Postal Rate Commission
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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268–0001

Proposed Amendments to the Commission's Rules	Docket No. RM2004-1

INITIAL COMMENTS OF THE UNITED STATES POSTAL SERVICE
(March 15, 2004)

On January 16, 2004, the Postal Rate Commission issued Order No. 1389 (Order), soliciting comments on a proposed amendment to its rules to incorporate a definition of the term "postal service." As requested by that Order, the Postal Service hereby offers its initial comments on the proposed new provision of the rules.

Order No. 1389 presents substantial detail on the history of issues surrounding identification of services as "postal" or "nonpostal," which the Commission concludes are becoming increasingly controversial. Consequently, the Commission has determined that it would be administratively most efficacious to clarify the postal character of new services by rule rather than on an ad hoc basis. Order No. 1389 at 8. Obviously, the expression of these views in Order No. 1389 is not unrelated to matters raised by the petition of Consumer Action (CA) and the OCA, which was the context in which both Order No. 1389 and related Order No. 1388 were issued.

The Postal Service submitted extensive comments in response to the CA/OCA petition. Comments of the United States Postal Service on Consumer Action Petition (Jan. 30, 2003). The Postal Service believes it unnecessary to reiterate all of the views

and arguments presented in that pleading, but finds it useful to refer to several of them. For example, the Order states:

> The Commission has the primary responsibility for interpreting whether services offered or proposed by the Postal Service are subject to Chapter 36 of the Act.

Order No. 1389 at 11. In support of this assertion, the Order cites *United Parcel Service v. US Postal Service*, 604 F2d 1370, 1381 (3rd Cir 1979), *cert. denied* 446 US 957 (1980). On pages 20-21 of the above-cited Comments filed by the Postal Service in response to the CA/OCA petition, the Postal Service explained why that case fails to support the proposition asserted. The Postal Service stands by its earlier interpretation of that opinion, as presented in those Comments.

More broadly, the Order at pages 8-12 sets out a perceived role for the Commission under the statutory scheme that is not fully consistent with the Commission's role as viewed by the Postal Service. Major portions of the Postal Service's Comments with respect to the CA/OCA petition are devoted to setting forth the Postal Service's interpretation of the statutory scheme. The Postal Service, rather than repeating all of that analysis again, simply notes its continued disagreement with the Commission on these issues.[1]

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[1] One topic, however, does warrant additional comment. At the bottom of page 10 of the Order, the suggestion appears to be made that "electronic mail" is a "postal service." Similar sentiments are expressed on pages 13-14 of the Order. The intended purpose of these statements within Order No. 1389 is unclear. The Postal Service, though, wishes to make very clear its continued position, as articulated at pages 14-16 of its November 5, 1998 Motion to Dismiss in Docket No. C99-1 (Post ECS), that a wholly electronic service, unconnected with any physical carriage of mail, does not constitute a "postal service" covered by chapter 36.

Nevertheless, it is beyond cavil that Rule 54(h)(1) has long referred to both postal and nonpostal services. In light of the prominence of this topic in recent years, a definition would be a logical addition to the rules. In that context, the Postal Service does not oppose supplementing existing definitions.

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.

The Commission states that the intent of this definition is "to afford the Postal Service sufficient flexibility," in effect, to adjust to technological developments in providing postal services. Order No. 1389 at 12.

To the extent that this statement suggests that a definition in the Commission's procedural rules can establish limits on Postal Service authority under the Act, the Postal Service would not agree. In making its own determination whether a proposed service is "postal," and hence within the ambit of chapter 36, or "nonpostal" and thereby outside the ambit of chapter 36, the Postal Service would not in any way be bound by the definition which the Commission is now proposing to incorporate into its rules. In other words, the Postal Service is not conceding that the Commission's attempt in this rulemaking to "clarify" the postal or nonpostal character of new services would have all of the effects possibly intended by the Commission.

In this regard, we note that the Commission's further statement that the proposed definition is not intended to represent a "change" (*id.)* more accurately

captures the scope of the rule's actual effect. While the Commission cites its own interpretation of prevailing law as the reference point, however, we believe that the more accurate points of reference are the statute and controlling judicial interpretation. The specific differences between the Postal Service's and the Commission's interpretations of these sources, particularly as they relate to actual programs or services, have not yet been judicially reviewed. Until they are, we submit that the Commission cannot authoritatively impose its own formulation and interpretation on the Postal Service's conduct, any more than the Postal Service may, by regulation, delimit the jurisdiction of the Commission.[2]

One way to improve the proposed rule in this respect would be to cite to the D.C. Circuit Court of Appeals opinion on which both the Commission and the Postal Service have relied to support their respective views on the nature of postal services. The definition could simply include the following footnote:

> [1] *See National Association of Greeting Card Publishers v. U.S. Postal Service,* 569 F2d 570, 595-98 (DC Cir. 1976), *vacated on other grounds, U.S. Postal Service v. Associated Third Class Mail Users,* 434 U.S. 884 (1977)

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[2] We do not agree with the Commission's suggestion that dicta espoused in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), regarding judicial review of an agency's interpretation of statutory law, can expand the Commission's actual authority in the context of the statutory scheme embodied in the Act. *See* Order Denying, in Part, and Granting, in Part, Petition, Order No. 1388, at 20 (Jan. 16, 2004). Nor can the often-repeated doctrine that an agency has jurisdiction to determine its own jurisdiction override the balance of functions and authorities established by Congress in the Act.

This amendment would clarify that the effect of the proposed definition would be merely to restate prevailing law, as it has been interpreted by the courts.

The Postal Service also notes that the Commission's discussion of this issue as far back as Docket No. R76-1 (including the quotation from its Opinion in that docket at page 2 of Order No. 1389) has focused on the "carriage of mail." For example:

> The final step in isolating jurisdictional from nonjurisdictional services should, in our view, be based on the relationship of the service to the carriage of mail. Those which can fairly be said to be ancillary to the collection, transmission, or delivery of mail are postal services within the meaning of § 3622.

PRC Op. & Rec.Dec., Docket No. R76-1, Vol. 2, App. F, at 3. See also pages 1 and 5 of that Appendix. In addition to incorporation of the footnote suggested above, therefore, the Postal Service further suggests that the text of the proposed definition be slightly modified as well to incorporate the "carriage" nomenclature.

A final suggestion would be to leave somewhat more flexibility in the text with respect to the maximum weight of packages. Currently, the DMCS limit is set at 70 pounds, but that amount could be changed administratively, since the statutory maximum was removed in 1982. The Postal Service proposes that instead of a set weight amount, the definition refer merely to "mailable" packages. These two suggested changes in the text of the definition would cause the text to read as follows:

> <u>Postal service</u> means the carriage of letters, printed matter, or mailable packages, including acceptance, collection, processing, transmission, delivery, or other services supportive or ancillary thereto.

With adoption of these two suggested revisions in the text, plus incorporation of the

suggested footnote, the Postal Service would not oppose the proposed modification of the Commission's rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document in accordance with Section 12 of the Rules of Practice.

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