a family of “USPS NetPost Services.” (Attachment A, p. 1) The sign-in screen (Attachment A, p. 2) informs the user that (s)he will be using “United States Postal Service online services.” After signing in, the third screen (Attachment A, p. 3) states that NPCCS is “Brought to you by the United States Postal® through a trusted partner.” After clicking on a hyperlink to the “trusted business partner,” the customer is still very aware that the

³² Attachment A consists of four pages printed from NPCCS. These have been numbered in the order in which the screens open for the prospective customer.

United States Postal Service eagle and logo and Postal Inspection logo remain on the screen (Attachment A, p. 4).

Although the Postal Service apparently wants to disclaim responsibility for this service by stating that its private sector partner, TouchPoint, provides the service, not the Postal Service, this attempt must fail. The Postal Service is an integral participant in the provision of this service, from the starting point (where usps.com provides the channel for access), through the registration and sign-in process for NetPost services, and continuing through the last stage of the service which consists of First-Class Mail processing, transportation, and delivery of the card.³³

There are several contact points for the exercise of Commission jurisdiction over NPCCS:

- NPCCS is not entirely, or even primarily, a private sector service. It is a Postal Service product to a large degree.
- Consumers will have the distinct impression (deliberately conveyed by the Postal Service) that they are purchasing NPCCS from the Postal Service, and that if they are dissatisfied with the service, the Postal Service will be responsible.
- NPCCS is a service or product available to the public. Customers are not screened for participation (as contrasted with the leasing of real property by the Postal Service).
- NPCCS is a service antecedent (or ancillary) to the purchase of First Class.

The public character of NPCCS is an important factor for the Commission to consider in deciding whether it has jurisdiction. In Docket No. MC76-5, the Commission developed a mail classification theory to determine which matters should be included in

³³ Many current postal services such as First Class and Express Mail involve considerable participation by private sector companies, particularly the longer distance transportation of mail.

the mail classification schedule.³⁴ One of the key tenets of the theory is that the “DMCS should indicate clearly to postal patrons, the Postal Service, and the general public what their respective rights and duties were.” This reason applies with full force in the current circumstances.

The Postal Service’s claims to the Postal Rate Commission that the Commission has no jurisdiction over NPCCS because it is primarily a private sector service managed by a private sector company, *i.e.*, TouchPoint. If this is so, then the Postal Service deliberately misleads consumers about the entity with which they are doing business when they access NPCCS through usps.com. If the Postal Service’s involvement with NPCCS is really little more than allowing a placement by TouchPoint on the Postal Service’s internet “real estate,”³⁵ then one must wonder why the Postal Service intentionally deceives consumers.

Even if the Commission were to determine that the nature of NPCCS is merely to sell placement on usps.com to a single company – TouchPoint – for the purpose of selling greeting cards and First-Class delivery of the cards to the public, the Commission should still conclude that NPCCS is a postal service subject to its jurisdiction. A large component of NPCCS is the sale to the public of greeting cards and their delivery via First Class. NPCCS is, therefore, “public” in character. If NPCCS is subject to the Commission’s classification authority (even as merely a placement link on usps.com), then presumably the Commission would be able to determine whether it is appropriate to deceive the public into thinking that NPCCS is provided by the Postal

³⁴ PRC Op. MC76-5, Basic Mail Classification reform Schedule – Proper Scope and Extent of Schedule, Vol. 1 at 11.

³⁵ Report at 7.

Service, not another company. Fulfilling its purpose as a vehicle for the dissemination of information to the public, the DMCS would spell out exactly what NPCCS is or isn't so that customers would have the clarity that the DMCS strives to achieve – customers would know what their rights are. Without the exercise of classification authority by the Commission, the Postal Service is free to deceive the public with no outside checks.

The Report also characterizes NetPost Certified Mail as a “private sector service offered by USCertified Mail through a link on the Postal Service website.” The essential nature of NPCM is very similar to NPCCS. Consequently, the analysis presented above applies to NPCM as well. Like NPCCS, NPCM customers access NPCM through the usps.com channel, register for NetPost services at usps.com, and are intentionally led to believe that the purchase of NPCM is from the Postal Service. NPCM includes the purchase of a traditional mail service (First Class and others) and a traditional ancillary postal service – Certified Mail.

USPS eBillPay, according to the Report, is “largely operated by CheckFree Corporation.”³⁶ This, apparently, is the internal justification for the decision not to request a recommended decision under Chapter 36. Postal Service involvement in USPS eBillPay is even greater than with NPCCS and NPCM: “USPS eBillPay enables customers to receive, view and pay their bills electronically *via the Postal Service web site.*”³⁷ Notably, even the name of the service is *USPS* eBillPay. Currently, “the Postal Service retains branding and governance responsibilities. The Postal Service receives

³⁶ Report at 8.

³⁷ Report at 8 (emphasis added).

a fee based upon the number of registered customers.”³⁸ The Report adds that: “This online service is all-electronic. It does not involve the mailstream, *except for any payments that are mailed at standard rates of postage.*”³⁹ Although the Postal Service claims that USPS eBillPay is “largely operated” by CheckFree, it is integrally involved in this service at every stage. Certainly members of the public are given the deliberate impression that they are doing business with the Postal Service. In many cases, bills payments are mailed via the Postal Service. As demonstrated above, the Postal Service’s involvement in this service is so substantial that it should also be subject to the ratemaking and classification provisions of Chapter 36.

Thus, merely applying the label “strategic alliance” or private sector partnership to an arrangement does not trigger an automatic exemption from Commission jurisdiction. An examination of the nature of the service, the means by which it is provided, and to whom it is provided is necessary to determine whether the arrangement is subject to the Commission’s authority.

For the remaining services discussed in the Report, CA/OCA saw nothing in their description or in the decisionmaking process to dissuade us from concluding that they are subject to the procedures of Chapter 36.

Contrary to the Postal Service’s assertions, §3623 applies to the 14 challenged services. The Postal Service argues that the challenged services are not mail and, therefore, would not be subject to §3623.⁴⁰ Curiously, the Postal Service’s Comments

³⁸ Report at 9.

³⁹ Report at 9 (emphasis added).

⁴⁰ Comments at 24-25.

contain a number of statements that contradict this position. As discussed above, the Postal Service alleges that the authority to offer these services arises from its broad powers and duty to provide “mail and related services.”⁴¹ The Postal Service also attempts to distinguish the *Air Courier* case by making the statement: “international mail . . . by any conventional definition are postal services.”⁴² Sure Money, the umbrella title for the Postal Service’s international funds transfer service offered through retail units, is both “exclusively . . . international” and “all-electronic.”⁴³ This would suggest that, by definition, international electronic money transfers are postal services. By extension, domestic electronic money transfers are also postal services. CA/OCA certainly believe them to be postal services since they are sold to the public by the Postal Service and function very much as does a check mailed as First Class.

The Postal Service’s attempt to prevent the Commission from exercising its power to deny a requested mail classification under §3623 must be rejected. The Postal Service maintains that the Commission has the “authority to evaluate changes in the categorization of existing mail services,” but “it may not intrude on management’s decision on whether to offer a new service.”⁴⁴ This attempt to restrict the Commission’s power to modify only existing mail services, denying it the option to say “No” to a Postal Service request for a new mail classification must be decisively rejected. The

⁴¹ Comments at 17.

⁴² Comments at 18.

⁴³ Report at 8. See also, GAO/GGD-99-15, “Report to the Chairman, Subcommittee on the Postal Service, Committee on Government Reform and Oversight, House of Representatives, on U.S. Postal Service Development and Inventory of New Products,” November 1998 at 54.

⁴⁴ Comments at 32.

Commission has a full range of powers under §3623, including the power to turn down classification requests that do not satisfy the factors of part (c) of §3623.

It should also be borne in mind that if the Commission declares the status of a challenged service as “postal,” effectively it has also given it the status of a constructive mail classification. The classification can then be modified (as stated by the Postal Service) by formally codifying it in the DMCS. Under §3623, the Commission may recommend changes to the service different from the manner in which the Postal Service offers it. The Commission’s decision in these circumstances would be transmitted to the Governors who, of course, may reject it; but at least the issue is ventilated in public.

The Postal Service’s stale attempt to deny the Commission the power to determine its jurisdiction over the postal/nonpostal character of challenged services must be rejected once more. The Postal Service attacks the Petition’s statement that the well-established legal principle of “jurisdiction to determine jurisdiction” is applicable here. In the alternative, the Postal Service claims that, even if the principle is applicable here, the Postal Service views should be given deference.⁴⁵ The Petition pointed out that not only does an agency have jurisdiction to determine its own jurisdiction and thus make ripe the issue for judicial review but also that courts will give deference to the agency’s determination as to whether or not it has jurisdiction over a matter in issue. The courts have pointed out that agencies are most familiar with the subject of their inquiries and have a better understanding of the area and the need for regulation that

⁴⁵ Comments at 28-30.

warrants deference to the agency's decision as to its jurisdiction. This principle is expressed forcefully and clearly in the celebrated Supreme Court decision in *Chevron*, *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984):

Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, [415 U.S. 199, 231](#) (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation [[467 U.S. 837, 844](#)] of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, e. g., *National Broadcasting Co. v. United States*, [319 U.S. 190](#); *Labor Board v. Hearst Publications, Inc.*, [322 U.S. 111](#); *Republic Aviation Corp. v. Labor Board*, [[467 U.S. 837, 845](#)] [324 U.S. 793](#); *Securities & Exchange Comm'n v. Chenery Corp.*, [332 U.S. 194](#); *Labor Board v. Seven-Up Bottling Co.*, [344 U.S. 344](#).

". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, [367 U.S. 374, 382](#), 383 (1961).

Accord, *Capital Cities Cable, Inc. v. Crisp*, ante, at 699-700.(Footnotes omitted.)

Thus, the principle is founded upon logic and sound administrative policy.

The Postal Service suggests that this principle does not control interpretation of the Commission's authority under §3623. As anticipated, the Postal Service contends that it alone has the clear right under the PRA to decide and determine that which is a postal service and which is not a postal service. But the Postal Service errs in each of its arguments.

Most significantly, §3623(b) of the PRA specifically provides that "the Commission may submit to the Governors, on its own initiative, a recommended decision on changes in the mail classification schedule." That classification schedule relates to classes "for postal services." The Commission must not be thwarted in its oversight by narrow definitions of postal services advanced in the self-interest of the Postal Service. The term postal services resides within the statute and underlies the classification review authority. It is the foundation upon which the Commission's jurisdiction rests. In the absence of clear statutory language, the Commission may exercise its jurisdiction to interpret the statute's "postal services" phrase based upon the facts and the law. Contrary to the Postal Service's claim,⁴⁶ the Commission's determination as to whether these services are postal services will involve questions of fact concerning the details of the services offered rather than a strict legal determination.

The Postal Service throws further chaff at the proposition by suggesting that the principle of jurisdiction to determine jurisdiction "typically" arises in a court challenge to a factual element of jurisdiction. This objection is misleading. The question here will

⁴⁶ Comments at 28.

turn upon the facts relating to the services involved. The facts are then applied to the language of the statute to determine its applicability.

The Postal Service cites to one case as providing for an exception to the "jurisdiction to determine jurisdiction" principle where there is a "patent lack of jurisdiction."⁴⁷ The case provides no guidance and merely states the obvious. In passing, the court noted there is an exception to the rule when there is a patent lack of jurisdiction, but it provided neither discussion nor example. Here, on the other hand, probable Commission jurisdiction to require classification of these services is based upon a reading of numerous cases, the statutory history and the policy underlying the PRA. Significantly, the court noted that, "In general, this [the D.C. Circuit court] respects the doctrine that an agency has jurisdiction to determine the scope of its authority, in the first instance...."

ATCMU, supra, by itself, is enough to demonstrate that there is not here a patent lack of jurisdiction over review of Postal Service claims as to what is postal and what is non postal. In *ATCMU*, the court overruled the Postal Service's determination of the distinction between postal and nonpostal services. Thus the Postal Service's determination does not carry the weight the Postal Service ascribes to it. Rather, other questions of fact, policy and legislative history are relevant. When it comes to the Commission's oversight authority, *ATCMU* demonstrates that it cannot be contended that there is a "patent lack of jurisdiction."

Incredibly, the essential point of the Postal Service's argument as stated by the Postal Service is that it is free to define the breadth of this Commission's authority:

⁴⁷ Comments at 28, citing *CAB v. Deutsche Lufthansaaktiengesellschaft*, 591 F2d 951, 952 (D.C. Cir. 1979).

"Congress did not contain a mechanism for administrative review of postal versus nonpostal status. That is essentially the point of the Postal Service's opposition."⁴⁸ We would agree there is no specific provision for review of the specific Postal Service determination of nonpostal status. But that is not our position nor is it necessary. The Commission classification proceedings are subject to administrative review in the normal course of events. At that time, the court would review the decision as to the postal character of these services. Even if the Commission sets the matter for hearing, the matter would not yet be ripe for review; however, it is fruitful to advise the Commission that courts will support and give it deference in deciding the matter, if the issue reaches court. The Postal Service contention that §3623 precludes a Commission inquiry is simply not based upon a fair reading of the PRA.

It is not a bootstrap jurisdiction argument as the Postal Service contends, but it is necessary in furthering the administrative process. By suggesting, as the Postal Service does, that assuming jurisdiction to decide the issue of jurisdiction is tantamount to deciding the issue "by default" misconprehends the point. Merely by initiating a hearing to determine jurisdiction does not necessarily predetermine whether the services are postal or nonpostal as the Postal Service seems to believe. Commencing Commission proceedings only initiates the process so that the issue may be determined. Once determined by an agency, if appealed, the matter is then ripe for review in a court.

Moreover, even if the services in question are held to be subject to Commission classification and rate review the dire consequences imagined by the Postal Service do

⁴⁸ Comments at 28.

not follow. Such a holding would not be tantamount to striking at the core of management's discretion to offer new products, nor would the Postal Service "be a shadow of the organization envisioned by the congress."⁴⁹ There would not be a "transfer of entrepreneurial control away from the Board of Governors."⁵⁰ The Petition merely seeks to apply the standards of the PRA to additional services offered by the Postal Service and within the confines of the legislative purpose. The Postal Service on the other hand, is the party reaching for broad powers far beyond that discussed in the legislative history or the provisions of the PRA. The Postal Service says it must have total entrepreneurial control and unfettered discretion to offer any new products in any business it sees fit and that the Commission has no authority to review those decisions whenever the Postal Service unilaterally determines that the new products are not a postal service. Significantly, in the absence of Commission authority to review these services, no other agency would review these services either.

The Postal Service's main point is that the PRA does not grant the Commission specific authority to "subvert management's determination of nonpostal status by conducting a proceeding. . . ."⁵¹ We are not suggesting that the Commission should ignore the Postal Service's views on the subject as to the Postal or nonpostal character of services, but that the Commission should consider the policies of the PRA and whether Congressional purposes would be furthered if each service is declared postal or nonpostal. The Postal Service has considered the services nonpostal and has not heretofore been challenged. The Commission is not precluded from reviewing the

⁴⁹ Comments at 2.

⁵⁰ Comments at 1.

jurisdictional status of the enumerated services merely because the Postal Service has said and now says they are not postal.

The Postal Service also suggests that it too is an agency and its own determination as to whether certain of its activities are subject to this Commission's jurisdiction should be controlling or given deference. The Postal Service's argument has a certain appeal at first blush, *i.e.* when two agencies are involved, why should one agency receive deference over another agency? On the surface this has a logical appeal; yet a bit of analysis reveals its flaw. The Postal Service forgets that the Commission is charged with reviewing classifications consistent with the policies of the PRA. The Commission is instructed to work with the Postal Service. However, by demanding the right to determine in the first instance what is a postal service subject to Commission review, the Postal Service is effectively suggesting that the fox in the hen house should be allowed to define what is a chicken. It forgets that the Commission's responsibility is to review classifications, rates and fees for postal services as defined by Congress.

The Postal Service's charge that the CA/OCA proposed procedures are convoluted and unworkable are not a basis to eschew consideration of the issues raised in the Petition. In its Comments, the Postal Service argues at length about the procedural difficulties inherent in the CA/OCA proposed procedures.⁵² The time to work out procedural details is *after* the proceeding is initiated, not before. Certainly the Postal Service raises no issue so formidable as to bar the initiation of the requested proceeding altogether.

⁵¹ Comments at 29.

In light of the Postal Service's determination not to address the specific amendments to Rule 54 proposed by CA/OCA, we need only rely on the reasons presented in the Petition to urge the Commission to initiate the rulemaking phase of the proceeding in due course. Wherefore, for the reasons presented above, CA and OCA respectfully request the Commission to initiate the classification and rulemaking proceeding requested in our October 15, 2002, Petition and Letter.

Respectfully submitted,

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Attachment A, p.3

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