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## **I. INTRODUCTION**

This proceeding arises under section 39 U.S.C. § 404(e)(3). This section directs the Postal Regulatory Commission (Commission) to determine which nonpostal services should continue to be offered by the Postal Service and to classify those continuing services on the Mail Classification Schedule (MCS). The Commission's task is straightforward. It must review all nonpostal services identified by the Postal Service in this proceeding and apply congressionally mandated statutory criteria to determine if the Postal Service should be permitted to continue to offer those services. For the services it decides should continue, the Commission must classify and list those services on the MCS.

Despite the clear-cut direction provided by Congress in § 404(e), many of the Postal Service's filings to date in this case attempt to obfuscate the meaning of § 404(e) and, in doing so, unnecessarily complicate the Commission's responsibilities. By focusing on the forest instead of the trees, the Commission can accomplish Congress's mandate without inappropriately narrowing the scope of its section 404(e) responsibilities.

## **II. SUMMARY OF ARGUMENT**

The Public Representative respectfully requests the Commission to find (1) that the term "nonpostal services" in § 404(e) means all services that are not postal services, and (2) that all Postal Service offerings listed below in Section IV be continued and categorized and listed on the Mail Classification Schedule as described below.

The Public Representative's Initial Brief is organized into as follows. Section III addresses the legal arguments as to the proper scope of the Commission's jurisdiction under § 404(e). Once that groundwork is set, Section IV discusses the various Postal

Service offerings under the statutory criteria of 39 U.S.C. § 404(e)(3) to help the Commission determine “whether that nonpostal service should continue” and, if so, how that service should be classified under § 3642.

### III. LEGAL FRAMEWORK

The threshold issue in this case is the scope of the Commission’s jurisdiction under § 404(e). “Nonpostal” activities of the Postal Service that fall under § 404(e) are subject to the Commission’s review. “Nonpostal” activities that are outside the scope of § 404(e) are, presumably, not subject to regulatory review.

Section 404(e) subjects those nonpostal activities that qualify as “nonpostal services” to the Commission’s jurisdiction. Section 404(e)(1) defines “nonpostal service” as “*any service* that is not a postal service defined under § 102(5).” 39 U.S.C. § 404(e)(1) (emphasis added). Section 102(5), in turn, defined “postal service” as “the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto.” Section 404(e)(1), therefore, sets up a clear dichotomy – “postal services” as defined under § 102(5) and “nonpostal services,” which are all remaining services that are not “postal services.”

Notwithstanding this clear statutory language, the Postal Service attempts to claim that this language is “vague”<sup>1</sup> and uses inapplicable legislative history and a strained interpretation of the statutory scheme to support its erroneous theory that there are three categories of services offered by the Postal Service: (1) “postal services” within the meaning of § 102(5); (2) “nonpostal services” within the meaning of § 404(e); and (3) other statutorily authorized services that the Postal Service does not consider to

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<sup>1</sup> United States Postal Service Notice of Submission of Sworn Statement on “Nonpostal Services” Pursuant to 39 U.S.C. Section 404(e) at 22 (March 19, 2008) (Postal Service Notice).

be either a “postal service” within the meaning of § 102(5) or a “nonpostal service” within the meaning of section 404(e). Postal Service Notice at 3. It also attempts to argue that several of its other offerings are not subject to this proceeding because they are not “services.”<sup>2</sup> If accepted, the Postal Service’s interpretation would improperly constrict the Commission’s authority under section 404(e) by removing services properly considered as nonpostal services from Commission review. This section addresses the reasons that the Commission should adopt the clearly defined, plain meaning of the statutory term nonpostal service and reject the Postal Service’s strained interpretation.

**A. The Commission’s Reasonable Interpretation of the Scope of § 404(e) is Entitled to Strong Deference**

At the outset, it is important to note that the Commission’s reasonable interpretation of § 404(e) is entitled to strong deference from the courts. Courts afford the highest degree of deference to agency determinations where the administrative body uses a high degree of procedural safeguards such as notice and comment rulemaking or formal adjudication.<sup>3</sup> A high degree of procedural safeguards is important in a court’s determination of the amount of deference to afford an agency because such procedures encourage public scrutiny of an agency’s proposed course of action and

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<sup>2</sup> *Id.* at 27. As a result, the Postal Service’s entire list of nonpostal services that it claims are subject to this proceeding are the following: Passport Photo Service, Photocopying Service, Notary Public Service, Stored Value Cards, and Officially Licensed Retail Products. See Statement of Tina M. Lance on Behalf of United States Postal Service at 2-13 (March 19, 2008) (Lance Statement). The Postal Service later added Electronic Postmark to that list. Further Response of the United States Postal Service to Order No 74, and Notice of Filing of Sworn Statements (June 23, 2008) at 6 (Response to Order 74); Statement of Thomas J. Foti on Behalf of United States Postal Service at 2-3 (June 23, 2008) (Foti Statement).

<sup>3</sup> See *U.S. v. Mead Corp.*, 533 U.S. 218, 229-31 (2001); see generally, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

allow interested parties an opportunity to express their views. *Cf. Fior d'Italia, Inc. v. United States*, 242 F.3d 844, 852 (9th Cir. 2001), *rev'd on other grounds*, 536 U.S. 238 (2002). Significant procedural due process gives interested parties the ability to influence the rulemaking and agency process in a meaningful way.<sup>4</sup> In those cases, the “court does not simply impose its own construction on the statute,” but must determine only “whether the agency’s answer is based on a permissible construction of the statute.” *PBGC v. The LTV Corp.*, 496 U.S. 633, 647-48 (1990) (*quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

In this proceeding, the Commission afforded a high degree of procedural due process to interested persons. It issued a notice about the issues to be addressed in this proceeding to interested persons through publication in the Federal Register and on its Website. See 72 FR 73909 (December 28, 2007). Furthermore, this proceeding provides interested persons the opportunity to submit testimony, rebuttal testimony, and two rounds of briefing. The Commission also allows motions practice in this proceeding.<sup>5</sup> These very formal procedures are akin to those afforded to litigants in Federal district courts. They clearly provide interested persons a high degree of procedural due process – much more due process than they would receive in ordinary notice and comment rulemaking under the Administrative Procedure Act. Accordingly, the Commission’s interpretation of § 404(e) is entitled to *Chevron* deference.

Even if the Commission’s reasonable interpretation of § 404(e) were not entitled to the highest degree of *Chevron* deference, it would be entitled to a considerable degree of deference since “the well-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informed judgment to which courts and

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<sup>4</sup> See *Ohio Dep’t of Human Servs. v. U.S. Dep’t of Health and Human Servs.*, 862 F.2d 1228, 1236 (6th Cir. 1988).

<sup>5</sup> See, e.g., Public Representative Motion to Compel United States Postal Service to File Complete List of Nonpostal Services (March 25, 2008).

litigants may properly resort for guidance.” *U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

At a minimum, the Commission’s interpretation would be entitled to considerable respect under the standards of *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

**B. The Purpose of § 404(e) is to Ensure That the Postal Service Focuses on its Core Mission by Increasing Oversight and Accountability of Those Nonpostal Services that the Commission Decides Should Continue Being Offered**

The general theme and purpose of The Postal Accountability and Enhancement Act (PAEA) is to give the Postal Service increased flexibility to carry out its core mission of providing postal services<sup>6</sup> and to balance the flexibility with enhanced transparency and accountability. Section 404(e) is part of that general theme. Section 404(e)(3) tasks the Commission with the responsibility of reviewing the Postal Service’s nonpostal service offerings to ensure that the Postal Service is not inappropriately deviating from its core mission.

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’s objectives. 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.

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<sup>6</sup> See 39 U.S.C. § 101.

**C. The Unambiguous Term “Nonpostal Services” Must be Interpreted in Accordance with the Statutory Text**

1. The Rules of Statutory Construction Dictate that the Term “Nonpostal Services” be Defined as the Diametric Opposite of the Term “Postal Services”

The Commission should interpret the unambiguous term “nonpostal services” in accordance with the rules of statutory construction and the clear statutory text. The first rule of statutory construction states: “in interpreting a statute a court should always turn to one cardinal canon before all others....[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Supreme Court went on to say that “[w]hen the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Id.* at 254. Nonpostal services are clearly defined in § 404(e) as all services that are not postal services. The inquiry is at its end; there is no need to look further into the legislative history or to other canons of interpretation. See *e.g.*, *Passa v. Derderian*, 308 F. Supp. 2d 43 (D.R.I. 2004) (When the statutory language is clear on its face, and its words neither create ambiguity nor lead to an entirely unreasonable interpretation, an inquiring court must apply the statute as written, and need not consult other aids to statutory construction). The Postal Service does not even attempt to explain how it comes to the peculiar conclusion that the statutorily defined term nonpostal service is ambiguous since it never attempts to discern the meaning of the statutory language on its face before it inappropriately launches into analyzing legislative history.

Based on the rules of statutory construction, the Commission should resist the Postal Service’s urging to ignore the plain and ordinary meaning of the statute’s words

and inappropriately delve into legislative history that clouds the issue.<sup>7</sup> The rules of construction dictate that the term nonpostal service be interpreted based on the clear text of the statute. There is no need to make the inquiry more difficult. Nonpostal services as defined in § 404(e) means all services that are not postal services.

2. The Location of 39 U.S.C. § 404(e) Within the PAEA is of no Consequence to that Section's Meaning

The Postal Service incorrectly argues that Congress intended the scope of § 404(e) to equal to that of former § 404(a)(6) since the text of the PAEA in § 102 “immediately followed that repeal with the establishment of the ‘grandfathering’ procedures now appearing in § 404(e)(3) of title 39.” Postal Service Further Response at 3-4. The fact that Congress decided to place the amendatory language in the PAEA for § 404(e) near the amendatory language repealing former § 404(a)(6) is of no consequence to the interpretation of that provision. Throughout the PAEA, when Congress sought to change the law with respect to a particular topic, it first repealed the former language and then added new amendatory language to the United States Code. See e.g., PAEA §§ 201, 501, 502, 503. 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 the 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).

Title I of the PAEA is entitled “Definitions; Postal Services.” It contains all of the PAEA’s provisions related to the overall definitions within title 39 of the United States

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<sup>7</sup> *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 569 F.2d 570 n.113 (D.C. Cir. 1976) (“We are reminded on numerous occasions that “the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover,” (quoting *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364 (1925)), *vacated on other grounds*, 434 U.S. 884 (1977).

Code and those dealing with the scope of the Postal Service's offerings (which includes postal and nonpostal services). If anything can be deduced from the placement of § 404(e) within the "Definitions; Postal Services" title heading of the PAEA and further within § 102 entitled "Postal Services,"<sup>8</sup> 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 the 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 the logical inverse of postal services. Accordingly, the location of section 404(e) within the PAEA does not justify a departure from the plain meaning rule.

#### **D. The "Legislative History" Cited by the Postal Service is Inapposite**

The "legislative history" relied upon by the Postal Service is irrelevant and should not be used to interpret the statute. The Postal Service inappropriately cites and traces several prior postal-related bills from as early as the Postal Modernization Act of 1999 and their respective committee reports,<sup>9</sup> in order to support its strained interpretation of the scope of § 404(e).

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<sup>8</sup> The Supreme Court has repeatedly stated "that the title of a statute or section can aid in resolving an ambiguity in the legislation's text." See e.g., *INS. v. National Center for Immigrants' Rights*, 502 U.S. 183, 190 (1991). However, it should be noted that "[w]hile title may be considered part of statute, it may not be used as means of creating ambiguity when body of act itself is clear." *Bautista v. Star Cruises*, 286 F.Supp.2d 1352, 1360 (S.D. Fla. 2003) (internal quotation omitted).

<sup>9</sup> The Postal Service's citations to "legislative history" in relation to the PAEA requires clarification. None of the Postal Service's citations to such "legislative history" are derived from the bill that ultimately became the PAEA. All of the Postal Service's arguments based on legislative history are to prior, un-enacted postal bills; no committee reports, conference reports, or any other official legislative history surrounding the passage of the PAEA exist.

First, it should be noted that none of these earlier bills were actually enacted into law. Accordingly, their use for interpreting the PAEA bill that actually *was enacted* is marginal at best. Second, the old non-enacted postal bills grandfathering provisions that the Postal Service attempts to use have different wording than that actually used in the PAEA § 404(e). Compare H.R. 4970, 107<sup>th</sup> Cong. § 102 (2004) (“special nonpostal or similar services provided by the Postal Service as of”) *with* enacted § 404(e)(3) (“each nonpostal service offered by the Postal Service”). Clearly, Congress meant something different when it decided to change the term “special nonpostal or similar services” to “nonpostal service” in the enacted statute. The terminology used in the prior, un-enacted bills, “special nonpostal or similar services,” may be read to be tied to former § 404(a)(6) as the Postal Service suggests, since it used the same terminology. See former § 404(a)(6) (“special nonpostal or similar service”).

However, using this unenacted bill to interpret enacted § 404(e) ignores the fact that Congress specifically chose not to use the same terminology as former § 404(a)(6) in the enacted version of § 404(e)(3). All the Postal Service’s history lesson shows is that Congress clearly knew how to word the grandfathering clause to specifically tie it to former § 404(a)(6).<sup>10</sup> By choosing not to do so, Congress clearly intended for § 404(e) to be broader than the reach of former § 404(a)(6). Accordingly, the “legislative history” cited by the Postal Service does not justify a departure from the plain meaning rule.

#### **E. The Postal Service’s Reliance on § 404(e)(2) is Misguided**

The Postal Service erroneously argues that reliance upon the plain meaning of the words used in the statute will led to irrational results. Specifically, the Postal Service

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<sup>10</sup> Similar reasoning applies to the Postal Service’s argument that its provision of governmental services under section 411 were exempted in various postal reform bills introduced prior to the passage of the PAEA. The fact that Congress knew how to exempt such services from the realm of section 404(e) and did so in prior bills – but specifically chose not do so in the PAEA – demonstrates Congress’s intention that such services fall within the purview of section 404(e).

contends that if the Commission interprets “nonpostal services” under the PAEA to be broader than that of former § 404(a)(6), then, by virtue of § 404(e)(2), section 404(a)(5) could be rendered a nullity. In other words, “one could conclude that the Commission has the authority to terminate the Postal Service’s offering of philatelic services” under § 404(e) even though such services are specifically listed under section 404(a)(5).

The Postal Service’s argument is based on several unfounded assumptions; there are several ways to harmonize the plain meaning of the term “nonpostal service” with § 404(a)(5) without rendering it a nullity.

First, for § 404(a)(5) to be rendered meaningless, the Postal Service inappropriately assumes that its ability to provide a philatelic services is a “nonpostal service” under the PAEA. This is not necessarily the case. Under the PAEA, philatelic services may be considered postal services. While the former Postal Rate Commission had previously decided in R76-1 that philatelic services were not postal services, this in no way relates to the term postal services as defined in the PAEA. Indeed, Congress specifically chose to statutorily override the Postal Rate Commission’s earlier definition of postal services in its passage of the PAEA.<sup>11</sup>

Section 102(5), as amended by the PAEA, defines “postal services” as the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, *or other functions ancillary thereto.*” (Emphasis added). Stamps as collectables are clearly ancillary to these functions. There would be no stamp collections without the Postal Service’s issuance of stamps in the first place.

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<sup>11</sup> Compare former 39 C.F.R. 3001.5(s), 71 FR 2472(January 17, 2006)(postal service “means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services incidental thereto”) with 39 U.S.C. § 102(5) (postal service means “delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto.”)

Stamps are intimately related to the delivery of letters, and for some collectors, first day issue cancels and postmarked stamps are preferable to mint stamps.<sup>12</sup> The Postal Service “often cannot distinguish philatelic from regular stamp purchases.” Postal Service Initial Response June 9, 2008 at 14. Moreover, the private sector does not print stamps, and the Postal Service’s postal inspectors are charged with helping ensure that stamps – including all philatelic stamps – are free from counterfeiting. 18 U.S.C. §§ 501, 3601. There is simply no basis for the Postal Service to assume that philatelic services should automatically be classified as nonpostal services under the PAEA.<sup>13</sup> They are better classified as market dominant postal services.<sup>14</sup> This result allows harmonization of § 404(e)(2) with § 404(a)(5) by taking philatelic services out of the realm of nonpostal services.

Second, even if philatelic items were “nonpostal services,” § 404(e)(2) does not hinder the Commission’s ability to use the plain meaning of the term nonpostal services. Section 404(e)(2) does nothing more than to say that nonpostal services (as defined by the PAEA) offered by the Postal Service on January 1, 2006 *may* be offered, subject to the provisions of section 404(e). Section 404 does not force the Postal Service to provide nonpostal services. The Postal Service’s specific powers listed in § 404(a) are not requirements that must be exercised by the Postal Service; rather, they are specific methods that the Postal Service *may* use to achieve its overall mission as stated in § 101. See *e.g.*, 39 U.S.C. § 101(a) (“The Postal Service shall have as its *basic function* the obligation to provide postal services to bind the Nation together through ...

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<sup>12</sup> See American Philatelic Society, Questions and Answers *available at* [http://www.stamps.org/directories/dir\\_qna.htm](http://www.stamps.org/directories/dir_qna.htm); American Philatelic Society, Kids Questions and Answers, *available at* [http://www.stamps.org/kids/kid\\_qa.htm](http://www.stamps.org/kids/kid_qa.htm).

<sup>13</sup> It appears counterintuitive for the Postal Service to argue that its mailing and shipping supply offerings such as boxes and packaging materials are postal services under section 102(5), while stamp collections are nonpostal services since either may or may not ultimately be processed by the Postal Service in a mailing. See Postal Service Notice at 8-10.

<sup>14</sup> “Migratory Bird Stamps,” “Customized Postage and Mail Metering Programs,” and “Stamp Fulfillment Services Shipping and Handling Charges” are postal services for these same reasons.

correspondence of the people. It shall provide prompt, reliable, and efficient service to all patrons.”) (Emphasis added); see also 39 U.S.C. §§ 403(a) & (b). 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. Compare 39 U.S.C. § 404(a) with 39 U.S.C. § 404(c) (“The Postal Service *shall* maintain one or more classes of mail for the transmission of letters sealed against inspection.”) (Emphasis added).

For example, section 404(a)(8) allows the Postal Service to issue a substitute check for one that is lost or stolen. It does not require the Postal Service to issue such a check. It may meet its obligation through other means such as electronic funds transfer or offsetting mutual obligations. Just because Congress did not amend § 404(a)(8) does not mean that the Postal Service cannot take advantage of technological advances with respect to the satisfaction of obligations. Similarly, the Postal Service does not have to offer philatelic services just because such services are listed in § 404(a)(5). Accordingly, the specific referencing of § 404 in § 404(e)(2) is not a bar to the Commission adopting the plain and ordinary meaning of the term nonpostal services.

**F. The Postal Service Cannot Escape the Transparency and Accountability Mandated in the PAEA by Claiming that its Activities Related to § 401(5) are Not Services**

1. Activities Undertaken Pursuant to § 401(5) are Services Under § 404(e)

In an attempt to avoid oversight and accountability, the Postal Service argues that nothing that it does with respect to its property under § 401(5) constitutes the performance of a service under § 404(e). The Commission should summarily reject the Postal Service’s attempt to inappropriately narrow the scope of § 404(e) in this manner.

Such arrangements with third parties are contracts to perform services, and thus, subject to the requirements of § 404(e).

Section 401(5) states that one of the Postal Service's general powers is:

To acquire, in any lawful manner, such personal or real property....to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein, and to *provide services* in connection therewith.

39 U.S.C. § 401(5) (emphasis added). Section 401(5) discusses the Postal Service's ability to "*provide services* in connection therewith" its property rights. Congress, in drafting § 401(5) explicitly recognized that in connection with exercising its property rights, the Postal Service would be providing services. These services, in connection with the exercise of the Postal Service's property rights, are subject to review under § 404(e) to determine if those services constitute "postal services" or "nonpostal services."<sup>15</sup>

2. The Postal Service's Licensing or Assigning of Patent, Copyright, Trademark and Similar Rights are Not an Exercise of its Powers Under § 401(5)

In an attempt to avoid Commission oversight, the Postal Service appears to argue that entering into contracts to license or assign its patent, copyright, trademark, and similar intangible rights are not services, but rather an "exercise of its property rights under § 401(5)," in part, as "virtual real estate." Postal Service Notice at 28-30. The Commission should reject this strained interpretation of § 401(5) and interpret such arrangements with third parties as Postal Service contracts to perform services and thus subject to the requirements of § 404(e).

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<sup>15</sup> It may be that the few situations where the Postal Service's disposal of its property does not entail an ongoing business relationship and, as such, are not "services" under § 404(e). An example of such a situation could be the sale of Postal Service vehicles that have outlived their useful life to private parties. In such situations there may be no performance of a service by the Postal Service other than the tendering of the good to be sold.

Section 401(5) permits the Postal Service to “hold, sell, lease, or otherwise dispose of such property.” 39 U.S.C. § 401(5). Attempting to apply these actions to patents, copyrights, trademarks and similar rights is nonsensical. Many of these intangible rights, such as patents and trademarks, are assigned and licensed; they are not sold, leased, or disposed of.

Additionally, the purpose behind granting such intangible rights is entirely different than that of tangible or real property. Whereas tangible and real property rights are based on managing the allocation of scarce resources; patents, copyrights, trademarks, and similar rights are government-granted incentives to encourage the creation of new works. U.S. Const. Art. I, § 8 (“To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”). With intangible property such as copyrights and patents there is no need to worry about efficient allocation since anyone can have a copy of these virtually infinite resources.

With respect to real and tangible property, an owner no longer has control over a item once it’s sold, but a copyright gives an owner control over output of a copyrighted work even after that particular copy is sold. Moreover, rights with respect to patents, copyrights, trademarks, and similar rights are limited in duration, which is not true of real or tangible property. Thus, because these rights are not analogous to real and tangible property, the Commission should not interpret rights related to patents, copyrights, trademarks, and similar intangible rights as an exercise of the Postal Service’s powers under § 401(5). They are instead an exercise of the Postal Service’s power under § 401(3) which allows the Postal Service to enter into and perform contracts.<sup>16</sup>

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<sup>16</sup> Of course, the Postal Service cannot enter into contracts for any and all subject matter under the sun. Among other things, its contract authority in section 401(3) is limited to non *ultra vires* activities by section 101 and by the Commission’s conclusions with respect to nonpostal services in section 404(e)

**G. The Commission's Complaint and Annual Compliance Review Jurisdiction are Outside the Scope of This Proceeding**

The scope of the Commission's complaint jurisdiction as enacted by Congress in the PAEA has nothing to do with whether the Commission should allow certain nonpostal services to continue under § 404(e). The Commission's complaint jurisdiction is immaterial for purposes of this proceeding.

It may be that certain nonpostal services under § 404(e) ultimately may fall outside of the Commission's complaint jurisdiction. However, this is not a reason for the Commission to inappropriately narrow the scope of § 404(e) as envisioned by Congress. Even if certain nonpostal services under § 404(e) are outside of the Commission's complaint jurisdiction, aggrieved parties may not be without remedy for violations of the law. A party that has suffered harm by inappropriate Postal Service action may have a case in Federal court.

It is simply not appropriate for the Commission to determine or opine on the scope of its complaint jurisdiction in a proceeding which has nothing to do with complaints or the annual compliance determination. The scope of the Commission's complaint jurisdiction is based on § 3662, while the scope of the annual compliance determination is based on § 3652. Neither of those provisions is implicated in the instant proceeding. The Commission should use appropriate restraint and avoid issuing an advisory opinion on its complaint or annual compliance review jurisdiction. Instead, it should wait for a case or controversy raising a real dispute between adverse parties on an issue related to the size and scope of its complaint or annual compliance determination jurisdiction before ruling on such issue, rather than addressing hypothetical claims by the Postal Service in this proceeding.<sup>17</sup>

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<sup>17</sup> See e.g., *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). (A suit "must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be

#### **H. Congress Did Not Impermissibly Delegate Legislative Authority to the Commission to Determine Which Nonpostal Services Should Continue**

Congress appropriately exercised its legislative powers in tasking the Commission with determining which nonpostal services should continue.<sup>18</sup> Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. Const. art I, § 1. In considering a challenge to a delegation of power, “the test is whether Congress has set forth ‘an intelligible principle to which the person or body authorized to act is directed to conform.’” *TOMAC v. Norton*, 433 F.3d, 852, 866 (D.C. Cir. 2006) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (alterations and internal quotations omitted)). Courts “have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” *Whitman*, 531 U.S. at 474-75 (internal quotations omitted). The Supreme Court also realized that “Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion,” *Yakus v. United States*, 321 U.S. 414, 425-26 (1944).

Here, Congress has clearly set forth an intelligible principle for the Commission to use in determining whether to continue certain nonpostal services. One needs to look no further than the statutory text itself. In exercising its delegated authority to determine which nonpostal services should continue, the Commission must consider:

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a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”).

<sup>18</sup> The Postal Service erroneously argues that a broad interpretation of section 404(e) would result in an unconstitutional delegation of legislative power. Further Response of the United States Postal Service to Order No. 74, and Notice of Filing of Sworn Statements at 6 n.3 (June 23, 2008) (Postal Service Further Response).

“(A) the public need for the service; and (B) the ability of the private sector to meet the public need for the service.” 39 U.S.C. § 404(e)(3).

In its most recent opinion to address the nondelegation doctrine, the Supreme Court upheld an intelligible principle much more murky than the one described in 39 U.S.C. § 404(e)(3). The *Whitman* Court rejected a nondelegation challenge to a provision of the Clean Air Act that directed the Environmental Protection Agency to set air quality standards at a level “requisite to protect public health.” *Id.* at 465 (citing 42 U.S.C. § 7409(b)(1)). The “scope of discretion” allowed by such a standard, which the Court interpreted to mean “not lower or higher than is necessary,” was found to be “well within the outer limits of [the Supreme Court’s] nondelegation precedents.” *Id.* at 474, 476 (noting that the Clean Air Act’s standard was also “strikingly similar” to the standard approved in *Touby v. United States*, 500 U.S. 160 (1991), which permitted the Attorney General to designate a drug as a controlled substance if doing so was “necessary to avoid an imminent hazard to the public safety.”). The Court confirmed that its nondelegation precedent has never required Congress to define, for example, “how ‘necessary’ was necessary enough.” *Id.* at 475. Given this precedent on the nondelegation doctrine and the intelligible principle codified in § 404(e)(3), the Commission must conclude that § 404(e) is an not unconstitutional delegation of legislative power.

#### **IV. APPLICATION OF APPLICABLE § 404(e)(3) AND § 3642 STANDARDS**

After determining the proper scope of this proceeding, the Commission’s next task is to identify a complete list of nonpostal services offered by the Postal Service to determine if those services should continue under § 404. The Postal Service did not make it easy to identify and classify all those services. Instead, it filed a host of spreadsheets and other documents relating to revenue generated from nonpostal

services.<sup>19</sup> This filing shows that all these nonpostal services were recorded on the Postal Service's General Ledger in 64 different accounts. It also traces debit and credit entries for these accounts, rather than providing a succinct, brief description of each nonpostal service for the Commission to insert on the Mail Classification Schedule pursuant to § 404(e)(5).<sup>20</sup> The service's filing informs the Commission that:

When an entry reflects a relatively substantial amount, the Postal Service has, for purposes of this exercise, endeavored to ascertain what underlying activity or set of activities have caused generation of such an amount. In those instances, a description of the relevant activities is provided, unless the activity is either intuitively obvious, or has been described elsewhere. (An example of an activity which seems relatively intuitive is GL 44036.149 (Sale of Recyclable Products), which is aptly described in Attachment One and about which there is nothing to add at this point.).... Activities or programs that have historically been the focus of "nonpostal" discussions, or activities or programs of a similar nature to those, have received the same amount of attention (in terms of seeking to fill in the details) as activities or programs with substantial revenue.

*Id.* at 4. The lengthy descriptions that are provided are then linked back to the General Ledger account numbers. Thus, the Commission is left with task of cross-referencing these activities to create a complete list, determine which activities should be consolidated, consider whether they should continue pursuant to § 404(e), decide

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<sup>19</sup> Initial Response of the United States Postal Service to Order No. 74 (June 9, 2008) (Postal Service Initial Response). This Postal Service's filing calls these "other-than-postal services."

<sup>20</sup> The Postal Service appears to recognize that the textual listing on the MCS sets the scope of nonpostal service it may offer upon completion of this proceeding. See Postal Service Notice at 16 n.38 ("The relevant 'nonpostal service' for purposes of 102 would not be each individual philatelic item, but rather the overall philatelic program. Such a reading would allow the Postal Service to continue introducing new philatelic items."). For example, if the MCS described each individual Officially Licensed Retail Product rather than the entire program, the Postal Service would be barred from offering a new travel mug with a forever stamp since that activity was not specifically authorized to continue pursuant to section 404(e).

whether those activities are market dominant or competitive,<sup>21</sup> and create an entry for insertion on the MCS for those services that are to be continued.

To add to this confusion, the Postal Service's filing goes on to state:

There are a number of entries for which no additional information has become available [other than the accounting entry heading].... It would be difficult to discern a rational basis to attempt to probe the source of each and every one of these entries, with what would inevitably be a labor-intensive manual inquiry process. If, however, there are specific entries which are subsequently deemed to warrant particular attention, the Postal Service will seek to obtain whatever additional information can be obtained.

Postal Service Initial Response June 9, 2008 at 4. This appears to inappropriately attempt to shift the burden of proof in this proceeding; in effect asking the other participants to show why the Postal Service should not be allowed to continue these services for which it has no information, yet appear to generate revenue.

The statute clearly states that "any nonpostal service not determined to be continued by the Commission ... shall terminate." 39 U.S.C. § 404(e)(4). Thus, services that the Postal Service has not clearly identified and supported through testimony on the record are terminated by operation of law.<sup>22</sup>

Unfortunately, the Postal Service's supplemental filings on June 23, 2008 do not shed further light on these unexplained nonpostal activities. It simply states that the

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<sup>21</sup> It is interesting to note that for certain activities the Postal Service did submit testimony supporting its contention that the service be classified as market dominant or competitive, while for the vast majority of others, it did not. *Compare* Shah Statement at 5 (Testimony supporting including International Money Transfer Service "in the Mail Classification Schedule as a competitive postal service") *with e.g.* Lance Statement (Testimony concerning five nonpostal services, but not discussing whether they should be classified as market dominant or competitive). From these examples, it is clear that the Postal Service knew that part of the Commission's responsibility in this docket was to make such findings and chose not to submit testimony on those issues with respect to many of its nonpostal activities.

<sup>22</sup> Any nonpostal service not listed on the MCS at the conclusion of this proceeding terminates pursuant to section 404(e)(4).

“Postal Service wishes to continue all of the activities and programs identified in its June 9 filing.” Postal Service Initial Response at 2. This is perplexing since it is not practical or appropriate for the Commission to incorporate the nonpostal services portion of the Postal Service’s General Ledger into its Mail Classification Schedule. All nonpostal services that the Postal Service wishes to continue must be listed and described on the MCS, not just “[a]ctivities or programs that have historically been the focus of ‘nonpostal’ discussions” or those of a “relatively substantial amount” of revenue.

Accordingly, in the next sections, the Public Representative helps the Commission focus on the forest instead of the trees with an appropriate workable draft list<sup>23</sup> which classifies and categorizes the Postal Service’s nonpostal services for insertion into the MCS. The following section does the same for the postal services that were made subject to this proceeding pursuant to Order No. 74.<sup>24</sup> These listings are based on the Postal Service’s Witness Statements<sup>25</sup> and other testimony submitted by interested parties.

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<sup>23</sup> If the Postal Service wishes to expand upon or edit this list in its reply comments, the Public Representative may seek leave to file sur-reply based upon the Postal Service’s comments on those classifications.

<sup>24</sup> PRC Order No. 74 at 14 (April 29, 2008) (“The Postal Service may, if it wishes, submit its proposal to have certain nonpostal services reclassified as postal.”).

<sup>25</sup> These Statements are: the Lance Statement, Foti Statement, Donahoe Statement, Meyer Statement, Shah Statement, and VanGorder Statement. A corollary to the Postal Service’s filing of these six statements is that the activities described therein are, as a practical matter, the outer limits of the activities that the Commission may authorize to continue pursuant to section 404(e). All other nonpostal activities of the Postal Service cannot meet the test described under § 404(e)(3) since there is no evidentiary support for them on the record in this proceeding.

## **A. Specific Nonpostal Services**

This section attempts to list, in an easy to use format, the various nonpostal services,<sup>26</sup> their descriptions for inclusion in the MCS (if such services are to be allowed to continue), their proposed classification (market dominant or competitive), the proposed rationale for meeting the statutory test under § 404(e)(3), and any additional analysis or comments that the Commission should consider in making its determination under § 404(e).

- **Product Title: Fees for Providing Statutorily Authorized Nonpostal Services to the Public.**
  - **Product Description:** The Postal Service is authorized or required by certain statutes to provide certain nonpostal services to the Public in exchange for a fee. These include, but are not limited to, Freedom of Information Act Fees, Privacy Act Fees, and Fees collected under 39 U.S.C. § 3010.
  - **Public Need:** Mandated by Congress.
  - **Private Sector Ability to Meet Need:** Cannot be met by private sector.
  - **Continue:** Yes.
  - **Classification:** Market Dominant.
  - **Additional Comments/Analysis:** Because these activities cannot be performed by the private sector pursuant to Congressional mandate/monopoly, it should be classified as market dominant.
  
- **Product Title: Law Enforcement and Litigation Activities.**

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<sup>26</sup> Electronic Postmark (EPM) is a highly contested issue in this proceeding. Due to the complexity of this service, EPM is addressed in a separate section.

- Product Description: The Postal Service is authorized or required by certain statutes to investigate or help other agencies investigate a variety of criminal and civil statutes which may result in the Postal Service acquiring property or other assets through asset forfeiture, civil penalties, restitution, fines, or other payments. The Postal Service may also be awarded judgments, including fees and costs in connection with its litigation activities.
  - Public Need: Mandated or Authorized by Congress.
  - Private Sector Ability to Meet Need: Cannot be met by private sector.
  - Continue: Yes.
  - Classification: Market Dominant.
  - Additional Comments/Analysis: Because these activities cannot be performed by the private sector pursuant to Congressional mandate/monopoly, it should be classified as market dominant.
- Product Title: Arrangements with Government Entities.
    - Product Description: The Postal Service may seek to enter into agreements with governmental entities to provide and receive services to their mutual benefit.
    - Public Need: In certain situations, the services of a publicly trusted nationwide quasi-governmental entity is highly beneficial (e.g., emergency assistance in times of disaster like Hurricane Katrina).
    - Private Sector Ability to Meet Need: Private sector can usually perform these functions, but typically not as quickly, efficiently, or with such a high degree of public trust as the Postal Service.
    - Continue: Yes.
    - Classification: Competitive
    - Additional Comments/Analysis: N/A

- Product Title: Management of Real and Tangible Property.
  - Product Description: The Postal Service may prudently manage its real and tangible property in furtherance of its core business activities including the acquiring, leasing and disposal of such property.
  - Public Need: Mandated or Authorized by Congress.
  - Private Sector Ability to Meet Need: Private sector may be able to offer substantially similar real or tangible property to the marketplace.
  - Continue: Yes.
  - Classification: Competitive.
  - Additional Comments/Analysis: The Postal Service competes with entities having the same or similar portfolio of real and tangible property with respect to such property.
  
- Product Title: Licensing and Assignment Programs for Intangible Assets.
  - Product Description: The Postal Service may enter into arrangements to license or assign its patents, trademarks, copyrights, or other similar rights to third parties in furtherance of its core business activities.
  - Public Need: The public may benefit from arrangements that increase the value of the Postal Service's intangible property.
  - Private Sector Ability to Meet Need: Private sector may be able to offer similar intangible property to the marketplace.
  - Continue: Yes.
  - Classification: Competitive.
  - Additional Comments/Analysis: The Postal Service competes with entities having the same or similar portfolio of intangible property with respect to assigning or licensing the use of such property.

- Product Title: Interest/Sale of Items in Financial Portfolio.
  - Product Description: The Postal Service may prudently manage its investment portfolio to facilitate achieving its core mission.
  - Public Need: The public may benefit from arrangements that increase the value of the Postal Service's investment portfolio.
  - Private Sector Ability to Meet Need: Private sector may be able to offer similar intangible property to the marketplace.
  - Continue: Yes.
  - Classification: Competitive.
  - Additional Comments/Analysis: The Postal Service competes with entities having the same or a similar investment portfolio.
  
- Product Title: Strategic Partnerships.
  - Product Description: The Postal Service may enter into arrangements with strategic partners to facilitate achieving its core mission.
  - Public Need: The public may benefit from arrangements that increase the value of the Postal Service's assets.
  - Private Sector Ability to Meet Need: Private sector may be able to offer similar arrangements to the marketplace.
  - Continue: Yes.
  - Classification: Competitive.
  - Additional Comments/Analysis: The Postal Service competes with entities that may offer similar services or partnership arrangements.
  
- Product Title: Passport Photo Service.

- Product Description: The Postal Service may provide passport photo services to the public in connection with its passport acceptance agreement with the Department of State.
  - Public Need: Passport applications require photographs to be taken of the applicants. The public benefits from having the option of receiving passport photography service in the same location as the passport application acceptance facilities.
  - Private Sector Ability to Meet Need: In many rural locations, there is no convenient alternative for customers seeking passports to get required photos.
  - Continue: Yes.
  - Classification: Competitive.
  - Additional Comments/Analysis: While in urban areas, there is significant competition for passport photography, in rural areas, there is no other convenient alternative for customers to obtain required passport photographs. It would be too difficult, administratively, to design and implement a workable system for allowing passport photography in rural locations, but not allowing such action to take place in urban areas. Accordingly, this nonpostal service should be allowed to continue on a nationwide basis.
- Product Title: Photocopying Service.
    - Product Description: The Postal Service may provide photocopying services to the public.
    - Public Need: The public benefits from having the convenience of being able to make photocopies of documents at their local post offices immediately prior to placing them in the mailstream.
    - Private Sector Ability to Meet Need: In many rural locations, there is no convenient alternative for customers seeking photocopies of documents.
    - Continue: Yes.

- Classification: Competitive.
- Additional Comments/Analysis: While in urban areas, there is significant competition for photocopying, in rural areas, there is no other convenient alternative for customers to obtain such services. It would be too difficult, administratively, to design and implement a workable system for allowing the Postal Service to provide photocopying service in rural locations, but not allowing such action to take place in urban areas. Accordingly, this nonpostal service should be allowed to continue on a nationwide basis.
- Product Title: Notary Public Service.
  - Product Description: The Postal Service may provide notary public services to the public.
  - Public Need: The public benefits from having the convenience of being able to have documents notarized at their local post offices immediately prior to placing them in the mailstream.
  - Private Sector Ability to Meet Need: In many rural locations, there is no convenient alternative for customers seeking notarization of documents prior to mailing.
  - Continue: Yes.
  - Classification: Competitive.
  - Additional Comments/Analysis: While in urban areas, there is significant competition for notary public services, in rural areas, there is no other convenient alternative for customers to obtain such services. It would be too difficult, administratively, to design and implement a workable system for allowing the Postal Service to provide notary public service in rural locations, but not allowing such action to take place in urban areas. Accordingly, this nonpostal service should be allowed to continue on a nationwide basis.
- Product Title: Stored Value Cards.

- Product Description: The Postal Service may provide stored value cards to the public.
  - Public Need: The public benefits from having the convenience of being able to purchase stored value cards for mailing at their local post offices immediately prior to placing them in the mailstream.
  - Private Sector Ability to Meet Need: The private sector can also offer stored value cards to the public.
  - Continue: Yes.
  - Classification: Competitive.
  - Additional Comments/Analysis: N/A.
- Product Title: Officially Licensed Retail Products.
    - Product Description: The Postal Service may provide officially licensed retail products to the public.
    - Public Need: The public may wish to purchase items that bear postal branding, trademarks, or other similar markings.
    - Private Sector Ability to Meet Need: The private sector can offer similar items, although the private sectors items may not bear postal branding, trademarks, or other similar markings.
    - Continue: Yes.
    - Classification: Competitive.
    - Additional Comments/Analysis: N/A.

## **B. Electronic Postmark**

This proceeding has generated much testimony on the Postal Service's Electronic Postmark (EPM) nonpostal service from participants such as DigiStamp,

Epostmarks, and Microsoft. Much of the testimony presented has provided the Commission with extensive information on the value of the EPM service, yet some portions of the submitted testimony generated what may be considered as inappropriate and irrelevant personal attacks against other participants. It is important for the Commission to remember its role in this proceeding with respect to the Electronic Postmark service. The law provides that:

The Postal Regulatory Commission shall review each nonpostal service offered by the Postal Service ... and determine whether that nonpostal service shall continue, taking into account--(A) the public need for the service; and (B) the ability of the private sector to meet the public need for the service.

39 U.S.C. § 404(c)(3). Thus, the Commission's inquiry is limited to whether there is a public need for EPM service, and if so, whether the private sector adequately meets that public need. The participants appear to agree that there is a public need for the EPM service,<sup>27</sup> although there is significant debate about what, exactly the EPM service that the Postal Service would be providing to the public entails.<sup>28</sup> Nonetheless, the participants have considerably narrowed the issues.

The fundamental question for the Commission to address in this proceeding with respect to EPM is the private sector's ability to meet that public need. DigiStamp contends that there is a public need for a secure digital time stamp.<sup>29</sup> Epostmarks

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<sup>27</sup> See e.g., Borgers Statement at 4 ("I state emphatically that there is a strong public need for time/date stamp products.").

<sup>28</sup> DigiStamp appears to argue that the public need is the time/date stamp product, *id.*, while the Postal Service, Epostmarks, and Microsoft appear to argue that the public need is for (a) a trusted neutral third party that consumers could hold to a higher criterion for legal support against fraud, (b) for a certification process to place providers on a higher, but equal playing field, and (c) a rational, yet not burdensome fee structure, e.g. Foti Statement at 3; Grossman Rebuttal Statement at 3 ("The unique value of the EPM lies elsewhere: in the ability to provide a trusted online environment where the public can feel safe and protected."); Lesur Rebuttal Statement at 1-2.

<sup>29</sup> Borgers Statement at 5.

concedes that time stamps are widely available and easy to implement.<sup>30</sup> It believes, however, that the private sector cannot provide the trusted brand name and enforcement powers embodied in a Postal Service protected EPM. DigiStamp takes issue with the assumption that the Postal Service will enforce violations of the EPM service. As a result, there is a factual dispute as to whether the Postal Service intends to enforce the misuse of its brand with respect to the EPM product. It is important to the public that the Postal Service maintain the high level of public trust and confidence associated with its brand name and trademarks.

There are several other considerations that bear on this topic. First, the Universal Postal Union's (UPU) involvement in this arena is important. Microsoft testifies that its technology, in compliance UPU Standard S43-3 will allow users to exchange legally binding, sensitive documents and digitally sign them from one country to another country.<sup>31</sup> The Commission may find that it will harm the public for the United States, due to a lack of authority of its current Postal Operator, to be unable to participate in that arena of the international postal network.

Second, DigiStamp suggests that another government agency, the National Institute of Standards and Technology (NIST), may be able to meet the public need for an EPM type service in lieu of the Postal Service. Epostmarks takes issue with that assertion since NIST does not have the brand familiarity and enforcement powers of the Postal Service. Additionally, Epostmarks points out that NIST is not a private sector entity as required to meet the test under § 404(e)(3)(B). The distinction between public and private sector entities is important. Congress did not intend for the Commission to decide which of two public sector entities should set criteria for certification of an EPM type service. Moreover, there has not been any testimony on this record from NIST on its views of the appropriateness or its willingness to undertake such a task. Prior to any

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<sup>30</sup> Grossman Rebuttal Statement at 2.

<sup>31</sup> Lesur Rebuttal Statement at 4; see also Grossman Rebuttal Statement at 7-9.

Commission decision as to NIST being the appropriate entity to undertake these issues, the Commission should obtain views from NIST on this topic.

An additional issue is the potential for the Postal Service to discriminate or allow unfair competition between EPM providers. Allegations of a quasi-public entity treating customers or competitors unfairly are of paramount concern to the general public. Congress foresaw that this type of activity could occur and provided several mechanisms in the statute for redress – §§ 403(c) and 404a ensures that there will be no undue discrimination or preferences and there will be a level playing field among competitors. See 39 U.S.C. § 3662 (providing a procedure for the Commission to enforce allegations of wrongdoing under §§ 404a and 403(c)).

### **C. Reclassified of Certain Services as Postal Services**

This section attempts to list, in an easy to use format, the various postal services subject to this docket pursuant to Commission Order No. 74,<sup>32</sup> their descriptions for inclusion in the MCS, their proposed classification (market dominant or competitive), and any additional analysis or comments that the Commission should consider in making its determination under 39 U.S.C. § 3642.<sup>33</sup>

- Product Title: ReadyPost.
  - Product Description: The Postal Service may offer shipping supplies for use in connection with customers mailing activities at postal retail locations.

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<sup>32</sup> PRC Order No. 74 (April 29, 2008) at 14 (“The Postal Service may, if it wishes, submit its proposal to have certain nonpostal services reclassified as postal....”).

<sup>33</sup> This section does not discuss Philatelic Services, Migratory Bird Stamps, Customized Postage and Metering Programs, and Stamp Fulfillment Services Shipping/Handling Charges. These services should be classified as postal services, and have been addressed in Section III.E of this brief. See, *supra*, Section III.E.

- Classification: Competitive.
  - Additional Comments/Analysis: The sale of shipping supplies to customers appears to be ancillary to acceptance of mailable manner at postal retail locations. The public benefits from the convenience of being able to purchase shipping supplies for mailing at their local post offices immediately prior to placing them in the mailstream. ReadyPost should be classified as competitive since shipping supplies can be obtained at many stores and other retail outlets throughout the nation.
- Product Title: Greeting Cards.
    - Product Description: The Postal Service may offer greeting cards to customers for mailing at postal retail locations.
    - Classification: Competitive.
    - Additional Comments/Analysis: The sale of greeting cards appears to be ancillary to acceptance of mailable manner at postal retail locations. The public benefits from the convenience of being able to purchase greeting cards for mailing at their local post offices immediately prior to placing them in the mailstream. Greeting cards should be classified as competitive since cards can be obtained at many stores and other retail outlets throughout the nation.
- Product Title: International Money Transfer Service (IMTS).
    - Product Description: The Postal Service may offer International Money Transfer Service to customers.
    - Classification: Competitive.
    - Additional Comments/Analysis: This service is the electronic equivalent to the Postal Service's money order special service which was classified as a postal service. Due to this similarity, this 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.

- Product Title: Address Management Services.
  - Product Description: The Postal Service may offer Address Management Services to customers in furtherance of its core mission.
  - Classification: Market Dominant.
  - Additional Comments/Analysis: Permanent and temporary address changes are ancillary to the delivery of mailpieces to the Postal Service's delivery point network. Accordingly, Address Management Services should be classified as a postal service. It should be classified as market dominant since the Postal Service exercises significant market power over the change of address service and related services without risk of losing a significant level of business regarding this product.

## V. CONCLUSION

For the reasons set forth above, the Public Representative respectfully requests that the Commission (1) interpret the term “nonpostal services” in § 404(e) in accordance with the applicable rules of statutory construction and the Congressional intent of the PAEA and find that that it includes all services that are not postal services, and (2) all Postal Service postal and nonpostal services listed above in Section III be allowed to continue categorized and listed on the Mail Classification Schedule as described in that section of this brief.

Respectfully Submitted,

/s/ Robert Sidman

Robert Sidman

Public Representative for  
Docket No. MC2008-1

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