

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C.. 20268-0001

**Proposed Amendment to
The Commission's Rules**

Docket No. RM2004-1

**POSTCOM COMMENTS ON PROPOSED RULEMAKING CONCERNING
AMENDMENT TO THE RULES OF PRACTICE AND PROCEDURE**

The Association for Postal Commerce ("PostCom") offers the following comments on the proposal to define "postal service" in the above-referenced rulemaking:

I. Now is Not the Right Time for the Commission to Define "Postal Services".

In PostCom's view, now is not the appropriate time for the Commission to introduce a definition of the term "postal service" in its rules. The Commission's Notice of Proposed Rulemaking points to a modicum of precedent where the question of whether a service offered by the Postal Service was a "postal service" was squarely addressed. The Commission has taken a case-by-case approach for over thirty years, and we see no reason to presently alter that approach absent further Congressional guidance.

Indeed, there are reasons not to proceed with developing a regulatory definition. We are now at a point in time when the Postal Service has -- perhaps under the pressures imposed by recent Congressional and public scrutiny, or, to its own credit, perhaps with a closer eye on the bottom line lack of benefit in offering nonpostal services -- scaled back its forays into services which it has posited are nonpostal in nature. There is thus no immediate need to propose an administrative definition of "postal service".

Moreover, Congress is actively considering legislation which is likely to revamp the regulatory oversight of the Postal Service, and establish a legislative definition of the term "postal service". Such legislative action would moot any determination made here which

reaches a differing definition, possibly before the end of this session of Congress, and possibly even before the conclusion of this proceeding. Therefore, it is, quite simply, an inefficient use of administrative resources to evaluate this matter now.

Should this Commission nonetheless proceed with its rulemaking, PostCom offers its substantive comments in the next two sections.

II. The Proposed Rule Fails to Recognize that the Definition will Influence Prospective Determinations on the Jurisdiction of this Commission, and the Prospective Implications Dictate that this Commission Proceed with Caution, If At All.

A Commission determination of what constitutes "postal service" will influence its future determinations of its jurisdiction under Title 39, Chapter 36 of the United States Code, including (but not necessarily limited to) sections 3622 and 3662, which provide the Commission with jurisdiction over rates and fees for each class of mail or type of service (39 U.S.C. §3622), and jurisdiction over complaints regarding rates and service (39 U.S.C. §3662).

The Commission states that it intends to afford the Postal Service "the flexibility to engage in functions ordinarily performed by a national post as may be affected, from time to time, by changes in technology." But its discussion of this point fails to directly address the Postal Service's historic view that it has the flexibility to engage in both postal and "nonpostal" services pursuant to 39 U.S.C. § 404(6). That section provides the Postal Service with the specific authority "to provide, establish, change, or abolish special *nonpostal* or similar services." (Emphasis added.) To be of useful application, any rulemaking which attempts to define "postal services" should also shed some light on the scope of the term "nonpostal" services.

In PostCom's view, the legislative significance of "nonpostal" services in 39 U.S.C. § 404(6) was only to provide the Postal Service with the continuing authorization to perform those governmental functions which were traditionally performed by the former Post Office Department

on behalf of the federal government.¹ These services have historically included such governmental services as distribution of information pertaining to civil service examinations, and providing passport services (among others). In many cases, these governmental services were performed by the Post Office Department only because a Post Office was the only federal office in a particular locale. Since the legislative significance of the term "special" services in 39 U.S.C. § 404(6) may also have some bearing on these definitions, we further observe that this term was probably intended to encompass such services as were addressed by former Title 39 U.S.C. § 507, which had previously authorized the Postmaster General to prescribe the fees for the special services identified therein. The Federal courts have recognized that these services are within the ambit of "postal services", and squarely within the jurisdiction of this Commission.²

A survey of the use of the terms "postal service" and "service" in the 1970 Act itself, and in legislative history of the Act suggests that, aside from philatelic services and certain governmental functions, Congress simply did not envision that the Postal Service would offer a category of services that is "nonpostal" in nature. *See generally*, 39 U.S.C. § 403 *et seq.*; *and* H.R. No. 91-1104, U.S.C.C.A.N. 91st Cong., 2d Sess. Vol. 2 at p. 3649 *et seq.*

Nonetheless, the Commission's proposed rule does little to inform the Postal Service or the public with respect to the scope of the Commission's claim of jurisdiction over services which may be or have been offered by the Postal Service, which the Postal Service views are "non-postal".

As a consequence, the proposed rule threatens to be either under or over inclusive, and in some applications it may be both. This problem becomes especially critical at present, when the Postal Service is exploring the deployment and actually deploying new and evolving

¹ *Associated Third Class Mailer Users v. U.S. Postal Service*, 405 F. Supp. 1109 at 1117, n. 3 (D.D.C. 1975) ("ATCMU"); *National Association of Greeting Card Publishers v. U.S. Postal Service*, 569 F. 2d 570 (D.C. Cir. 1976); *vacated on other grounds*, 434 U.S. 884 (1977).

² *Id.* at 1115.

ways of handling physical mail. A rule that overstates the Commission's jurisdiction may tend to stifle innovation. A rule that understates the Commission's jurisdiction may tend to deter the filing of legitimate complaints against the Postal Service. Indeed even if the rule is precise and accurate, it will not -- and cannot -- substitute for case-by-case determinations on complaints and only shifts the debate from interpretation of the statute to interpretation of the rule.

III. If the Commission Chooses to Proceed with a Final Rule, PostCom Proposes an Alternative Definition Which it Believes is More Precise.

The Commission has proposed the following definition: "postal service means the delivery of letters, printed matter, or packages weighing up to 70 pounds, including acceptance, collection, processing, transmission, or other services supportive or ancillary thereto."

PostCom would limit "postal services" to "the physical delivery of letters, printed matter or packages, including acceptance, collection, verification, sorting and transportation, and directly related services and functions."

PostCom perceives several important differences between the definitions. First, PostCom's definition limits "postal services" to the *physical* delivery. The addition of this term is intended to leave electronic delivery mechanisms squarely outside of the definition. Second, there are differences in the Commission's choice of terms "processing" and "transmission" as compared with PostCom's terms "verification, sorting and transportation." PostCom believes its terms are more specific and more clearly reflect the essential activities of the Postal Service. In particular, PostCom is concerned that the term "transmission" is vague, and potentially could be interpreted as suggestive of electronic rather than physical means. Finally, PostCom believes its use of the term "directly related" is more precise than the Commission's terms "ancillary" and "supportive".

To expand on this last point, PostCom believes it may be unclear the extent to which a service offering is "ancillary" to or "supportive" of the "acceptance, collection, processing, transmission, or delivery" of mail. The plain meaning of the term "ancillary" implies services which are auxiliary or subordinate to other postal services provided. But, the proposed rule also uses the term "supportive" and that term is elusive at best. For example, a purely electronic end to end service is arguably "supportive" of postal services because it adds revenues, even if the service is utterly unrelated to the physical delivery of mail.

In its proposed rule, the Commission seems to suggest (slip op. at p. 13) that it believes certain electronic services offered in the past may have been inherently "postal" because they relate to one or more functional component of the carriage of mail – although not physical carriage.³ In PostCom's view, certain of these electronic mail services are not "ancillary" or "supportive" because they are not *necessary*⁴ for the provision of "adequate and efficient postal services,"⁵ but the Commission's discussion of its definition fails to make this point. Moreover, the question of whether the offering of a purely electronic service is beyond the Postal Service's power is a matter for the courts, not a regulatory agency whose duty it is to oversee the provision of "postal service."

To PostCom, our own choice of words is clearer: where electronic services are not "directly related" to the "physical" delivery of letters, printed matter, or packages, they are not

³ This view is broader than the view the Commission expressed in PRC Op. R76-1, Vol. 2 App. F, in which it distinguished between "*actual* carriage" and other services performed.

⁴ See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 75 FERC ¶ 61,080 (1996), 1996 LEXIS 777, **256 (where FERC uses the term "ancillary services" to describe services that are "*needed* to accomplish transmission service while maintaining reliability." [Emphasis added.]

⁵ 39 U.S.C. § 403.

"postal services."⁶ And nonpostal services are not subject to this Commission's jurisdiction regardless of whether the current statute permits the Postal Service to offer them at all.

In sum, if a rule attempting to define "postal services" is to be adopted at this late date, the rule that has been proposed is inadequate to the task.

Respectfully submitted,

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⁶ PostCom's use of the words "directly related" also more closely corresponds to the judicial definition of "postal service" as "closely related to the delivery of mail." *ATCMU*, 405 F. Supp. 1109 at 1115.