

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Dan G. Blair, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Tony L. Hammond

Review of Nonpostal Services

Docket No. MC2008-1

REVIEW OF NONPOSTAL SERVICES UNDER THE
POSTAL ACCOUNTABILITY AND ENHANCEMENT ACT



(Issued December 19, 2008)

TABLE OF CONTENTS

	<i>page</i>
I. Introduction.....	1
II. Background.....	5
III. Scope of Review	9
A. Commercial Nonpostal Services are Subject to Review Under Section 404(e)	11
B. The Legislative History Confirms that Review under Section 404(e) Extends to All Commercial Non-Core Activities	16
C. The Postal Service's Reliance on Former Section 404(a)(6) to Limit Review under Section 404(e) is Misplaced	22
IV. Activities Proposed for Classification as Postal Services.....	27
V. Activities Proposed to be Grandfathered As Nonpostal Services	39
A. Passport Photo Service	41
B. Photocopying Service	43
C. Notary Public Service.....	45
D. Stored Value Cards.....	46
E. Officially Licensed Retail Products.....	48
F. Electronic Postmark (EPM).....	50
VI. Activities that the Postal Service Claims are Unreviewable	57
A. Services Provided to Government Agencies.....	57
B. Philatelic Services Under 39 U.S.C. § 404(a)(5).....	60
C. Stamp Fulfillment Services	63
D. Activities Undertaken Pursuant to 39 U.S.C. § 401(5)	64
E. Miscellaneous Revenue-Generating Activities	82
VII. Future Proceedings.....	87

Appendix I—Treatment of Revenue Producing Activities Identified in Postal Service Response to Order No. 74

Appendix II—Procedural History

I. INTRODUCTION

The Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3198, limits the Postal Service's authority to provide nonpostal services, first, to those it offered as of January 1, 2006, and, second, to those that the Commission authorizes to continue. 39 U.S.C. § 404(e). The Commission is required by § 404(e) of the PAEA to review each nonpostal service offered by the Postal Service on the date of enactment of the PAEA (December 20, 2006) to determine whether that nonpostal service shall continue, taking into account the public need for the service and the ability of the private sector to meet that public need. 39 U.S.C. § 404(e)(3). Any nonpostal service the Commission concludes should not continue shall terminate. 39 U.S.C. § 404(e)(4). Those services that shall continue are to be regulated under title 39 as market dominant, competitive, or experimental products. 39 U.S.C. § 404(e)(5).

The PAEA defines nonpostal service to mean "any service that is not a postal service defined in 39 U.S.C. § 102(5)." 39 U.S.C. § 404(e)(1). In turn, a postal service, as defined in 39 U.S.C. 102(5), "refers to the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other function ancillary thereto." Thus, by definition, only two types of services are provided by the Postal Service: those that are postal services and those that are nonpostal services.

A preliminary, yet central, issue left unresolved by the PAEA is the definition of the word "service" as used in the phrase "nonpostal service." The Postal Service contends that only a few things were intended by the PAEA to be viewed as services. Other participants contend that "service" should be given its normal, broad definition.

The Commission concludes that, for purposes of this proceeding, a service is (1) an ongoing activity, (2) of a commercial nature, (3) offered to the public, (4) for purposes of financial gain.¹

Against this benchmark, the Commission reviewed each revenue-generating activity as follows:

- Does it constitute a service? If not, the inquiry is at an end since the activity is not subject to review under 39 U.S.C. § 404(e).
- If it is a service, is it postal or nonpostal?
- If postal, a proceeding to add the service to the Mail Classification Schedule is required.
- If nonpostal, was the service offered on December 20, 2006? If not, it is not subject to this review. If so, it is subject to review.
- If nonpostal, was it offered as of January 1, 2006? If not, it may not lawfully continue.
- If nonpostal and subject to review in this proceeding, should it be authorized to continue taking into account (a) the public need for the service, and (b) the private sector's ability to meet that need?
- If not authorized, the service may not be offered.

¹ In this context, financial gain encompasses remuneration established by or with the agreement of the Postal Service.

- If authorized to continue, should it be designated as a market dominant, competitive, or experimental product?

This process implements 39 U.S.C. § 404(e) in reasoned fashion, permitting the Postal Service to continue to transact its core business without cumbersome procedures, while bringing regulatory oversight to what has long been a source of contention, namely, pre-PAEA commercial, nonpostal ventures.

The Commission finds that 26 of the 47 revenue-generating activities identified by the Postal Service are not services under the above definition and not subject to review under 39 U.S.C. § 404(e). The rationales for these findings are provided in Chapter VII of this Order.

The Commission finds that 6 revenue-generating activities meet the definition of postal services. The Postal Service shall within 60 days make the appropriate filing under 39 U.S.C. § 3642 to add these items to the Mail Classification Schedule. The rationales for these findings are provided in Chapter IV of this Order.

The Commission finds that 15 revenue-generating activities meet the definition of nonpostal services. Of these, 1 was not offered on January 1, 2006 and may not continue. The rationales for these findings are provided in Chapters V and VI of this Order.

The Commission authorizes the 14 remaining nonpostal services to continue. Of these, 7 are market dominant, 7 are competitive, and none is experimental. 39 U.S.C. § 404(e)(5). The rationales for these findings are provided in Chapters V and VI of this Order.

Chapter I: Introduction

For those nonpostal services authorized to continue, the Commission will initiate a rulemaking proceeding to address the scope and extent of the regulation of such services under title 39.

The Commission finds that the record is not sufficiently developed in two areas: the licensing of Mailing & Shipping services, and the warranty repairs program. The Commission will grandfather those services pending the outcome of Phase II of this proceeding. The rationales for this finding are discussed in Chapter VI of this Order.

II. BACKGROUND

On December 20, 2007, the Commission initiated this proceeding to fulfill its responsibilities under 39 U.S.C. § 404(e)(3), adopting a procedural schedule which, among other things, directed the Postal Service to submit a sworn statement by no later than March 19, 2008, “identify[ing] and provid[ing] a complete description of each nonpostal service offered by the Postal Service on the date of enactment of the PAEA.”²

On March 19, 2008, the Postal Service filed Statement of Tina M. Lance on Behalf of the United States Postal Service (Lance Statement), and United States Postal Service Notice of Submission of Sworn Statement on “Nonpostal Services” Pursuant to 39 U.S.C. § 404(e) (March 19 Notice). The Lance Statement discusses five nonpostal services, offered on January 1, 2006, which the Postal Service proposes it be authorized to continue (“grandfathered”) pursuant to 39 U.S.C. 404(e)(2). Lance Statement at 12. The five nonpostal services are passport photo service; photocopying service; notary public service; stored value cards; and official licensed retail products. The Postal Service proposes that these five nonpostal services be added to the Mail Classification Schedule (MCS) and be classified as competitive products. Postal Service Notice at 3-4.

Following the Postal Service’s initial filing, the Public Representative moved to compel a more complete listing of nonpostal services. In Order No. 74, the Commission directed the Postal Service to file a complete listing and comprehensive description of each nonpostal service including all existing activities (contracts, arrangements, or

² PRC Order No. 50, Notice and Order Concerning Review of Nonpostal Service, December 20, 2007, at 2 (footnote omitted) (Order No. 50). The “complete description” was to include the current status of each nonpostal service, the Postal Service’s proposed classification of each service it believes it should continue to offer (as market dominant, competitive, or experimental), and a sworn statement by a knowledgeable person (or persons) addressing, at a minimum, the public need for each such service. *Id.* at 2. A more detailed discussion of the procedural history is set forth in Appendix II to this Order.

however characterized) that generate revenues or compensation regardless of the statutory authority claimed for the agreements.³ In response to the Commission's directive, on June 9, 2008, the Postal Service filed a comprehensive listing and descriptions with two attachments listing general ledger accounts with FY 2006 and FY 2007 annual revenues for all revenue-generating activities that are not postal services.⁴ Subsequently, it filed an additional response which, among other things, requested that Customized Postage be classified as a "postal service" and that Electronic Postmark (EPM) be continued as a grandfathered nonpostal service.⁵ Further Response to Order No. 74 at 3, 6. Concurrently, it filed sworn statements by five individuals in support of its requested treatment of the various activities.⁶

On July 30, 2008, three parties submitted statements responsive to the Postal Service filings. American Stamp Collectibles, Inc., (ASC) through the statement of Charles P. Naumoff, supports continuation of both the Official Licensed Retail Product (OLRP) program and the offering of philatelic products and services.⁷ DigiStamp, Inc. (DigiStamp), through the statement of Rick Borgers, opposes the continuation of the

³ PRC Order No. 74, Order Granting Motion to Compel and Revising the Procedural Schedule, April 29, 2008 (Order No. 74).

⁴ Initial Response of the United States Postal Service to Order No. 74, June 9, 2008 at 1-2 (Response to Order No. 74).

⁵ Further Response of the United States Postal Service to Order No. 74, and Notice of Filing of Sworn Statements, June 23, 2008. (Further Response to Order No. 74).

⁶ Statement of Alice VanGorder on Behalf of the United States Postal Service (VanGorder Statement); Statement of Patrick R. Donahoe on Behalf of United States Postal Service (Donahoe Statement); Statement of Thomas J. Foti on Behalf of the United States Postal Service (Foti Statement); Statement of Margot A. Myers on Behalf of the United States Postal Service (Myers Statement); and Statement of Pranab M. Shah on Behalf of the United States Postal Service (Shah Statement), all filed on June 23, 2008. Two supplemental exhibits to the statement of Pranab Shah were filed: Notice of the United States Postal Service of Supplemental Exhibit to Statement of Pranab Shah, June 24, 2008, and Motion of the United States Postal Service for Leave to Supplement Further the Statement of Pranab Shah, July 28, 2008.

⁷ Statement of Charles P. Naumoff on Behalf of ASC, Inc., July 30, 2008 (Naumoff Statement).

Electronic Postmark service.⁸ Adam Grossman, on Behalf of Epostmarks, Inc. (Epostmarks) endorses EPM and argues that there is a public need for it, which can not be met by the private sector.⁹

In lieu of a statement, Stamps.com submitted a response stating its position on, among other things, Customized Postage and EPM.¹⁰

Three reply statements were filed. DigiStamp and Epostmarks comment on one another's initial comments on EPM.¹¹ Microsoft Corporation filed comments in support of EPM.¹²

Initial and reply briefs were filed on September 10, 2008 and September 30, 2008, respectively.

Subsequent to the submission of briefs, numerous miscellaneous motions, and pleadings have been filed. These are addressed in greater detail in Appendix II to this Order. In Order No. 126, the Commission granted, in part, Pitney Bowes Inc. Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, filed October 15, 2008 (Pitney Bowes Motion to Compel), and directed the Postal Service to file detailed supplemental information regarding its commercial trademark license

⁸ Statement of Rick Borgers on Behalf of DigiStamp Inc., July 30, 2008 (Borgers Statement).

⁹ Statement of Adam Grossman on Behalf of Epostmarks, Inc., July 30, 2008 (Grossman Statement).

¹⁰ Response [of Stamps.com], July 30, 2008.

¹¹ Supplemental Statement of Rick Borgers on Behalf of DigiStamp Inc. (Supplemental Statement of Rick Borgers), and Rebuttal Statement of Adam Grossman on Behalf of Epostmarks, Inc., both filed on August 20, 2008 (Rebuttal Statement of Adam Grossman).

¹² Reply Comments of Maxim Lesur, Worldwide Postal Industry Managing Director for Microsoft Corporation, August 20, 2008, at 2 (Microsoft Reply Comments).

agreements and the products (or services) offered.¹³ The Postal Service responded on November 17, 2008 with a detailed listing of its licenses and a general description of its licensing practices and provisions, including the degree of control the Postal Service exercises over its licensees.¹⁴ Several parties filed comments in opposition to the Postal Service's licensing program.¹⁵

¹³ PRC Order No. 126, Order Granting, In Part, Pitney Bowes Inc. Motion to Compel, November 3, 2008 (Order No. 126).

¹⁴ Response of the United States Postal Service to Order No. 126 Regarding Licensing Agreements and Notice of Filing of Sworn Statement, November 17, 2008 (Response to Order No. 126). With its response, the Postal Service filed the sworn statement of Gary A. Thuro, Postal Service Manager of Licensing.

¹⁵ Public Representative Response to Order No. 126: Supplemental Briefing on Licensing Agreements (Public Representative Response to Order No. 126); Pitney Bowes Inc. Comments on United States Response to Order No. 126 Regarding Licensing Agreements (Pitney Bowes Response to Order No. 126), both filed November 24, 2008.

III. SCOPE OF REVIEW

The PAEA amended the Postal Reorganization Act (PRA), Pub. L. 91-375, 84 Stat. 719, 39 U.S.C. §§ 101 *et seq.* by, among other things, limiting the Postal Service's authority to provide nonpostal services to grandfathered nonpostal services that the Commission, upon review, permits to continue. 39 U.S.C. § 404(e). Unlike the PRA, the PAEA defined the terms "postal service" and "nonpostal service." The term "postal service" refers to the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto[.]” 39 U.S.C. § 102(5). “[T]he term ‘nonpostal service’ means any service that is not a postal service as defined under section 102(5).” 39 U.S.C. § 404(e)(1). The inclusion of these definitions in the statute suggests that the Postal Service is limited to providing two types of service, postal or nonpostal, which, as defined, are mutually exclusive.

The Postal Service contends that the universe of nonpostal services that are subject to review in this proceeding consists solely of the six grandfathered nonpostal services it has identified and seeks to continue. To reach this conclusion, it construes 39 U.S.C. § 404(e) in a manner that defeats its very purpose. More specifically the Postal Service contends that the scope of review under 39 U.S.C. § 404(e) is limited to “‘nonpostal services’ which had previously been authorized by the power granted under former section 404(a)(6)....” Postal Service Brief at 14; see *also* March 19 Notice at 3 claiming that the scope of review is limited to “services that are ‘nonpostal’ within the meaning of former section 404(a)(6)....”¹⁶

¹⁶ Very early in this proceeding, the Postal Service asserted that neither section 102(5) nor section 404(e) imposes a limit on its authority to provide a third type of service, which it characterizes as “not postal.” *Id.* The argument that there is another type of service other than the two specific services enumerated by the PAEA is unpersuasive. The review mandated by section 404(e) can be accomplished to address those commercial, nonpostal services that have historically raised concerns without impairing the Postal Service's ability to operate under the statute.

The Postal Service's interpretation of 39 U.S.C. § 404(e) is flawed. It ignores the fundamental purpose underlying 39 U.S.C. § 404(e). For more than a decade prior to the passage of the PAEA, the Postal Service engaged in numerous commercial ventures which it characterized as "nonpostal" and which it claimed were not reviewable under the Postal Reorganization Act by the Postal Rate Commission. The various postal reform bills considered prior to passage of the PAEA all provided for restrictions on or regulation of nonpostal services.¹⁷ The approach embodied in the PAEA defines the terms "postal service" and "nonpostal service," eliminates the Postal Service's authority to provide new nonpostal services, requires the Commission to review existing nonpostal services, and directs the Commission to determine which of those services may continue. Congressional intent is clear. The Postal Service is barred from offering new nonpostal services, and the review under 39 U.S.C. § 404(e) is to be comprehensive. Under the PAEA, the Postal Service is not free to offer, under the guise of separate statutory authority, essentially the same commercial nonpostal services which Congress curtailed in 39 U.S.C. 404(e).

Several parties reach the same conclusion, noting that, if adopted, the Postal Service's interpretation of the PAEA would enable it to evade the very review the PAEA requires the Commission to conduct, and thus would allow it to continue to engage in an unfettered variety of commercial nonpostal activities contrary to Congress' express intent.¹⁸

¹⁷ H.R. 22, for example, eliminated the Postal Service's authority to provide nonpostal services. See H. Rept. 108-66, Part 1, H.R. 22, April 28, 2005 at 45 ("Section 102 declares that the Postal Service's authority to offer products and services is limited to postal services.").

¹⁸ PostCom *et al.* Response to Pitney Bowes Motion to Compel; Hasler and Neopost Response to Pitney Bowes Motion to Compel; and Public Representative Response to Pitney Bowes Motion to Compel.

A. Commercial Nonpostal Services are Subject to Review Under Section 404(e)

Under 39 U.S.C. 404(e)(3), the Commission is charged with reviewing each nonpostal service offered by the Postal Service on December 20, 2006 and determining, based on public need and the private sector's ability to meet that need, whether that service shall continue.

As noted above, the terms "postal service" and "nonpostal service" are defined in a mutually exclusive manner. Any service that is not a postal service is a nonpostal service. In Order No. 74, the Commission found the Postal Service's response to Order No. 50 inadequate and directed it to file "a complete listing and comprehensive description of each nonpostal service provided as of December 20, 2006, including all existing agreements (contracts, arrangements, or however characterized) that generate revenues (or for which the Postal Service otherwise receives compensation) regardless of the statutory authority claimed for such agreements." Order No. 74 at 14. In its Brief, the Postal Service correctly characterizes the objective of Order No. 74, namely, to develop a complete record on nonpostal services by requiring information on all the Postal Service's revenue-generating activities.¹⁹ Implicitly, this directive defines the term "service" broadly, a prerequisite in light of the Postal Service's response to Order No. 50 to ensure that the Commission's review under 39 U.S.C. § 404(e) would be fully informed.²⁰

Several parties take issue with the Postal Service's interpretation of 39 U.S.C. § 404(e) and its assertion that, for purposes of Commission review under that section,

¹⁹ In its March 19 Notice, the Postal Service used the phrase "revenue-producing transactions." March 19 Notice at 28.

²⁰ In response to a Postal Service request for clarification, the Commission indicated that Order No. 74 "represents [its] preliminary views" and that it "has not reached definitive conclusions regarding the jurisdictional nature of any of the activities undertaken by the Postal Service." Order No. 74 at 2-3.

there is a third category of services which is neither postal nor nonpostal. See Valpak Brief at 5; Public Representative Brief at 8; Pitney Bowes Motion to Compel at 7-8; PostCom *et al.* Response to Pitney Bowes Motion to Compel²¹ at 3-4; and Hasler and Neopost Response to Pitney Bowes Motion to Compel²² at 2-3; see also PostCom *et al.* Brief at 7-8; and Pitney Bowes Inc. Response to Order No. 126 at 5-9.

Valpak also finds fault with the standard used by the Commission in Order No. 74. It argues that the predicate underlying Order No. 74, that every revenue-generating arrangement executed by the Postal Service is either a postal service or nonpostal service, is overly broad. Valpak Brief at 6. Instead, Valpak argues that “[c]entral to section 404(e)’s definition of ‘nonpostal service’ is that it must be a service.” *Id.* To that end, it suggests that “the most relevant dictionary definition of ‘service’ would appear to be ‘the supplying...of utilities or commodities...required or demanded of the public.’” *Id.* Based on this definition, Valpak suggests that “only those activities of the Postal Service that are regularly made available to the public should be considered services.” *Id.*²³

Two parties address Valpak’s suggestion that the scope of 39 U.S.C. § 404(e) review should be tied to the concept of service. Notwithstanding that Valpak opposes the Postal Service’s interpretation of 404(e), the Postal Service sees similarities in their

²¹ Statement in Support of Pitney Bowes Inc.’s Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, October 22, 2008 (PostCom *et al.* Response to Pitney Bowes Motion to Compel).

²² Statement in Support of Pitney Bowes Inc.’s Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, October 22, 2008 (Hasler and Neopost Response to Pitney Bowes Motion to Compel).

²³ On brief, PostCom *et al.* argue that both the Postal Service and the Commission misread section 404(e)(5). PostCom *et al.* Brief at 9. Regarding the latter, PostCom *et al.* appear to assume that any continuing nonpostal services would be regulated by the Commission in the same manner as it regulates postal services. The bases for this assumption are unstated. PostCom *et al.* apparently read the phrase “shall be regulated under this title” in section 404(e)(5) as conferring a predominant role on the judiciary. As discussed below, the form of regulation to be applied to continuing nonpostal services will be the subject of a subsequent proceeding before the Commission. To the extent relevant, PostCom *et al.* may raise their concerns in that proceeding.

views. Postal Service Reply Brief at 8. Although it does not offer a specific definition of the term “service,” the Postal Service suggests that nonpostal services may be viewed as “products” and, as such, imbued with characteristics associated with postal products, *i.e.*, commercial products, offered to the public at rates established by the Postal Service. *Id.* at 8; *see also* Postal Service Brief at 21-22. Given that standard, the Postal Service contends that review under 39 U.S.C. § 404(e) would be limited since the term product, synonymous, in this instance, with the term “nonpostal service”, “does not apply to activities in which revenue is raised through mechanisms other than through rates that the Postal Service sets.” Postal Service Reply Brief at 8.

The Public Representative criticizes Valpak’s definition as too limited and argues that defining the term “service” may have implications for the regulatory treatment of postal services. Public Representative Reply Brief at 5-6. He contends that typically the term “service” is defined broadly, citing *Creameries of America v. Industrial Commission*, 98 Utah 571, 102 P.2d 300, 304, Utah 1940 (“In ordinary usage the term ‘services’ has a rather broad and general meaning. It includes any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed.”). Alternatively, the Public Representative offers Md. Com. Code Ann. § 11-201(g) (defining service, for purposes of the state antitrust law, as “any activity performed in whole or in part for the purpose of financial gain, and includes any sale, rental, leasing, or licensing for use.”) *Id.* at 6, n.13.²⁴

The Public Representative argues that the Commission need not adopt a general definition of the term “service”, but instead should review each of the nonpostal services

²⁴ In addition, the Public Representative suggests that the statutory definitions of the terms “postal service” and “nonpostal service” may be harmonized by tying the definitions to the term “functions,” which the Public Representative characterizes as the key definitional component of postal services. Thus, he suggests that if the Commission concludes that the term “service” should be defined, it should be defined as “profit seeking functions performed by the Postal Service to the benefit of the public.” *Id.* at 7.

at issue and, on a case-by-case basis, determine whether the activity is a service.²⁵ Alternatively, he suggests that if it is inclined to adopt a definition of the term “service” for purposes of 39 U.S.C. § 404(e)(1), the Commission should employ a balancing test, taking various statutory factors into account. *Id.* at 8-9.

Having reviewed the record in this proceeding, the Commission is persuaded that not every Postal Service revenue-generating activity (that is not a postal service) is subject to review under 39 U.S.C. § 404(e) as a nonpostal service. The PAEA does, as the Postal Service recognizes, “lend itself to the view that all ‘services’ that are not ‘postal’ in nature must be considered a ‘nonpostal service’ subject to review and possible termination under section 404(e).” Postal Service Reply Brief at 15. As several parties note, however, treating all “not postal” revenue-generating activities as falling within the ambit of section 404(e) would encumber Postal Service operations without serving any pressing regulatory prerequisite.²⁶ The Postal Service offers a wide variety of services, some to the public, some not. While most of these activities generate revenues, on review, it is apparent that not every one raises a concern that the Postal Service is engaged in an activity (offering a service or holding itself out to the public) unrelated to its core responsibilities. Thus, the Commission’s task is to implement 39 U.S.C. § 404(e) in a manner that reflects the statute, Congressional intent, and the realities of the Postal Service’s operations.

Valpak’s and the Public Representative’s focus on the term “service” has been particularly helpful in the Commission’s deliberations. Given the sweeping statutory definition of nonpostal services, the Commission looked for guidance to the purpose underlying section 404(e)’s mandated review. The legislative history (discussed below)

²⁵ *Id.* In his brief, the Public Representative grouped the nonpostal services at issue in this proceeding into 13 categories. See Public Representative Brief at 24-35.

²⁶ See, e.g., Valpak Brief at 8.

is clear that the Commission review under section 404(e) encompasses, at a minimum, nonpostal commercial, activities undertaken by the Postal Service under the PRA.²⁷

To frame its review under 39 U.S.C. § 404(e), the Commission identified four features common to nonpostal services (regardless if styled as activities, products, programs, or initiatives) available from the Postal Service prior to enactment of the PAEA. These features are (1) that the activity be regular or ongoing; (2) that it be of a commercial nature; (3) that it is offered (or available) to the public, including where the Postal Service holds itself out as offering the service or product; and (4) that it is for the purpose of financial gain. Accordingly, for purposes of its review under 39 U.S.C. § 404(e), the Commission employed the following definition of “service”: Any ongoing, commercial activity offered to the public for the purpose of financial gain.²⁸

This definition is broader than that suggested by the Postal Service, yet more narrow than those offered by the Public Representative. It recognizes that the motivating Congressional concern was with Postal Service commercial activities, as shown by Pitney Bowes. It does not extend to irregular or one-time events that may occur on an ad hoc basis, to things not offered to the public, or to activities where the Postal Service does not set, or negotiate, the price. It fairly reflects the essential elements of the Postal Service’s pre-PAEA non-core activities that inspired section 404(e). Stated otherwise, the review mandated by 39 U.S.C. § 404(e), as implemented by the Commission, encompasses all commercial, nonpostal services that gave rise to Congressional concerns without impinging on the Postal Service’s core responsibilities.

²⁷ For a review of the legislative history, see Chapter III.B, *infra*; see also Pitney Bowes Response to Order No. 126, Appendix A.

²⁸ The Public Representative expresses concern that any definition of the term “service” may have regulatory implications for the term “postal service.” Public Representative Reply Brief at 5-6. Defining “service” for the purposes of implementing section 404(e) does not affect the meaning of the term “postal service,” which is defined by statute.

Based on this definition of “service,” the Commission reviewed each revenue-generating activity using the decision tree identified in Chapter I. This process implements section 404(e) in reasonable fashion, permitting the Postal Service to continue to transact its core business without cumbersome procedures, while bringing regulatory oversight to what has long been a source of controversy, namely, pre-PAEA commercial, nonpostal ventures.²⁹

B. The Legislative History Confirms that Review under Section 404(e) Extends to All Commercial Non-Core Activities

The Postal Service argues that there is a third category of services that are neither nonpostal nor postal which is exempt from review under 39 U.S.C. § 404(e). It asserts that it may offer these “not postal services” pursuant to separate statutory authority.³⁰ The entire history of postal reform legislation belies that claim. As discussed above, while some revenue-generating activities may not be services for purposes of review under 39 U.S.C. § 404(e), no revenue-generating activity is exempt from review by dint of the alleged previous authority for such activity.

The legislative history of the PAEA itself is sparse. No committee or conference reports were issued for the enacted bill. Postal reform legislation, however, has an extensive (11-year) legislative history that informs the Commission’s conclusion that 39 U.S.C. § 404(e) applies to all commercial nonpostal (non-core) services. The legislative history demonstrates growing Congressional concern over, and various legislative solutions for, Postal Service services and products unrelated to its core business of providing postal services to the Nation. Thus, as outlined below, the reform

²⁹ For those nonpostal services authorized to continue, the Commission intends to commence a rulemaking proceeding to address the scope and extent of the regulation of such services under title 39, 39 U.S.C. § 404(e)(5). See Chapter VIII, *infra*.

³⁰ March 19 Notice at 3.

efforts segued from bills that initially did not address nonpostal services, to intervening bills that either restricted nonpostal services, to those offered under former section 404(a)(6) or eliminated them entirely to finally the PAEA, which, as noted, defines postal service and nonpostal service in a mutually exclusive manner, permits grandfathering but directs the Commission to review existing nonpostal services to determine which shall continue subject to regulation under chapter 36 of title 39.

The following legislative history demonstrates that the series of legislative initiatives steadfastly focused on the Postal Service's core mission, while eliminating or severely limiting the Postal Service's authority to offer nonpostal services. In the end, the compromise embodied in the PAEA provides an opportunity for the Postal Service to continue to provide existing services for which there is public need that can not be met by the private sector.³¹

The relevant history of postal reforms begins in 1996 with the introduction of H.R. 3717 in the 104th Congress. While that bill did not address nonpostal services, the issue was raised during hearings where concerns were expressed about certain nonpostal products such as phone cards.³²

During the 105th Congress, H.R. 22 was introduced and was substantially identical to H.R. 3717.³³ Although no action was taken on the bill, concern over the Postal Service's offering of nonpostal services heightened giving rise to a request from

³¹ Pitney Bowes provides a useful overview of the proposed postal reform legislation during this period. See Pitney Bowes Response to Order No. 126 at 19-30.

³² Hearing on September 26, 1996. House Government Reform and Oversight Committee's Subcommittee on the Postal Service Subcommittee. *Postal Service Reform: Hearing of the Postal Service Subcomm. of the H. Govt. Reform Comm.*, 104th Cong. 16-17 (1996). (Testimony of Charmaine Fennie). The first bill, H.R. 3717, was introduced in June 25, 1996.

³³ Postal Reform Act of 1997, H.R. 22, 105th Cong. (1st Sess. 1997).

Representative McHugh that the (then) General Accounting Office review the Postal Service's activities beyond its core services.³⁴

H.R. 22 introduced in the 106th Congress brought the issue of the Postal Service's core mission to the forefront for the first time.³⁵ The bill is notable in several respects. For the first time, the terms "postal service" and "nonpostal service" were defined. Second, nonpostal service was defined by reference to former section 404(a)(6) to mean "any product or service offered by the Postal Service (or that could have been offered by the Postal Service under section 404(a)(6), as last in effect before the enactment of the Postal Modernization Act of 1999) that is not a postal product."³⁶ Third, the bill included a grandfather provision limiting it to nonpostal services offered before January 1, 1994, and barring the Postal Service from offering any future nonpostal services except via a private law corporation.³⁷

Growing concern over the Postal Service's nonpostal service activities and their potential impact on postal customers was evidenced during hearings on H.R. 22. The dual concerns that emerged were a need to protect mailers from underwriting nonpostal activities through the postal monopoly and to ensure a level playing field in nonpostal

³⁴ U.S. Gen. Accounting Office, U.S. Postal Service: Development and Inventory of New Products, 3-4 (1998) ("Some private sector companies have also complained about the Service's entry into nontraditional postal markets. They were concerned that the Postal Service could use its governmental status to an unfair advantage when introducing products that compete with private sector companies.").

³⁵ Postal Modernization Act of 1999. H.R. 22, 106th Cong. (1st Sess. 1999).

³⁶ H.R. 22, 106th Cong. § 205 (1999).

³⁷ Hearings examining the provisions for a private law corporation for future nonpostal services indicated agreement, but for different reasons, that a private law corporation was not a desirable means of overseeing future nonpostal services. That proposal did not reappear in later bills. See, e.g., H.R. 22, *The Postal Modernization Act of 1999: Hearing of the Postal Service Subcomm. of the H. Govt. Reform Comm.*, 107th Cong. 106-16 (1999) (testimony of Frederick W. Smith and James Kelly).

markets entered by the Postal Service.³⁸ Subsequent bills proposed varying solutions to these dual concerns.

H.R. 4970 introduced in the 107th Congress eliminated the Postal Service's authority to provide nonpostal services, repealing section 404(a)(6) and modifying section 404 so as to preclude any special nonpostal or similar services.³⁹ The bill did not provide for grandfathering.

In the 108th Congress, bills introduced in the Senate, S. 1285 and S. 2468, included language identical to that included in H.R. 4970 concerning postal and nonpostal services.⁴⁰ The report on S. 2468 issued by the Committee on Governmental Affairs makes it clear that the proposed legislation was designed to both define the Postal Service's core responsibilities and limit its activities to postal services.

"To further this focus on core mail products, the Postal Service will not be permitted to offer nonpostal products except in cooperation with other government agencies, for example, sale of federal migratory bird hunting and conservation stamps or acceptance of passport applications."⁴¹

During the 108th Congress, the House pursued a different approach. H.R. 4341 defined the term "postal service", barred future nonpostal services, but grandfathered

³⁸ See, e.g., H.R. 22, *The Postal Modernization Act of 1999*: Hearing of the Postal Service Subcomm. of the H. Govt. Reform Comm., 107th Cong. 106-16 (1999) (testimony of Edward J. Gleiman).

³⁹ Postal Accountability and Enhancement Act, H.R. 4970, 107th Cong. (2nd Sess. 2002).

⁴⁰ See S. 1285, 108th Cong., section 102 (1st Sess. 2003); S. 2468, 108th Cong. Section 102 (2nd Sess. 2003). Neither of these bills included a grandfather provision.

⁴¹ See S. Rept. 108-318, August 25, 2004, at 6. This statement also gives credence to the scope of the term nonpostal by identifying intra-agency agreements as nonpostal services.

nonpostal services provided as of May 12, 2004.⁴² Significantly, this bill eliminated for the first time specific reference to 404(a)(6) when referring to ongoing or future nonpostal services. This bill was designed to clarify the Postal Rate Commission's jurisdiction and to limit the scope of the Postal Service's commercial activities to postal services and certain grandfathered nonpostal services.⁴³

Three postal reform bills were introduced during the 109th Congress. H.R. 22 similar to earlier bills, included a grandfather provision for special nonpostal or similar services provided by the Postal Service as of January 1, 2005, but barred any future nonpostal services.⁴⁴ The Government Reform and Oversight Committee's report echoes the report on the prior bill, H.R. 4341, that the principal purpose of the bill was to limit Postal Service activities to postal services.⁴⁵

In the Senate, S. 662 was introduced. It prohibited all nonpostal services except those provided pursuant to section 411.⁴⁶ This exception was also contained in predecessor bills from the 108th Congress.⁴⁷

⁴² H.R. 4341, 108th Cong. Section 102 (2nd Sess. 2004).

⁴³ See H. Rept 108-672, September 8, 2004, at 4-5. Again, the broad sweep of the term "nonpostal" is underscored by the Report, which indicates the bill was not intended to impact the Postal Service's ability to furnish government services pursuant to section 411 of title 39. *Id.* at 5.

⁴⁴ H.R. 22, 109th Cong. (1st Sess. 2005). As passed by the House, the bill provided, "Nothing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services, except that nothing in this subsection shall prevent the Postal Service from providing any special nonpostal or similar services provided by the Postal Service as of January 4, 2005." *Id.* at § 102.

⁴⁵ See H. Rept. 109-66, Part 1, H.R. 22, April 28, 2005, at 45.

⁴⁶ S. 662, 109th Cong. (1st Sess. 2005) ("Except as provided in section 411, nothing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services.").

⁴⁷ S. 2468, 108th Cong. § 102 (2nd Sess. 2004); H.R. 4341, 108th Cong. § 102 (2nd Sess. 2004).

H.R. 22 was passed on July 26, 2005 in the House, and S. 662 was passed in the Senate on February 9, 2006. The differences were resolved by resolution, resulting in H.R. 6407, which was passed by both Houses in early December 2006. The PAEA was enacted on December 20, 2006.

H.R. 6407 is noteworthy in several respects. First, it defines the terms “postal service” and “nonpostal service” in mutually exclusive fashion, thus unequivocally limiting the Postal Service to two types of services. Second, unlike Congress’ first effort to define the term “nonpostal service” (in H.R. 22 introduced in the 106th Congress), H.R. 6407 is not limited to “any product or service offered by the Postal Service (or *that could have been offered by the Postal Service under section 404(a)(6)....*”⁴⁸ In this context, the omission of any reference to section 404(a)(6) is telling since the definition is without limitation—nonpostal service encompasses any service that is not a postal service. Nor logically would there be a need for any limitation since H.R. 6407 directs the new regulator, the Postal Regulatory Commission, to review each nonpostal service offered by the Postal Service on the date of enactment and determine which shall continue subject to regulation under title 39.

In adopting this framework for postal reform, Congress requires the Postal Service to focus on its core responsibilities, while leaving it to the Commission to determine the scope of the Postal Service’s continuing grandfathered nonpostal services. Clearly, nothing in the PAEA or the history of postal reform suggests that Congress contemplated providing the Postal Service with a loophole to continue to engage in the same activities which caused Congress to bar all such future activities in the first place. Under 39 U.S.C. § 404(e), the scope of review of nonpostal services is

⁴⁸ H.R. 22, 106th Cong. § 205 (1st Sess. 1999) (emphasis added).

committed to the Commission. To that end, the Commission has implemented 39 U.S.C. § 404(e) consistent with Congress' intent in adopting that provision.⁴⁹

C. The Postal Service's Reliance on Former Section 404(a)(6) to Limit Review under Section 404(e) is Misplaced

Former section 404(a)(6) authorized the Postal Service to "provide, establish, change, or abolish special nonpostal or similar services." The Postal Service contends that review under 404(e) is limited to "'nonpostal services' within the meaning of former section 404(a)(6)" implicitly assuming that meaning was settled when clearly it was not.

Under the PRA, the Commission's jurisdiction extended only to postal services. It had no authority over nonpostal services. Nonetheless, given the Postal Service's interpretation that under former section 404(a)(6), it could engage in unlimited commercial, nonpostal activities, the Commission found it necessary in a series of cases to address the Postal Service's interpretation and its jurisdictional implications concerning postal services.⁵⁰ In evaluating the Postal Service's claims that it lacked authority under the PRA to consider services classified as nonpostal by the Postal Service, the Commission concluded, "[a]nalysis of the statute, legislative history, and precedent confirms that the Postal Service is not free to engage in unfettered

⁴⁹ The Postal Service's interpretation of section 404(4) recalls its interpretation of former section 404(a)(6) more than 30 years ago. The court in *Associated Third Class Mail Users v. U.S. Postal Service*, 405 F. Supp. 1109 (D.D.C. 1975) (*ATCMU*) rejected the Postal Service's claim that former section 404(a)(6) empowered it to prescribe fees for special services based on the authority to "provide, establish, change, or abolish special nonpostal or similar services." Among other things, the court notes that the Postal Service's interpretation "totally ignores the significance of the changes produced by the [PRA]."

⁵⁰ Under the PRA, the Postal Service argued its denomination of a service as nonpostal was determinative, and that the Commission lacked authority to determine the scope of its own jurisdiction, *i.e.*, to determine based on a complaint that a putative nonpostal service should properly be classified as a postal service. The Commission rejected the Postal Service's interpretation. See, *e.g.*, Docket No. RM2004-1, Notice and Order Concerning Proposed Amendment to the Commission's Rules of Practice and Procedure, November 12, 2004, at 18-28 (Order No. 1424).

commercial activities under the guise that they are nonpostal.” Order No. 1424 at 2. In that rulemaking, however, the Commission disclaimed any effect of its order on the lawfulness of the Postal Service’s nonpostal services. “Nothing in the proposed rule affects the lawfulness of Postal Service products or services that are *not* postal.” *Id.* at 3 (footnote omitted). “[T]he lawfulness of Postal Service’s nonpostal activities is not an issue before the Commission.” *Id.* at 30-31 (footnote omitted). Thus, the meaning of the term “nonpostal services” in former section 404(a)(6) was never adjudicated before the Commission or elsewhere.⁵¹ Accordingly, the assumption that its meaning is known and therefore should be used to limit the scope of review under 39 U.S.C. § 404(e) is unsound. What is clear, however, is that the term encompassed a wide variety of commercial services, programs, and products undertaken by the Postal Service without any regulatory review.

Moreover, the Postal Service’s historical characterization of nonpostal services, variously styled as initiatives, products, programs, and activities, belies any suggestion that section 404(e)’s review is limited to only the six nonpostal services it seeks to continue. Historically, the Postal Service interpreted former section 404(a)(6) broadly, rather than narrowly, as it now contends.

The Postal Service’s expansion into commercial, nonpostal services (products and activities) beginning in the 1990s gave rise to a number of proceedings before the

⁵¹ In Docket No. RM2004-1, in which the Commission proposed to codify the meaning of the term “postal service” for purposes of its rules, two participants asked the Commission to reconsider its previous determinations that nonpostal products and services may be commercial in nature. *Id.* at 13. In the process of evaluating their arguments, which were ultimately found to be unpersuasive, the Commission reviewed the history of the term “nonpostal service,” noting, among other things, that early on, it disclaimed jurisdiction over a variety of special user charges, including the sale of philatelic products, photocopying services, the sale of postal-related products, and vending machines. *Id.* at 15. Given its jurisdictional limits under the PRA, the Commission made it clear that it took no position on the Postal Service’s contention that it had authority (under the PRA) to engage in commercial, nonpostal services other than as related to commercial, communication services (or products) or those ancillary thereto which could, upon consideration, be classified as postal. *Id.* at 20, n. 67.

Commission⁵² and several reports by the General Accounting Office critical of those ventures.⁵³ As the Postal Service indicated in its 2002 Transformation Plan, it would “seek opportunities that minimize direct investment and leverage its strong brand and assets.”⁵⁴

For the most part, the Postal Service relied on section 404(a)(6) as authorizing these ventures. For example, in response to a petition filed in 2003 by Consumer Action, which requested the Commission initiate proceedings to consider the jurisdictional status of numerous unclassified services provided to the public by the Postal Service without prior Commission approval,⁵⁵ the Postal Service stated that “[c]ommercial nonpostal initiatives have existed for many years.”⁵⁶ Indeed, in a subsequent report in the same proceeding, the Postal Service characterized several of these various commercial “initiatives” in terms it now suggests are beyond the purview of section 404(e)’s review. For example, NetPost CardStore is described as a private sector service offered by TouchPoint with *Postal Service branding* pursuant to a

⁵² PRC Order No. 1128, Order Denying Motion of United States Postal Service to Dismiss Proceedings and Notice of Formal Proceedings, July 30, 1996; PRC Order No. 1239, Order Denying Motion of the United States Postal Service to Dismiss Complaint and Notice of Formal proceedings, May 3, 1999; Order No. 1424, *supra*; and Order No. 1455, *supra*.

⁵³ General Accounting Office Report, Development and Inventory of New Postal Products, GAO/GGD-99-15, November 24, 1998; General Accounting Office Report, Postal Activities and Laws Related to Electronic Commerce, GAO/GCD-00-188, September 7, 2000; and General Accounting Office Report, Update on E-Commerce Activities and Privacy Protections, GAO-02-79, December 21, 2001.

⁵⁴ United States Postal Service Transformation Plan, April 4, 2002, section 2.1.2, *Strategy 6: Develop New Features and Services*.

⁵⁵ See Docket No. *2003, Petition of Consumer Action Requesting that the Commission Institute Proceedings to (1) Review the Jurisdictional Status of 14 Specified Services and (2) Establish Rules to Require a Full Accounting of the Costs and Revenues of Non-Jurisdictional Domestic Services, October 15, 2002 (CA Petition). See *also* PRC Order No. 1388, January 16, 2004. The following are among the 14 unclassified services identified in the Petition: Liberty Cash, Online Payment Services, eBillPay, Pay@Delivery, USPS Send Money, NetPost Certified Mail, Electronic Postmark, Unisite Antenna Program, and First Class Phone Cards.

⁵⁶ Comments of the United States Postal Service on Consumer Action Petition, January 30, 2003, at 6 (Postal Service Comments on CA Petition).

February 2002 contract that enables consumers to create personalized greeting cards that are printed and mailed the next business day.⁵⁷ *Id.* at 7-8. NetPost Certified Mail is described as a private sector service offered through Certified Mail *through a link on the Postal Service's website* pursuant to a February 2002 contract allowing users to create a document and transmit it electronically to the Postal Service (at *www.usps.com*) along with a mailing list. For USPS eBillPay, an online payment service, the Postal Service noted that it retained *branding* and governance responsibilities. Moreover, regarding the latter service, the Postal Service specifically stated, "it was determined that the service [USPS eBillPay] is nonpostal, and does not require a filing with the Commission." *Id.* at 9.⁵⁸ That "admission" is telling because, like some of its current licensing arrangements, which it claims are not nonpostal services subject to review under 39 U.S.C. § 404(e), that service was outsourced to the licensee with the Postal Service branding.⁵⁹

As those services evolved over time, the Postal Service would occasionally contend that its nonpostal activities also implicated section 401 in various ways. See, *e.g.*, *id.* at 19. The point being apparently to suggest that, under the PRA, certain nonpostal services could in no way implicate the Commission's jurisdiction over postal

⁵⁷ See Docket No. *2003, Notice of United States Postal Service of Filing Report, Docket No. *2003, March 10, 2004, at 7 (Report on Nonpostal Initiatives).

⁵⁸ The Postal Service continues: "The same determination was made as to the two other services provided under a single alliance agreement, as listed below." *Id.* That alliance involved EPM, a service the Postal Service now seeks to classify as nonpostal.

⁵⁹ The Postal Service recognizes the purpose of section 404(e). "It is clear from this history that Congress intended section [404(e)] solely to eliminate the legal rationale used by the Postal Service to justify its past provision of commercial, nonpostal services to the public (specifically, former section 404(a)(6)." March 19 Notice at 17. Its attempt to recast its historical characterizations of these various commercial, nonpostal initiatives is unavailing. The services which it now contends are exempt from review are indistinguishable legally from those which it previously characterized as nonpostal or otherwise relied on branding or linking arrangements to effectuate the service. Under the Postal Service's theory, the elimination of its authority to engage in nonpostal services under former section 404(a)(6) leaves it free to engage in the very same commercial, nonpostal initiatives that caused Congress to eliminate the authority in the first place. Plainly, the PAEA does not contemplate that.

services. Whatever the purpose may have been, however, is irrelevant to the issue of the scope of review under 39 U.S.C. § 404(e). The concern that section 404(e) addresses is the provision by the Postal Service of commercial, nonpostal services, including, as the Postal Service sometimes styled them, initiatives, products, programs, and activities.

The PAEA eliminated the Postal Service's authority to provide new nonpostal services. It also defined the two types of services the Postal Service could lawfully provide. With that as the framework, 39 U.S.C. § 404(e) directs the Commission to review each grandfathered nonpostal service and determine which, if any, should continue. To be meaningful, that review must take into account all commercial, nonpostal services regardless of whatever putative authority the Postal Service may claim for offering them. Otherwise, the very activities that Congress sought to curb by rescinding the Postal Service's authority to engage in new commercial, nonpostal ventures may be perpetuated. In sum, the Postal Service's restrictive interpretation of 39 U.S.C. § 404(e) is unpersuasive.

IV. ACTIVITIES PROPOSED FOR CLASSIFICATION AS POSTAL SERVICES

The Postal Service seeks to add five previously unclassified services to the Mail Classification Schedule product list as postal services.⁶⁰ The five services are Address Management Services; ReadyPost; International Money Transfer Services; Greeting Cards; and Customized Postage. Preliminarily, the issues presented by this classification request are whether these are services and, if so, whether they are postal services or nonpostal services. Thus, it is appropriate to consider the Postal Service's request in this proceeding because if a service is determined not to be a postal service, the issues become whether as a nonpostal service it is eligible for grandfathering and whether it should continue. If, however, a service is determined to be a postal service, threshold issue is whether it can be added to the product list at this time.

PostCom *et al.* take issue with the Postal Service's request, particularly as it relates to Address Management Services, arguing that the request does not fall within the scope of this proceeding, and that it fails to follow procedures applicable to new products.⁶¹ Subsequently, PostCom *et al.* filed a motion to establish a separate docket to consider the Postal Service's request.⁶² Movants elaborate on their reply brief, arguing that the Postal Service's request fails to satisfy the requirements of 39 U.S.C. § 3642 and the Commission's rules for adding a new product to the product list. *Id.* at 2-4. They urge the Commission to establish a separate docket and to grandfather

⁶⁰ Initially, the Postal Service identified four services that it requested be classified as "postal services." March 19 Notice at 10. Subsequently, it added Customized Postage to that list. Further Response to Order No. 74 at 3; *see also* Foti Statement at 4-5.

⁶¹ PostCom *et al.* Reply Brief at 2, 5, 7-8.

⁶² Motion of PostCom *et al.* to Sever Consideration of the Postal Service's October 17 Filing into a Separate Docket for Consideration of a New Postal Product Listing, and Require Substantiation to Comply with the Postal Service Commission's Rules, December 5, 2008 (PostCom *et al.* Motion to Sever).

Address Management Services as market dominant pending the outcome of that proceeding. *Id.* at 5-6.

In reply to PostCom *et al.*'s Motion to Sever, the Postal Service references Order No. 74 contending that "it made the appropriate treatment of these services part of this proceeding."⁶³ The Postal Service characterizes Order No. 74 as indicating the Commission's intent "to consider these services as part of this proceeding." *Id.*⁶⁴

The Postal Service's reply is notable for what it does *not* say. It does not contest PostCom *et al.*'s central contention that it failed to comply with the statute and the Commission's rules applicable to new products. Instead, it points to Order No. 74 as the basis for considering its proposals. The Postal Service reads too much into Order No. 74.

The Postal Service's initial filing in this proceeding identified "a number of services not currently within the MCS (as proposed by the Postal Service in Docket No. RM2007-1) that fall comfortably within the definition of 'postal service,'...."⁶⁵ In that filing, the Postal Service identified four services which it thought should be classified as "postal services," stating that it "will take the appropriate actions, in the near future, to

⁶³ Response of the United States Postal Service to PostCom *et al.* Motion to Sever from this Proceeding the Consideration of those Previously Unregulated Services that the Postal Service Asserts are "Postal Services," December 12, 2008, at 3 (Response to Motion to Sever).

⁶⁴ On December 15, 2008, PostCom *et al.* moved to file a reply to the Postal Service's response. Motion of PostCom *et al.* for Leave to File Reply to December 12 Response of USPS in Opposition to Motion to Sever, December 15, 2008. Their motion was accompanied by their reply. The Motion for leave to file is denied.

⁶⁵ March 19 Notice at 7.

add them to the MCS.”⁶⁶ In Order No. 74, the Commission directed the Postal Service to file a comprehensive listing and description of all nonpostal services. Order No. 74 at 14. In light of the Postal Service’s initial filing referring vaguely to a “number of services” that could be reclassified as postal services, Order No. 74 afforded the Postal Service an opportunity to complement its comprehensive listing of nonpostal services by identifying any additional services it believed should be reclassified as postal services. This is not equivalent to the Commission initiating a proceeding, *sua sponte*, to add a new product to the product list. See 39 CFR § 3020.70 *et seq.* By providing the Postal Service with that opportunity, the Commission hoped to avoid the possibility that any current nonpostal service would not be reviewed in this proceeding.

The Postal Service did not perfect its request that these five previously unclassified services be added to the product lists. The PAEA requires the Postal Service to provide notice to be issued in the *Federal Register* when requesting to add a product to the MCS. 39 U.S.C. § 3642(d). The Postal Service has not issued that notice, nor has it complied with the requirements of the Commission’s rules, 39 CFR § 3020.30 *et seq.*

For purposes of this proceeding, therefore, the Commission will review the services to determine whether they are properly classified as nonpostal or as postal. For those found to be postal services, the Postal Service shall make the appropriate filings within 60 days to add them to the product lists. Pending the outcome of that new proceeding, each of the formerly unclassified services found to be a postal service shall be classified as a market dominant or competitive product as requested by the Postal

⁶⁶ *Id.* It did not file the proposed MCS language until October 17, 2008. See United States Postal Service Notice of Filing of Proposed Mail Classification Schedule Language for Four Products It Requests Should be Added to the Product Lists as Postal Services, October 17, 2008 (Notice of Proposed MCS Language).

Chapter IV: Activities Proposed for Classification
as Postal Services

Service. Such classification is subject to change, if appropriate, based on the record developed in the subsequent proceeding.

Because the Postal Service requests these five services be classified as postal services, it may be useful at the outset to outline the considerations that influence that determination. As noted above, the PAEA defines “postal service” to mean “the delivery of letters, printed mater, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto[.]” 39 U.S.C. § 102(5). Thus, if a service relates to any of these functions, broadly, the carriage of mail, it may properly be classified as a postal service. It may also be classified as a postal service if it serves “other functions ancillary” to the carriage of mail.

The term “ancillary” means auxiliary, subordinate, or subsidiary.⁶⁷ In Docket No. R76-1, the Commission confronted a similar issue concerning whether certain special services were postal services under the PRA. The Commission adopted the following standard:

Special postal services — that is, those which fall within the ambit of § 3622 — are services other than the actual carriage of mail but supportive or auxiliary thereto. They enhance the value of service rendered under one of the substantive classes by providing such features as added security, added convenience or speed, indemnity against loss, correct information as to the current address of the recipient, etc.

PRC Op. R76-1, Vol. I, at 266-267 (footnote omitted).⁶⁸

⁶⁷ <http://www.merriam-webster.com/dictionary/ancillary%20>.

⁶⁸ The Commission noted that carriage of mail encompasses collection, transmission, and delivery. “A special postal service is thus one which is ancillary to one or more of these steps.” *Id.* at 266, n.1.

In addition, the *ATCMU* decision provides guidance as well. In analyzing whether specific special services were jurisdictional, the court considered their relationship to the carriage of mail:

It is clear that nearly all of these other services are very closely related to the delivery of mail. The single possible exception is the selling of money orders, since they can be used equally as well without being delivered by mail. But it does seem that the vast majority of money orders sold at post offices are actually sent by mail. Therefore it appears safe to say that all of these services would be considered 'postal services' in ordinary parlance.

ATCMU, supra, at 1115.

That foregoing standards provide useful guideposts to apply the PAEA's definition as well. This is not to suggest that past is prologue. The PAEA establishes, for the first time, a statutory definition of the term "postal service." As a result, distinctions previously drawn under the PRA may need to be re-evaluated.

In support of its request, the Postal Service submitted statements which provide details of each service. Each of the five services is described below followed by a determination of its proper classification.

Address Management Services. The Postal Service provides two types of address offerings. See VanGorder Statement. Address Quality and Support services are designed to improve address quality and reduce costs for mailers and the Postal Service associated with undeliverable-as-addressed (UAA) mail due to errors in the

physical address.⁶⁹ The second offering, the Move Update program, enables business mailers to maintain current mailing lists and thereby reduce UAA volumes.⁷⁰

Address Management Services are designed to ensure that address elements and mailing lists are correct and current. VanGorder explains that these services “enable mailers to improve the quality of addresses on their mailpieces, and in some instances to qualify for postage discounts.” *Id.* at 5.

Like an existing special service, address correction service, Address Management Services are ancillary to the carriage of mail, enhancing both the delivery and sortation of mail. Thus, the Commission finds Address Management Services to be a postal service. Pending the outcome of the classification proceeding, Address Management Services will be classified as market dominant.⁷¹

ReadyPost[®]. ReadyPost is a Postal Service-branded line of shipping supplies designed for sale in postal retail locations to support mailing needs of Postal Service customers. See Myers Statement. Introduced in 2000, it consists of a selection of standard mailing cartons, specialty boxes, mailing tubes, mailing envelopes and a variety of packaging tapes and other shipping accessories. A decorative product line is available as well consists of mailing cartons, bubble mailers, mailing labels and licensed

⁶⁹ Postal Service Brief at 92-94. The Postal Service indicates that within the Address Quality and Support services, it provides other services such as the Address Information System which enhance address quality. *Id.* at 93-94.

⁷⁰ *Id.* at 95-96. The Move Update program includes NCOALINK (National Change of Address) service, FASTforward[®]MLOCR, ANKlink (Address Not Known) and Alternative Move Update Methods. VanGorder Statement at 7.

⁷¹ Pending the outcome of the subsequent classification proceeding, AEC Service, AMS API, and TIGER/ZIP + 4 File will be classified as competitive as requested by the Postal Service. Postal Service Brief at 96. In the classification proceeding, the Postal Service shall address all component parts of Address Management Services.

image shipping products. Each item depicts the ReadyPost brand and the Postal Service Corporate logo. These products are sold at approximately 32,000 postal retail locations. The program is supported by a contract with Hallmark Custom Marketing, Inc.

In Docket No. R76-1, the Commission considered whether various products such as packaging boxes, self-seal mailing wrap, and packaging materials which were being sold at selected postal facilities were postal services. While noting that the most obvious use of these “postal related products” is for mailing, the Commission concluded that such products were not postal services principally, it appears, based on the availability of similar products elsewhere. PRC Op. R76-1, Vol. II, App. F, at 20-21. Under the PRA, had the Commission determined such materials to be jurisdictional, it would have required the Commission to exercise its rate authority over such products. Moreover, the finding that they were not jurisdictional did not preclude the Postal Service from continuing to offer these postal-related products.

The PAEA casts these products in a new light. The Commission’s 1976 description of similar products as “postal related” is apt for ReadyPost. First, it is likely that most ReadyPost products are mailed. The Postal Service presents research showing that a large majority of ReadyPost purchases (71 percent) are for a single use. Meyers Statement at 3-4. Second, ReadyPost product lines, which are available in post offices, are designed to meet customers’ mailing needs. They offer customers a degree of assurance that such products will meet the packaging and labeling requirements of the Postal Service. Moreover, from the Postal Service’s perspective, use of approved packaging and labels should lower the Postal Service’s handling and transportation costs, e.g., through reduced breakage and ease of readability. Third, making these postal-related products available at retail outlets offers convenience to the customer and makes access to the mailstream easier. In sum, ReadyPost can reasonably be viewed as ancillary to the carriage of mail. Therefore, for the foregoing reasons, the

Commission finds ReadyPost to be a postal service. It will be classified as competitive subject to the outcome of the pending classification proceeding.

Greeting Cards. The Postal Service seeks to classify greeting cards and other stationery items, which it has been selling since at least as early as 1997, as postal services. Myers indicates that the products, such as note cards, greeting cards, and other stationery items, are sold in post offices and feature stamp designs and other postal intellectual property.⁷² Some are sold as philatelic items; others as part of the OLRP program.

The Postal Service states it has no plans to offer a full line of greeting cards, but believes that cards and stationery remain an important part of the retail product mix. Postal Service Brief at 99, citing Myers at 2. Myers highlights an integrated retail promotion featuring the Frank Sinatra commemorative stamp along with two Sinatra-themed song cards (greeting cards with a prerecorded music chip).⁷³ Such products are available online and at selected offices.

The Postal Service believes that a majority of these products are mailed. It references the Greeting Card Association which indicates that a majority of greeting cards, from all sources, are mailed. *Id.* at 2-3; Postal Service Brief at 100.

At bottom, the cards and related integrated retail promotions sold at retail facilities or online are designed to foster the use of the mails. The Postal Service represents that most cards are mailed. Greeting cards are a particularly valued form of personal communications commemorating special events in peoples' lives. In that

⁷² *Id.* at 2. Intellectual property, however, is not featured on every card.

⁷³ *Id.* The Sinatra cards, unlike most of the other products offered in the integrated retail promotion, do not feature any Postal Service intellectual property.

regard, greeting cards serve to bind the Nation together through personal correspondence, a basic function of the Postal Service. 39 U.S.C. § 101(a). In addition, greeting cards offer benefits similar to those ascribed to ReadyPost, e.g., customer convenience, and a degree of assurance that such products satisfy the Postal Service's processing requirements. Finally, no party objects to classifying greeting cards as a postal service.

For these reasons, the Commission concludes that, under the PAEA, greeting cards and stationery may be classified as a competitive postal service subject to the outcome of the pending classification proceeding.

This decision is necessarily limited in scope to the activities described by the Postal Service in its Response to Order No. 74. For example, the Postal Service identifies sales of a Frank Sinatra greeting card and CD as promoting the Frank Sinatra stamp. However, the Postal Store, accessible through the Postal Service website, appears to be selling a number of popular music CDs that are not obviously related to any stamp. Sales of CDs do not appear likely to be a postal service, and are not authorized as "greeting cards." The Commission recognizes that in an organization as large and complex as the Postal Service, it is possible for something to be inadvertently omitted when attempting to compile a complete list of activities. The Postal Service should again review its various retail programs and provide details of any omissions. The treatment of any omitted activities can be explored in the next phase of this case.

Customized Postage. Customized Postage was established in 2004 by the Postal Service as a means for the prepayment of postage. See 39 U.S.C. §§ 101, 404(a)(2). Customized Postage, which may be used in lieu of other forms of postage, is produced by private companies licensed by the Postal Service using PC Postage technology. Although not a postage stamp, Customized Postage includes a customer-supplied image and a state-of-the-art secure barcode that helps ensure protection of

Postal Service revenue. Foti Statement at 4; and Postal Service Brief at 101.

Customers of an authorized Customized Postage vendor may obtain Postal Service-authorized postage consisting of customer specific, customer-supplied images aligned with Postal Service-approved indicia of postage payment. The postage meter is a forerunner to Customized Postage.

Customized Postage providers must be an authorized PC Postage provider, authorized postage meter manufacturer or distributor, or a company affiliated with an authorized postage provider under conditions prescribed by the Postal Service to assure revenue security. Currently, the Postal Service has agreements with four authorized Customized Postage providers. Foti Statement at 4. The only revenue the Postal Service receives is in the form of a participation fee. The providers set the price paid by their customers, which is an amount greater than the face value of the postage required to mail the item. *Id.* at 4-5; Postal Service Brief at 102-103.

In its simplest terms, Customized Postage represents a form of postage prepayment, a core function of the Postal Service. See 39 U.S.C. §§ 404(a)(2) and (a)(5). In that regard, it is indistinguishable from the prepayment of postage via postage meters, a long-recognized special postal service. The payment of postage is a prerequisite to the carriage of mail. Without it, service is not possible. Accordingly, customized postage is a postal service. Given the Postal Service's licensing and oversight responsibilities regarding Customized Postage, it will be classified as market dominant subject to the outcome of the pending classification proceeding.

International Money Transfer Service. International Money Transfer Service (IMTS) enables customers to make payments or transfer funds to individuals or firms in foreign destinations. Payments may be made using hardcopy international money orders; electronic transfers are available at select postal facilities. The Postal Service

maintains that hardcopy money orders and electronic money transfers should be treated collectively as a single family of postal services.⁷⁴

Currently, the Postal Service offers hardcopy international money orders valued at up to a maximum of \$700 that can be cashed in 30 countries and an electronic transfer under the Dinero Seguro (or Sure Money) product name.⁷⁵ Shah believes that electronic IMTS complements Postal Service offerings, benefits from its core competencies, and fits within the existing product portfolio. *Id.* at 7. Among other things, he asserts that the existing retail infrastructure is in place to provide electronic IMTS. He also believes that electronic IMTS can contribute to global economic and social development by providing a vehicle for remitting funds securely and efficiently through the global postal infrastructure. Lastly, he states that electronic IMTS promotes mailing activities, noting that inbound electronic transfers may be paid out in domestic money orders which may be mailed. *Id.* at 5-7.⁷⁶

Domestic money orders have long been classified as a postal service. They represent the domestic counterpart to hardcopy international money orders, which the Postal Service has long provided. On the international front, the Postal Service indicates that it has provided an electronic transfer service, Dinero Seguro, since 1997. Under the PRA, of course, the Commission lacked jurisdiction over international postal services, and thus had no reason to address the status of such services. The PAEA

⁷⁴ Postal Service Brief at 103. Under the Universal Postal Union Postal Payment Services Agreement, electronic money transfers may be offered in cooperation with operators designated by their governments to fulfill the provisions of this agreement.

⁷⁵ The Postal Service indicates that it initiated Dinero Seguro service for electronic money transfers to Latin America in 1997. The current program is performed under an agreement with Bancomer Transfer Service, a private entity that has partnered with various institutions allowing for payout of Postal Service outbound money transfers to customers in Latin America. The program services 10 Latin America countries. Shah Statement at 6.

⁷⁶ In addition, he discusses UPU initiatives to expand electronic IMTS. *Id.* at 9-11.

changes that. On balance, given the Postal Service's extensive history in providing remittances to customers, the unique role that postal administration may serve in this area,⁷⁷ and that IMTS offered through postal networks is ancillary to hardcopy postal services, the Commission is persuaded that IMTS should be classified as a postal service.

It serves as both a complement and as an extension to the paper money order postal service that has long been recognized as a special service in the MCS. IMTS uses modern technology to extend and enhance the service that has been provided for many years. It would seem needlessly short-sighted to restrict the service solely to hardcopy form, one long recognized as a postal service, when the electronic alternative has long been provided and serves the same function. Furthermore, no participant has objected to the Postal Service's request to include IMTS as a postal service. Accordingly, the Commission finds that IMTS may be classified as a competitive postal service subject to the outcome of the pending classification proceeding.

⁷⁷ While niche players in the electronic IMTS market, posts may serve important public policies by providing services to underserved populations and contributing to global economic and social development. Shah Statement at 9-11.

V. ACTIVITIES PROPOSED TO BE GRANDFATHERED AS NONPOSTAL SERVICES

To determine whether a nonpostal service shall continue, the Commission must take into account two specific factors: the “public need for the service” and “the ability of the private sector to meet the public need for the service.” 39 U.S.C. § 404(e)(3). The term “public need” is not defined in the PAEA, nor does the legislative history shed any light on its intended meaning. No party suggests a definition for the term.

Depending on its context, the word “need” has several meanings, *e.g.*, as requisite or necessary, but also as a lack of something desirable or useful.⁷⁸ When coupled with the word “public,” it may also imply the demand for or the utility (usefulness) of the service provided.⁷⁹ Demand also appears to be a relevant consideration since the second factor goes to the private sector’s ability to meet that specific public need. In that regard, the Postal Service’s ubiquity would appear to be germane to the issue of public need. Demand for nonpostal services may vary based on geographic location. Alternatives may be available in some locations but not others. In addition, whether a service is customarily provided by businesses, is likely to improve the efficiency of postal operations, or is supported by a related government function may bear on whether it satisfies a public need. Thus, in assessing public need for a specific nonpostal service, the Commission will consider a variety of factors, *e.g.*, the demand for the service, its availability, its usefulness, whether it is a customary business practice, or serves the efficiency of operations.

⁷⁸ Webster’s Encyclopedic Unabridged Dictionary of the English Language, Portland House, New York (1989).

⁷⁹ The Commission does not read the term “public need” to mean whether, as a threshold matter, the government should provide the service. Had Congress intended such a meaning, surely it would have been more specific and would not have coupled it with the private sector’s ability to meet that need. In any event, the issue of what services government should provide is uniquely legislative in nature.

Chapter V: Activities Proposed to be Grandfathered
as Nonpostal Services

The second factor requires the Commission to consider the private sector's ability to meet the public need for the specific service. As with public need, the term "ability" is not defined in the statute, amplified by the legislative history, or defined by any party. While its definitional attributes include competence or capacity to act, the term, in context, appears to imply meeting the public's demand for the service. This meaning finds support from the very words used—"ability of the private sector *to meet* the public need." 39 U.S.C. § 404(e)(3)(B) (emphasis added). The need may be viewed as met if demand for that service is satisfied by the private sector's alternative. On the other hand, considerations other than demand may be pertinent. For example, public convenience, quality of service, availability and characteristics of alternatives, and economic impact may bear on this issue.

To fulfill its responsibility under 39 U.S.C. § 404(e)(3), the Commission has considered those factors relevant to both public need and the private sector's ability to meet that need. Where there is a dispute over the continuation of a particular nonpostal service, the Commission has reviewed the record developed by the parties in this proceeding. Where it finds the record to be inadequate, the Commission provides interested parties an opportunity to present additional support for their position in Phase II of this proceeding.

The Postal Service identifies the following six nonpostal services (products) which it proposes be grandfathered and classified as competitive products: passport photos service; photocopying service; notary public service; stored value cards; officially licensed retail products (OLRP); and Electronic Postmark (EPM) service. March 19 Notice at 3-4. Each is analyzed below. In brief, the Commission finds all but one, notary public service, to be a nonpostal service, and that of those, all but stored value cards are authorized to continue.

A. Passport Photo Service

The Postal Service offers passport application acceptance service pursuant to an inter-agency Memorandum of Understanding with the Department of State, dated 2001.⁸⁰ The service is offered at more than 6,000 post offices.⁸¹ As part of this effort, passport photo service also is offered for the convenience of applicants at more than 5,000 postal passport application acceptance sites. This number has increased in recent years. Some version of this service has been widely available since prior to January 1, 2006.

A nationwide fee of \$15 has been established for passport photos, and the availability of photo service is promoted on menu boards at the full-service counter. In setting this price, the Postal Service strives to use “convenience pricing” at a reasonable level in order to reflect the convenience provided to postal patrons who can engage in several related transactions at the post office. This tends, in practice, to be a price higher than at commercial alternatives. Representative prices obtained by the Postal Service from reviewing websites or direct inquiries include \$8.00 at major national drugstore chains; \$10.00 and \$13.50 at delivery service competitors of the Postal Service; and \$15.70 at a national specialty retail store chain. Passport photo services are not intended to under-price similar services that may or may not be commercially available; therefore, they are offered at a price disadvantage. The Postal Service has sold approximately 4.32 million photo sets to postal patrons. See Lance Statement at 2-4.

Plainly, passport photo service is a service. It does not qualify as a postal service. As a nonpostal service, it is eligible for grandfathering since it was offered as of

⁸⁰ The Lance Statement provides details about this service.

⁸¹ Passport application acceptance fees are set by the State Department. 22 U.S.C. § 214.

Chapter V: Activities Proposed to be Grandfathered
as Nonpostal Services

January 1, 2006. It is subject to review in this proceeding since it was also offered on December 20, 2006. Passport photo service qualifies as a nonpostal service since it is an ongoing, commercial activity offered by the Postal Service to the public for purpose of financial gain.⁸²

The record demonstrates there is a public need for the service. The Postal Service explains passport photo service is a benefit to customers in some smaller communities where there are fewer options available for having passport photos taken. In many locations, there is no other convenient alternative for customers to get the required photos. In areas with wide-ranging options, customers who are price conscious will be more likely to make an extra stop to acquire their photos at a lower price before going to the post office. Higher pricing by the Postal Service meets the needs of those postal customers for whom convenience is more important than price, while simultaneously avoiding direct price competition with potential private sector providers.

In a study conducted by Opinion Research Corporation,⁸³ 81 percent of residential customers and 78 percent of small business customers surveyed said that it is very or somewhat appropriate for the Postal Service to offer passport photo service. Residential customers find passport photo service more helpful than small business customers do. When asked to what degree is passport photo service helpful, 66 percent of consumers said “a great deal/somewhat” versus 40 percent of small business customers. This survey indicates there is a strong interest on the part of some postal patrons for this convenience.

⁸² Revenues for the passport photo service program were \$64.767 million in FY 2007, and \$39.377 million in FY 2006. See Response to Order No. 74 at 16 (referencing Attachment 2, GL Acct. 43420.241(Passport Photo Services) Excel spreadsheet.

⁸³ See Lance Statement, Appendix B.

No party addressed the private sector's ability to meet this public need.

Based upon the information in the record, and taking into account the public need for the service and the lack of adequate photo services in many communities and no indication of the private sector's ability to meet the public need, the Commission finds passport photo service should be authorized to continue as a nonpostal service and classified as competitive.

B. Photocopying Service

The Postal Service provides photocopying services in two ways. In some locations, coin-operated photocopiers are provided under local contracts with commercial vendors.⁸⁴ In addition, beginning in 2005, the Postal Service's Information Technology (IT) organization installed multi-function printer/copier/fax machines in facilities with sufficient demand to justify their placement. Some postal locations also instituted their own photocopying service using these IT-provided copiers. *Id.*

On a national level, the Postal Service calls for a minimum per-page fee of 15 cents. While it lacks comprehensive pricing information, the Postal Service represents that on a national level, it calls for a minimum per-page price of 15 cents, which Lance indicates is greater than competitors appear to charge. *Id.*

⁸⁴ *Id.* at 5. Lance indicates that such contracts are selected on a competitive basis.

Chapter V: Activities Proposed to be Grandfathered
as Nonpostal Services

Photocopying service is a service and is not a postal service. Photocopying service qualifies as nonpostal service since it is an ongoing, commercial activity offered by the Postal Service to the public for purpose of financial gain.⁸⁵ As a nonpostal service, it is eligible for grandfathering since it was offered as of January 1, 2006. *Id.* at 4-5. It is subject to review in this proceeding since it was also offered on December 20, 2006.

The record demonstrates that there is a public need for photocopying service. It is a convenience for customers who need to make copies of documents before mailing. Smaller (generally rural) communities and underserved areas may not have alternative photocopying service. Photocopying service is helpful to those postal patrons mailing tax returns, paying bills, or who want a record of any other communication being mailed.

In the study conducted by Opinion Research Corporation, 74 percent of residential customers and 68 percent of small business customers surveyed said it is very or somewhat appropriate for the Postal Service to offer photocopying service. *Id.* at 6.

No party addressed the private sector's ability to meet this public need.

Based upon the information in the record, and taking into account the public need for the service and the lack of any record evidence regarding the ability of the private sector to meet the public need (whether managed by the Postal Service or by contract

⁸⁵ The Postal Service has no firm estimate of photocopy revenue for FY 2006 and FY 2007. The general ledger accounts are not consistently applied. Lance indicates that in FY 2007, the Postal Service share of revenue from coin-operated photocopier contracts was \$1,766,894. *Id.* at 5; see also Response to Order No. 74 at 17.

vendors), the Commission finds photocopying service should be authorized to continue as a nonpostal service and classified as competitive.⁸⁶

C. Notary Public Service

Notary Public assistance has been available to the public in some post offices since long before January 1, 2006, and continues to be provided. *Id.* The Postal Service offers notary public service in Alaska, where all postmasters have the authority to perform functions of a notary public. *Id.*; *see also* 39 CFR § 222.6(c). The Postal Service also permits its employees who are notaries public to provide that service in a small number of post offices in other states. Postal Service Reply Brief at 70. Lance indicates that notary public service is available at 264 post offices, of which 72 are located outside of Alaska. Lance Statement at 7.

Current postal regulations provide that no officer or employee may charge or receive compensation for acting as a notary public during the hours of the notary's service to the Postal Service, including the lunch period. 39 CFR § 222.6(c)(2).

Notary public service is a service; it is not a postal service. While the service may be characterized as an ongoing (if only in limited areas), commercial activity offered to the public, it is not performed for purposes of financial gain.⁸⁷ As noted, regulations prohibit officials and employees from charging a fee or receiving compensation for providing notarial services during their on-duty hours. Thus, the

⁸⁶ For purposes of this conclusion, the Commission does not distinguish photocopying by whether the service is provided by a vendor (via a lease agreement) or directly by the Postal Service employees. As discussed below, where the Postal Service acts as a lessor, it is offering a service which must be reviewed to determine if it is nonpostal and therefore subject to review under section 404(e).

⁸⁷ The Postal Service did not record in the general ledger accounts any revenues from notary public activities for FY 2006 and FY 2007. See Response to Order No. 74 at 17.

Commission concludes that it is not a nonpostal service for purposes of review under 39 U.S.C. § 404(e).⁸⁸

On brief, the Postal Service characterizes notarial services as State programs, indicating that it requested authority for notarial services grandfathered only out of an abundance of caution to ensure that it may continue offering notary assistance in the future. Postal Service Reply Brief at 70. The Commission's finding does not preclude the Postal Service from continuing its current practice regarding notary public services.

D. Stored Value Cards

The Postal Service began its Stored Value Card program in 1996 with the Liberty Cash Card, a re-loadable stored value card for the purchase of Postal Service products and services.⁸⁹ The card was sold at 2,700 locations. The Postal Service suspended the product at the end of FY 2003 due to declining usage of the card. *Id.*

Lance also reports that the Postal Service sold a pre-paid phone card, the First Class PhoneCard, from December 1997 until October 2006 through an alliance with AT&T. She characterizes this card as a stored value card and indicates that it was available in domestic and international versions. *Id.*

In her statement, Lance discusses stored value cards generally, stating that they are offered by most major retailers and various debit card issuers. *Id.* at 9. She references a survey by Opinion Research Corporation concerning residential and small

⁸⁸ For purposes of this proceeding, the Commission need not attempt to distinguish between notarial services performed by postmasters and other employees in Alaska. In either case, no fee may be charged or compensation received for the services rendered.

⁸⁹ *Id.* at 8. The card was administered by ValueLink, a subsidiary of FirstData. *Id.*

business customers' impression on the appropriateness of the Postal Service offering a stored value card. *Id.* She also mentions the Postal Service's experience with financial instruments (money orders and Sure Money) and asserts that the Postal Service is "well positioned in the marketplace to enhance its offering with the flexibility of stored value cards as this technology begins to cannibalize its hardcopy money order instrument." *Id.* at 10. Finally, she indicates that the Postal Service intends to package stored value cards with envelopes or other mailpieces as a single mailable item, suggesting that the cards could be convenient as a way to send presents to friends or family. *Id.* On brief, the Postal Service reiterates much of Lance's Statement. See Postal Service Brief at 80-83.

The stored value card is a product that the Postal Service would like to offer to the public. As such, it represents a service. Lance's Statement suggests, but does not clearly explain, how the proposed stored value card may be used. In its Notice of Proposed MCS Language, the Postal Service clarified that it intends the card to be generic: "Stored Value Cards provide customers with payment alternatives that support their mailing, shipping, and purchase needs. They may include phone cards, gift cards, and prepaid debit cards." Therefore, as proposed, the stored value card is not a postal service.

A threshold question for any nonpostal service is whether that service was offered by the Postal Service "as of January 1, 2006." 39 U.S.C. § 404(e)(3). The record is clear that the Postal Service was not offering a stored value card as of January 1, 2006, having "suspended" the Liberty Cash product in 2003. Thus, the Commission

finds that the proposed stored value card is not eligible for grandfathering and thus may not be authorized under 39 U.S.C. § 404(e).⁹⁰

While the Postal Service did offer pre-paid phone cards as of January 1, 2006, it was not offering them as of December 20, 2006, having terminated that product in October 2006. *Id.* at 8. Thus, as a technical matter, pre-paid phone cards are not subject to this review. See 39 U.S.C. § 404(e)(3) “review each nonpostal service offered by the Postal Service on the date of enactment...”. In any event, Lance’s Statement is offered in support of a different product, a generic stored value card. Thus, even if the issue of pre-paid phone cards was before the Commission, the Postal Service has provided no record support of the public need for that product. Without that showing, there is no basis on which the Commission could authorize its continuance.

E. Officially Licensed Retail Products

The Postal Service sells officially licensed retail products (OLRP) in post offices and has been doing so since before January 1, 2006. Lance Statement at 10.⁹¹ All products licensed under this program bear postal branding, trademarks, or other intellectual property. *Id.*; see also Response to Order No. 74, *supra*, at 15. Lance indicates that OLRP products fall into two categories: (1) Ancillary Services, consisting of a variety of postal branded items that assist mailers in the use of the postal services, *e.g.*, scales, stamp dispensers, and passport holders; and (2) Brand Management, consisting of various other items bearing a postal theme, *e.g.*, teddy bears, pens, and key chains.

⁹⁰ Lance comments that the Commission might find stored value cards to be a postal service. Lance Statement at 10, n.6. On this record, that conclusion can not be reached. The finding that stored

The Postal Service sells a variety of postal branded and themed products through its licensing program. It wishes to continue to sell such licensed products. Taken as a whole, the activity represents a service.⁹² As proposed, it is not a postal service.⁹³ It qualifies as a nonpostal service since it represents an ongoing, commercial activity offered to the public for the purpose of financial gain.⁹⁴ As a nonpostal service, it is eligible for grandfathering since it was offered as of January 1, 2006. It is subject to review in this proceeding since it was also offered on December 20, 2006. Therefore, the OLRP program is subject to review under 39 U.S.C. § 404(e).

The Postal Service and ASC demonstrate a public need for the OLRP program. It leverages the Postal Service's brand, advertises and enhances its image, and, through the revenues generated, helps support the Postal Service's core mission. Naumoff Statement at 3-5,⁹⁵ and Postal Service Brief at 83-85. Like advertising, the OLRP program serves to keep the name of the Postal Service in the minds of potential customers and can serve to increase sales volumes to the benefit of the institution and

value cards, as proposed, may not be grandfathered does not foreclose the possibility of the Postal Service offering a card that may, if properly supported, be classified as a postal service.

⁹¹ OLRP products may also be sold through USPS.com or at off-site special events. *Id.* at 11.

⁹² The OLRP program involves sales at two levels. Through its licensing program, the Postal Service is, in the first instance selling its brand. The OLRP program also entails selling the "fruits" of its licensing program, namely, products developed by licensees.

⁹³ Those products described as ancillary by the Postal Service could, arguably, be considered postal services. Since no party advocates that treatment, the Commission finds it unnecessary to address it.

⁹⁴ For FY 2007 and FY 2006, the Postal Service reports revenue from the OLRP program of \$27.843 million and \$28.852 million, respectively. Response to Order No. 74 at 15 (referencing GL Acct. 44043.231 (Other Marketing Initiatives–OLRP)). Lance indicates that FY 2007 OLRP sales generated revenues of \$30.7 million. Lance Statement at 10-11. In addition, in FY 2006 and FY 2007, revenue for similar products was also booked into GL Acct. 42102.098 (Postal Related Retail Products), which reported \$1.942 million in FY 2006 and \$2.010 million in FY 2007. Response to Order No. 74 at 15.

⁹⁵ On brief, ASC emphasizes the philatelic nature of the products it sells. Brief of ASC at 3-5. It suggests that because philatelic services are closely tied to and support the provision of postal services, they could well be classified as postal services. *Id.* at 3.

its customers. The private sector is not able to provide trademark and copyrighted images of stamps and other Postal Service intellectual property to manufacturers.

No party opposes continuation of the OLRP program as a nonpostal service.

Based on the record, and taking into account the public need and the private sector's ability to meet that need, the Commission finds Officially Licensed Retail Products should be authorized to continue as a nonpostal service and classified as competitive.

F. Electronic Postmark (EPM)

The USPS Electronic Postmark[®] (EPM) is an auditable time-and-date stamp service offered by authorized service providers under license from the Postal Service.⁹⁶ It enables users to detect whether documents or files stamped with an EPM have been altered or modified. Thus, once applied to a document or file, an EPM seal may be used to verify the authenticity (content) of a document or file sent electronically as of a specific point in time. EPMs issued by authorized EPM licensees are stored in their repositories and available for verification for a period of up to seven years from the date of issuance. The Postal Service serves as the backup verifier for all EPMs issued by any of its EPM licensees.⁹⁷

The Postal Service defines and maintains the technical and operational standards for authorized EPM service providers. EPM licensees are required to meet certified standards for creating a secured environment for the auditable time stamps,

⁹⁶ See generally Foti Statement, *supra*, at 2-3 for a description and history of EPM.

⁹⁷ Authentidate Holding Corporation is the only current licensee. Grossman Statement at 3.

digital signatures, and hash codes, including the structured transactions for file exchanging and storage of the electronic files. EPM service is available for an annual license fee, with additional fees for usage above a threshold. Foti Statement at 3.

Plainly, the foregoing evidences that EPM is a service offered by the Postal Service. It is not a postal service. EPM qualifies as a nonpostal service since it is an ongoing, commercial activity available to the public for the purpose of financial gain.⁹⁸ DigiStamp, which opposes the continuation of EPM, argues that it is not eligible for grandfathering contending that the service was not offered as of January 1, 2006.

Grandfathering Issue. Foti explains the Postal Service's historical involvement with developing an electronic postmark and the provision of EPM service prior to January 1, 2006.⁹⁹ He notes that the former business model (of a postal-supported service) was changed in August 2007 to the licensing model described above. The latter continues to use Postal Service intellectual property. Foti Statement at 3.

DigiStamp argues that the business model change represents a new nonpostal service that is barred by 39 U.S.C. § 404(e)(2). Thus, it requests that the service be terminated.¹⁰⁰ The Postal Service and Epostmarks oppose DigiStamp's request. Both contend that the business model change did not alter the basic service being provided.¹⁰¹ Quoting Grossman, Epostmarks characterizes the EPM as essentially unchanged from 2005, with the only difference being that its agreement now is with the licensee not the Postal Service. Epostmarks Reply Brief at 7.

⁹⁸ EPM revenue reported for FY 2006 and FY 2007 was \$225,000 and \$135,000, respectively. Response to Order No. 74 at 10-11.

⁹⁹ Foti Statement at 2-3; see *also* Response to Order No. 74 at 10-11.

¹⁰⁰ DigiStamp Brief at 4. DigiStamp also argues that Epostmarks' application is likewise prohibited. *Id.* at 5.

¹⁰¹ Postal Service Reply Brief at 73; Epostmarks Reply Brief at 7-8.

The change does not serve to render EPM ineligible for grandfathering. The Postal Service has an extensive involvement with EPM that predates January 1, 2006. The principal effect of the change appears to be that instead of acquiring the Postal Service time-date stamps directly, they are obtained through the licensee instead. The Postal Service, however, continues to define and maintain the technical and operational standards for authorized EPM service providers. Moreover, DigiStamp appears to concede the point that the change does not disqualify EPM for grandfathering. See Borgers Statement at 27 (“A more accurate description [than an earlier one proffered by the Postal Service] is that the USPS has continued the old program with a new method for collecting fees from the EPM user.”).

Public Need. The parties unanimously agree on the public need for reliable, trusted time-date stamp products.¹⁰² They disagree over the Postal Service’s role in developing that market. DigiStamp argues that EPM is inimical to the public good, contending that the Postal Service’s involvement has hampered the development of the time-date stamp industry.¹⁰³ On the other hand, the Postal Service and those supporting the continuation of EPM point to the need for “a trusted third-party...consumers could hold to a higher criterion for legal support against fraud...”¹⁰⁴

¹⁰² See, e.g., Borgers Statement at 4 (“I state emphatically that there is a strong public need for time/date products of the type that DigiStamp offers.”).

¹⁰³ In that regard, Borgers contends that the Postal Service lacks the in-house technical expertise to establish certification standards. Borgers Statement at 4, 23-24.

¹⁰⁴ Foti Statement at 3; Postal Service Brief at 87. In addition, among the other factors cited by the Postal Service as supporting EPM are a certification process to place providers on a higher, but equal playing field, and a rational fee structure to foster fledging service providers. Foti Statement at 3.

Epostmarks emphasizes the Postal Service's trusted brand and its enforcement powers.¹⁰⁵ In addition, it argues that the EPM "platform provides an appropriate environment for the private sector to develop applications that efficiently meet market demands for trust products." *Id.* at 3 (citations omitted).

Microsoft Corporation believes that postal operators are uniquely positioned to employ the trust they have earned in the physical world to use in the digital world.¹⁰⁶ It argues that EPM satisfies "the public need for trusted electronic communications in a way no private sector organization could rival." *Id.* at 5.

Several states, including Delaware, South Carolina, Nebraska, and Maryland have amended their Uniform Electronic Transactions Acts to allow use of the Postal Service EPM service.¹⁰⁷ In addition, comments in support of EPM were submitted by two state legislators.¹⁰⁸

Based on the record, the Commission concludes that EPM serves the public need. Several factors influence this conclusion. First, EPM provides the Postal Service's imprimatur of trust to electronic files. Second, EPM provides a technological platform that may serve as a foundation for digital applications offering the trust of the Postal Service, which may provide additional benefits to the public.

¹⁰⁵ Epostmarks Brief at 4. Among the statutes it cites are 18 U.S.C. §§ 1028, 1029, 1343, and 2701. It contends that these and other relevant statutes are enforceable by the Office of Inspector General and the Postal Inspection Service. *Id.* at 5.

¹⁰⁶ Microsoft Reply Comments at 1.

¹⁰⁷ See Grossman Statement at 12.

¹⁰⁸ See Letter from Jeannie Haddaway-Riccio, Delegate, Maryland House of Delegates, August 26, 2008; Letter from Donna D. Stone, State Representative, Delaware House of Representatives, September 17, 2008.

Third, notwithstanding DigiStamp's comments, the record does not demonstrate that current EPM service is operating unsatisfactorily, and no participant has claimed that it does not provide adequate service. Moreover, DigiStamp's suggestion (Borgers Statement at 6) that another Federal entity, the National Institute of Standards and Technology (NIST), could fill any public need regarding electronic postmarks appears to be tacit acknowledgement that there may be a public need for government to play a role in establishing standards.

Finally, postal operators may have a unique role to play in authenticating electronic files. Pursuant to the convention of the Universal Postal Union, posts may agree to provide an electronic postal certification mark.¹⁰⁹ To foreclose that opportunity at this time does not appear to be warranted.

Private sector ability to meet public need. DigiStamp asserts that the private sector can satisfy the public need for EPM. It claims private industry has certification services, methods, and standards similar to those the Postal Service proposes to create for the EPM program. DigiStamp Brief at 9. Further, it points to third-party certification of vendor service based on defined policies in the digital signature industry, such as the role of public "Certificate Authorities" that were developed by the NIST and private industry. *Id.* at 9-10.

While private industry may someday meet the public need for EPM service, the record will not support a finding that it is currently meeting that need. The time-date stamp industry appears to be in its infancy. No potential alternative provided can match

¹⁰⁹ See UPU Convention, Article 14.

the trustworthiness associated with the Postal Service's brand,¹¹⁰ and none has the law enforcement capabilities of the Postal Service.

Late in this proceeding, the Information Assurance Consortium (IAC) submitted comments which acknowledge a public need for trusted time stamping service, which contend that private industry will build it, but do not object to the Postal Service's participation "if it were to be a responsible vendor."¹¹¹ The Commission views this as an important caveat in two respects. DigiStamp, which appears to desire to become a licensee, complains of difficulties with the EPM certification process that have prevented it from being certified.¹¹² It has made what appear to be good faith offers to address those issues. *Id.* at 24. Accordingly, the Postal Service should attempt, if possible, to resolve its differences with DigiStamp.¹¹³

Second, whether the problems raised by DigiStamp are due to technical difficulties in the certification process or a lack of adequate funding, they imply that the Postal Service is not devoting sufficient resources to enable EPM to grow appropriately.

¹¹⁰ Epostmarks cites recent polls which indicate that the Postal Service is the most trusted Federal agency. Epostmarks Brief at 5.

¹¹¹ Information Assurance Consortium Motion (1) For Leave to File a Late Response to Motion of Epostmarks, Inc. to Strike or, in the Alternative, for Leave to File Supplemental Brief (2) for Leave to File a Response to Epostmarks Supplemental Brief, October 31, 2008, at 1. IAC's motion is granted.

¹¹² Borgers Statement at 23-24.

¹¹³ The Postal Service and DigiStamp have a long, and somewhat contentious, history. In March 2004, DigiStamp filed a complaint with the Commission alleging that the Postal Service was providing EPM service in violation of the PRA. It argued that EPM was a "postal service" subject to the Commission's jurisdiction. DigiStamp's complaint was held in abeyance pending completion of a rulemaking proceeding which resulted in the Commission defining the term "postal service" to include, as DigiStamp advocated, electronic correspondence. Subsequently, pursuant to Order No. 1455, March 3, 2006 hearings were held, evidence presented, and briefs filed on DigiStamp's complaint. Prior to the issuance of a final order in that proceeding, the PAEA was passed by Congress. Thereafter, DigiStamp moved to withdraw its complaint without prejudice. That motion was granted. Order No. 1484, December 19, 2006. DigiStamp may take little comfort from the prospect of filing another complaint with the Commission should it believe the Postal Service is refusing to negotiate in good faith. Nonetheless, the PAEA seems to dictate that DigiStamp makes a final attempt to work with the Postal Service in light of this Order.

Chapter V: Activities Proposed to be Grandfathered
as Nonpostal Services

If the Postal Service chooses to continue this service, it should provide the resources necessary for its success. Currently, the authentication process is said to be trustworthy, but that is no guarantee the process may not be undermined by future technological developments. If the Postal Service does not maintain the necessary oversight, there could be damage to the trust the Postal Service has worked hard to achieve and has justifiably gained from the public. The Postal Service's well-deserved reputation of trust could be tarnished if EPM service is not run with the same degree of care.

The Postal Service must establish reasonable certification rules and regulations to certify applicants who comply with the EPM licensing agreement and other requirements. See 39 U.S.C. § 403(c). EPM will be regulated under title 39. Once EPM is included in the classification schedule as a nonpostal service, objections to EPM service may be raised through the Commission's complaint process. Concerns about the certification process may be raised at that time.

Based upon the information in the record and taking into account the public need for the service and the lack of a demonstration of an ability of the private sector to meet the public need, the Commission finds Electronic Postmark service should be authorized to continue as a nonpostal service and should be classified as competitive.

VI. ACTIVITIES THAT THE POSTAL SERVICE CLAIMS ARE UNREVIEWABLE

The Postal Service argues that activities (services or products) undertaken pursuant to separate statutory authority are not nonpostal services and thus are unreviewable under 39 U.S.C. § 404(e). As discussed above, the Commission rejects that interpretation of the PAEA. This conclusion does not mean, however, that all activities undertaken by the Postal Service pursuant to such authority are nonpostal services. That determination turns on the nature of the service provided. Below, the Commission examines the merits of the Postal Service's claims in light of Congress' intent in directing the Commission to review all nonpostal services as of the date of enactment of the PAEA.

A. Services Provided to Government Agencies

Section 411 of title 39 authorizes the Postal Service to enter into agreements with executive agencies of the Federal government and the United States Government Printing Office to furnish property and services under the terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate. Pursuant to this authority the Postal Service provides various services for other Federal agencies, *e.g.*, processing passport applications for the State Department, selling Migratory Bird Hunting and Conservation (Duck) stamps for the United States Fish and Wildlife Service, and processing equal employment opportunity

complaints.¹¹⁴ The Postal Service contends that services provided pursuant to 39 U.S.C. § 411 are not subject to review under 39 U.S.C. § 404(e). See, e.g., March 19 Notice at 3.

Under the PRA, services provided under 39 U.S.C. § 411 have historically been classified as nonpostal services. In determining the scope of its jurisdiction over “special” postal services in Docket No. R76-1, the Commission concluded that services performed by the Postal Service for Federal agencies “are in no sense ‘postal’ services,” and therefore were not jurisdictional.¹¹⁵ In *ATCMU*, 405 F. Supp. 1109, 1117, n.3, the court observed:

It is not certain exactly what ‘nonpostal’ refers to. Likely it encompasses such activities as selling United States savings bonds for the Treasury, maintaining a country-wide information service on civil-service examinations for all government positions, and conducting examinations for the Civil Service Commission.

In Docket No. RM2004-1, the Commission rejected a suggestion that the only nonpostal services permissible under former section 404(a)(6) were those performed by the Postal Service for other Federal agencies pursuant to 39 U.S.C. § 411. The

¹¹⁴ See *id.* at 16, 24. It is unclear from the Postal Service’s filing whether all of the following revenue-generating activities are offered pursuant to section 411: (1) non-sale lease agreements with government agencies involving parking, office space, and space for antennae towers; the first two categories involve leases or licenses with the General Services Administration, while the latter involves other Federal entities, usually law enforcement related; *id.* at 12; (2) vehicle supplies and services; the Postal Service has very little information on this activity, but suggests it involves “other government vehicles seeking fuel from postal facilities.” *Id.* at 13; and (3) inspection service reimbursements; from time-to-time, Postal Inspectors are detailed to act on behalf of other law enforcement agencies, a service for which the Postal Service is reimbursed. Regardless of the statutory authority that may support them, given the nature of these revenue-generating services, none is a nonpostal service subject to review under section 404(e).

¹¹⁵ PRC Op. R76-1, Vol. 2, App. F at 2.

Commission stated, “to be sure, nonpostal includes services provided by the Postal Service for other agencies[.]” Order No. 1424 at 17.

Lastly, even the Postal Service has historically characterized services performed pursuant to 39 U.S.C. § 411 as nonpostal. The regulations implementing section 411, 39 CFR § 259.1, indicate that it is the Postal Service’s policy to cooperate with other Federal agencies when it will reduce the overall costs to the government. For its part, the Postal Service states that assistance will be provided “when the knowledge and abilities of postal employees are helpful.” 39 CFR § 259.1(a). It is notable that the Postal Service uses the term “nonpostal” to describe section 411 arrangements in its implementing regulations. 39 CFR § 259.1(b). “The Postal Service establishes reasonable fees and charges for nonpostal services performed for agencies of the Federal as well as State governments.” “Nonpostal” fairly characterized the nature of these services under the PRA.¹¹⁶

The PAEA curtails the Postal Service authority to offer nonpostal services and requires the Commission to review all nonpostal services offered by the Postal Service on December 20, 2006. As noted above, in considering the scope of review under 39 U.S.C. § 404(e), the threshold inquiry is whether the activities at issue are a service. Plainly, the activities undertaken by the Postal Service pursuant to 39 U.S.C. § 411 are neither commercial in nature nor offered to the public for purposes of financial gain. Thus, notwithstanding their characterization under the PRA, they are not deemed to be services for purposes of review under 39 U.S.C. § 404(e).

¹¹⁶ Even before passage of the PRA, nonpostal services were considered services performed “mainly for other Government agencies (e.g., sale of documentary stamps, provision of custodial services for building space occupied by other Government agencies). See President’s Commission on Postal Organization, *Towards Postal Excellence* (June 1968), Annex II, at 6-10 (Kappel Commission Report); see also section 2303(a)(3) of former title 39, Pub. L. 86-682, September 2, 1960.

B. Philatelic Services Under 39 U.S.C. § 404(a)(5)

Pursuant to 39 U.S.C. § 404(a)(5), the Postal Service is authorized to provide philatelic services. It argues that this separate statutory authority exempts philatelic services from review in this proceeding. March 19 Notice at 3. The Postal Service recognizes, however, that the express language of 39 U.S.C. § 404(e)(2)—“[n]othing in this section shall be considered to permit or require that the Postal Service provide any nonpostal service”—necessarily encompasses philatelic services. Postal Service Brief at 41. Yet, it contends that Congress can not have meant what it said because “one might conclude that the Commission has the authority to terminate the Postal Service’s offering of philatelic services,” an interpretation, it argues, that is contrary to the principle that all statutory provisions be given effect if possible. *Id.* at 41-42.

Two parties address this issue. The Public Representative, noting that the PAEA includes a definition of the term “postal service,” suggests that philatelic services may be classified as postal services. Public Representative Brief at 13-14. ASC appears to endorse the same result, stating the “provision of philatelic services is so closely tied to, and supportive of, the provision of “postal service,” as defined in 39 U.S.C. § 102(5), as to be indistinguishable.” ASC Brief at 3.

The Commission initially considered whether philatelic services were subject to its jurisdiction under the PRA in Docket No. R76-1. There, the Commission determined that the sale of philatelic products was not within its jurisdiction. PRC Op. R76-1, Vol. 2, Appendix F, at 19-20. In a subsequent order distinguishing postal from nonpostal

services, the Commission characterized philatelic sales and services as nonpostal services.¹¹⁷

The language in subsection 404(e)(2), that “[n]othing in this section shall be considered to permit or require that the Postal Service provide any nonpostal service” specifically encompasses philatelic services under 39 U.S.C. § 404(a)(5). Thus, a fair reading of this section is that philatelic services are subject to review under 39 U.S.C. § 404(e). This reading comports with the PAEA’s definitional changes and the express language of this section. As noted, the Commission considered the effect of the definitional changes on the classification of philatelic services. On balance, however, given the historic treatment of philatelic services as nonpostal, a history it can safely be presumed that Congress knew, the Commission finds it appropriate to continue classification.

By defining both “postal service” and “nonpostal service,” the PAEA fundamentally altered the Commission’s jurisdiction and the Postal Service’s authority to offer nonpostal services. Thus, in considering various services offered by the Postal Service deemed nonpostal under the PRA, the Commission in conducting its review under 39 U.S.C. § 404(e) considers whether the service offered (if initially found to be a service) is a postal or nonpostal service.¹¹⁸ The suggestion that philatelic services be classified as postal services is not unreasonable. Stamps are integral to the provision of postal services. In this proceeding, for example, the Postal Service proposes to classify customized postage as a postal service. Moreover, as the Postal Service

¹¹⁷ Docket No. C96-1, Declaratory Order Finding Complaint to be Justified and Providing for Further Proceeding, December 16, 1996, at 12.

¹¹⁸ Following that process, the Commission found stamp fulfillment services to be postal services. This more holistic review process was followed by the Postal Service in seeking to have several services, which it previously viewed as nonpostal under the PRA, classified as postal services.

acknowledges, it “often can not distinguish philatelic from regular stamp purchases.”¹¹⁹ Notwithstanding this, the Commission is not persuaded, at this time, that philatelic services should be classified as postal services.

The record amply demonstrates the public need for philatelic services. In his statement, Deputy Postmaster General Donahoe notes that philatelic services “promote continued interest in the mail.” *Id.* On behalf of ASC, Charles Naumoff highlights the importance and benefits of philatelic programs, noting, among other things, that they promote the Postal Service’s core business and generate revenues contributing to the recovery of institutional costs. Naumoff Statement at 3-4; see *also* ASC Brief at 3-4.

The private sector is not able to meet the public need for philatelic services. Stamps originate with the Postal Service, with limited licensing exceptions. The Postal Service controls the use of philatelic items bearing its trademarks and other copyrighted indicia. In commenting on this issue generally, Naumoff indicates that although retail alternatives are not widely available to the public, the Postal Service is supportive of private firms. Naumoff Statement at 5.

Based upon the information in the record, and taking into account the public need for the service and the inability of the private sector to meet that need, the Commission finds that philatelic services should be authorized to continue as a nonpostal service and classified as market dominant.

¹¹⁹ Response to Order No. 74 at 14. Furthermore, as Deputy Postmaster General Donahoe notes, a main focus of philatelic services is to “ensure a secure means of payment of postage[.]” Donahoe Statement at 20.

C. Stamp Fulfillment Services

All orders placed with the Stamp Fulfillment Services in Kansas City, Missouri incur shipping and handling charges. Response to Order No. 74 at 14. The Postal Service indicates that the “main charge is \$1.00 for purchases of stamps and philatelic items, such as first-day covers.” *Id.* It clarifies that aside from philatelic sales, stamps purchased online or by phone incur a \$1.00 fee. The Postal Service also charges higher shipping and handling charges for personalized stamped envelopes. *Id.* The revenue reported for this service in FY 2006 and FY 2007 was \$4.462 million and \$4.732 million, respectively.

In Docket No. C95-1, the Commission held that the handling and shipping of catalog orders placed with the Philatelic Fulfillment Service Center were not closely related to the delivery of mail, and therefore fees for such services were not postal services subject to the Commission’s jurisdiction under the PRA.¹²⁰ The issue now before the Commission is somewhat different, namely, whether the stamp fulfillment shipping and handling charges for sales via the Internet or phone represent fees for postal or nonpostal services.

The handling and shipping fees associated with stamp purchases and personalized stamped envelopes represent fees for postal services. If such fees were incurred solely in connection with philatelic sales, classifying such services as nonpostal would be reasonable. The Postal Service acknowledges, however, that it “often can not distinguish philatelic from regular stamps purchases,....” *Id.* Regular stamps are purchased to be used in the mails. So, too, are personalized stamped envelopes. The fees for shipping and handling are for preparing these items for mailing and providing transportation and delivery. They are ancillary to the carriage of the mail. Therefore,

¹²⁰ Docket No. C95-1, Order Dismissing Complaint, September 11, 1995, at 5.

the service provided is properly classified as a postal service. Since stamps are only available from the Postal Service, this service will be classified as a market dominant special postal service.

D. Activities Undertaken Pursuant to 39 U.S.C. § 401(5)

The Postal Service generates revenues from several activities in connection with its property and undertaken pursuant to authority of 39 U.S.C. § 401(5), which authorizes the Postal Service to

acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor[.]

The linchpin to this authority is that it be exercised “in the transaction of [the Postal Service’s] business.” The scope of that business is spelled out in other sections of title 39, in particular, sections 101(a) and 403(a). Section 101(a) provides, in part, that “[t]he Postal Service shall have as its basic function the obligation to provide *postal services* to bind the Nation together through the personal, educational, literary, and business correspondence of the people.” 39 U.S.C. § 101(a); (emphasis added). Section 403 describes the Postal Service’s general duties, which include planning, developing, promoting, and providing “adequate and efficient *postal services* at fair and reasonable rates and fees.” *Id.* § 403(a); (emphasis added). Thus, the business of the Postal Service is to provide postal services to the Nation at fair and reasonable rates.

This obligation is sometimes referred to as its core responsibility. The PAEA reinforces this core responsibility in two ways. First, it specifically defines the terms postal service and nonpostal service. Second, it limits the Postal Service’s authority to provide nonpostal services to those it offered as of January 1, 2006, and directs the

Commission to review each nonpostal service offered by the Postal Service on December 20, 2006 and determine whether that nonpostal service shall continue. Section 404(e).

Deputy Postmaster General Donahoe discusses revenue-generating activities related to “the Postal Service’s core function of providing postal services.” Donahoe Statement at 2. Activities identified as related to the Postal Service’s core function include sales of real property,¹²¹ sales of personal property,¹²² web-based linking agreements,¹²³ purchasing arrangements that generate revenues,¹²⁴ and miscellaneous sources of revenues.¹²⁵

Deputy Postmaster General Donahoe’s statement provides a helpful overview of general postal operations. In large part, he discusses activities that relate directly to the transaction of its business, *i.e.*, its core responsibility to provide postal services. While the Commission does not agree with each of his conclusions, it does conclude that revenue-generating activities that are *necessary in the transaction of the Postal Service’s business* should not be inhibited as a result of section 404(e). Those that go beyond this purpose are subject to greater review. To conclude otherwise would, as several parties have noted, enable the Postal Service to offer a virtually limitless list of new nonpostal services in contravention of 39 U.S.C. § 404(e).

¹²¹ This discussion also touches upon leasing of real property by the Postal Service. *Id.* at 6-7.

¹²² Examples of personal property include used distribution and transportation equipment, used furniture, excess supply inventory, and unclaimed/undeliverable mail. *Id.* at 9-10.

¹²³ In addition to serving customers’ postal needs, *e.g.*, finding a ZIP Code or calculating and printing postage, the website contains links to, *inter alia*, other mail service providers. *Id.* at 12.

¹²⁴ Arrangements identified include the CMC transportation asset management program, warranty repair program, NASCAR sponsorship, and MoverSource Strategic Allowance. *Id.* at 13-18.

¹²⁵ Miscellaneous sources include income from interest and the sale of securities to unclaimed monies found in the mails and fees from employees for parking. *Id.* at 18.

Sale of real and personal property. In operating the largest postal system in the world, the Postal Service has over 34,000 retail facilities, a transportation fleet in excess of 220,000 vehicles, and a wide variety of mail processing and distribution equipment. When real property is deemed excess or underutilized, it may be sold. When personal property, such as vehicles, equipment, and supplies is at the end of its service life, it is generally sold.¹²⁶ These sales are done on an ad hoc, sporadic basis to dispose of used, excess, or underutilized property. They are not part of an ongoing enterprise. Thus, this revenue-generating activity is not a service that is subject to review under 39 U.S.C. § 404(e).

Leasing of real property. The Postal Service also leases real property to other government entities and to the private sector, some of the latter are for the benefit of its employees.¹²⁷ If the Postal Service leasing activity was limited to other government entities and for the benefit of employees, it likely would be a non-issue for purposes of this proceeding. In practice, however, Postal Service leases offered to the public fulfill a variety of needs, including parking facilities, office space, antenna towers, advertising, storage, and retail lobby space. Response to Order No. 74 at 13.

Deputy Postmaster General Donahoe highlights three activities relevant to this issue which he characterizes as “maximizing the value of our retail assets.” Donahoe

¹²⁶ The total revenue booked into the five real property and equipment sales accounts was \$57.7 million in FY 2006 and \$50 million in FY 2007. The five general ledger accounts are GL Acct. 45610 (Gain or Loss on Sale of PPE); GL Acct. 45960 (Reimbursements & Cost Reduction Control); GL Acct. 45961 (Sale of Land and Buildings); GL Acct. 45963 (Sale of Equipment and Miscellaneous Items); and GL Acct. 45965 (Sale of Vehicles). Response to Order No. 74 at 11-12, and Attachment One. Other accounts also record revenue from the sale of assets. See, e.g., GL Acct. 44036.000 (Sale of Supply Center Inventories); GL Acct. 44036.149 (Sale of Recyclable Products); GL Acct. 44036.156 (Sale of Misc. Items and Non-Capital Equip); and GL Acct. 44036.157 (Sale of Postal Antiques). In FY 2007, revenue recorded in these totaled \$8.5 million. *Id.*, Attachment One.

¹²⁷ An example is leasing retail space to a credit union at below market rates for the benefit of employees. Donahoe Statement at 7.

Statement at 7-8. These include a non-exclusive agreement with FedEx under which FedEx drop boxes are located outside post offices;¹²⁸ a non-exclusive “test-marketing relationship” with Pitney Bowes under which the Postal Service makes lobby space available for exhibits promoting Pitney Bowes’ postage meters and scales;¹²⁹ and the rental of training facilities to private and government entities. *Id.* at 18-19.¹³⁰

The Postal Service endeavors to align space with operational requirements, a practice which “prevents the Postal Service from acquiring space over and above its needs.” Donahoe Statement at 5. Notwithstanding that goal, given the scale of its operations and extensive real estate holdings, the Postal Service has numerous opportunities to “maximize[e] the value of [its real estate] assets” by executing leases for alternate use of its space.

When the Postal Service acts as a lessor, it incurs continuing obligations for the life of the lease, *e.g.*, related to the condition of the property. This service (leasing) is not a postal service. It qualifies as a nonpostal service since it is an ongoing,

¹²⁸ See also Response to Order No. 74 at 16.

¹²⁹ *Id.* at 16-17.

¹³⁰ In the main, the two training facilities are used for employee-related purposes. When not used for such purposes, the Postal Service rents the facilities for meetings and lodging to others to offset the cost of operating the facilities. While that goal is reasonable, in doing so, the Postal Service is holding itself out as being in the hospitality industry. An article in the December 2, 2008 edition of the *Washington Post* concerning the availability and prices for lodging in the Washington area for the upcoming inauguration underscores this point. See <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/01/AR2008120102950.html> As such, this leasing activity is providing a service; it is not a postal service. By offering these facilities to the public, the Postal Service is engaged in an ongoing commercial activity for the purposes of financial gain. In FY 2007, revenue reported for the Bolger Center training facility was \$3.2 million. The revenue is not reported separately for government and private entities use of the facility. *Id.*, Attachment Two, row 89.

commercial activity offered to the public for purpose of financial gain.¹³¹ As a nonpostal service, it is eligible for grandfathering since it was offered as of January 1, 2006.

The Postal Service's effort to offset the costs of its facilities is prudent. Net revenues generated by leveraging these assets make a contribution to institutional costs, benefiting mailers and supporting the Postal Service's universal service obligation. Thus, the Commission finds leasing serves the public need which, given that real property is traditionally viewed as unique, can not be met by the private sector. Accordingly, the Commission finds that leasing should be authorized to continue as a nonpostal service and classified as competitive.

As discussed below, the Commission intends to initiate a rulemaking to determine how nonpostal services are to be regulated under title 39. While the Commission authorizes the continuation of leasing and anticipates that such regulation will be light-handed, some types of agreements may require a closer look. The appropriate form and level of review will be addressed in the separate rulemaking.¹³²

Licensing. In addition to the OLRP program, which the Postal Service seeks to grandfather as a nonpostal service, it also licenses its intellectual property to third parties in the following ways:

¹³¹ FY 2007 revenues associated with these various types of lease agreements are approximately \$75 million, comprised of FedEx agreements (\$27.3 million); meter manufacturing marketing program (\$0.08 million); non-sale lease agreements (\$45 million); and training facilities (\$2.8 million).

¹³² Inherently, the types of leases identified by the Postal Service implicate various types of competitive markets. While the Commission is sensitive to the Postal Service's revenue needs, mechanisms need to be in place to ensure that the playing field remains balanced for all affected parties.

1. Inventions. The Postal Service holds 67 United States patents on its own inventions. Two, relating to cluster box units, have recently been licensed to third parties.¹³³
2. Trademarks used on third-party consumer goods. The Postal Service licenses its intellectual property, including stamp images; copyrighted material; the corporate signature and other trademarks, service marks, and trade dress to 42 third-party vendors for commercial use on Apparel (5); Art (1); Cards and Stationary (1); Fabric (1); Fashion Accessories (8); Food (2); Gifts and Collectibles (6); Mailing and Shipping (5); Pet Products (2); and Toys and Games (11).¹³⁴
3. Limited licenses used by third parties for noncommercial or limited commercial purposes. The Postal Service provides limited licenses for rights and permissions to use; for example, copyrighted materials; trademarks; stamp use in publications or advertising; stamp use by nonprofits; and agreements to photograph and publish murals.¹³⁵ The Postal Service indicates that it does not actively market its limited licenses program and that all requests

¹³³ Response to Order No. 74 at 21. In addition, three Postal Service inventions have been sold back to its suppliers with a royalty-free license for three inventions they developed under contract with the Postal Service. The Postal Service retains the right to royalty payments from the suppliers' sales of the inventions. The Postal Service indicates no such payments have been received as of June 2008. *Id.*

¹³⁴ *Id.* at 21-22. Initially, the Postal Service reported it had licenses with 40 vendors. It now reports it has 42 licenses with third parties. Thuro Statement at 4. The number in parentheses is the number of vendors reported by category of consumer goods.

¹³⁵ Response to Order No. 74 at 22-23. The Postal Service also describes two other licensing programs, Premium Trademark Licenses and Affinity Card Agreement, both of which are limited to Postal Service employees. As such, those programs are not services subject to review under section 404(e) since they are not available to the public.

come from the public. Generally, it charges a \$25 application fee for the limited license, although in some instances a small royalty or location fee is charged. *Id.* at 23.

In response to Order No. 126, which granted, in part, Pitney Bowes' motion for a complete list of all nonpostal services, the Postal Service provided a brief description of the intellectual property being licensed, how it is compensated, and its responsibilities under each licensing agreement. Response to Order No. 126 at 2-4, and Attachment. In that filing, the Postal Service reiterates its view that its licensing program is not subject to review under 39 U.S.C. § 404(e). It argues that its OLRP program is distinguishable because the Postal Service sells those licensed goods. Further, it attempts to minimize its licensing responsibilities as "simply retain[ing] certain authority over the third-party's activities in order to protect the integrity of the Postal Service's brand...and receiv[ing] a royalty payment in exchange for the license." *Id.* at 6.

The Postal Service's position on licensing is opposed on two levels. Numerous parties oppose the Postal Service's contention that its licensing program is not subject to review under 39 U.S.C. § 404(e).¹³⁶ As discussed previously (Chapter III), adoption of the Postal Service's interpretation of the PAEA would enable the Postal Service to offer, through its licensing program, sundry new nonpostal services in violation of 39 U.S.C. § 404(e). Section 404(e)'s proscription against the provision of any new nonpostal services and the requirement that the Commission review existing nonpostal services would be undone if the Postal Service could circumvent them simply by leveraging its brand. Thus, as discussed above, the Commission rejects the Postal Service's strained interpretation of the scope of review under 39 U.S.C. § 404(e).

¹³⁶ PostCom *et al.* Response to Order No. 126; Pitney Bowes Response to Order No. 126; and Public Representative Response to Order No. 126.

Some parties also oppose specific licensing agreements or, more generally, urge that the Postal Service be limited to its core business. *Id.* Before considering those issues, the Commission addresses whether licensing is a service subject to review under 39 U.S.C. § 404(e).

The distinction the Postal Service attempts to draw between its OLRP program and its program of licensing its trademark for use by third parties on consumer goods is unavailing. In the OLRP program, the Postal Service both licenses its trademark and also sells the licensed goods. The act of selling the goods, while representing a separate service, is irrelevant to whether the act of leveraging its brand is also a service. Plainly, by selling its brand, *e.g.*, the Sonic Eagle, whether through the OLRP program or third parties, the Postal Service is offering a service by authorizing willing buyers to affix its trademark to the specific goods.

When the Postal Service acts as a licensor, it is granting the right to use its intellectual property on consumer goods. This service (licensing) is not a postal service. It qualifies as a nonpostal service since it is an ongoing, commercial activity offered to the public for purpose of financial gain.¹³⁷ As a nonpostal service, it is eligible for grandfathering since it was offered as of January 1, 2006.

The Postal Service's argument that it is not "engaged in" whatever business the [licensed] consumer good represents"¹³⁸ misses the point. As the Public

¹³⁷ Thuro reports that in FY 2006 and FY 2007 the commercial lease program generated \$3.3 million. Thuro Statement at 3-4; see also Response to Order No. 74 at 23.

¹³⁸ Response to Order No. 126 at 6. As support for this proposition, the Postal Service draws an analogy between licensing its brand and leasing. It argues that just as it would be incorrect to assert that it had entered the toy business if it leased property to a toy company, so, too, it would be incorrect to assert that by licensing its brand it has entered the licensee's business. *Id.* The analogy is misplaced and not germane to whether licensing is a service subject to review under section 404(e). With leasing, there is virtually no chance that an average consumer would believe that the Postal Service manufactured, for example, Mattel Inc.'s toys, whereas with licensing, particularly if related to the

Representative notes, the purpose of trademark law is “to protect consumers from confusion and deception that would result if the use of trademarks was unregulated.” Public Representative Response to Order No. 126 at 2 (citation omitted). A trademark serves to identify and distinguish the source of goods of one entity from those of others and connotes that all goods sold under it are of equal quality. Where it is used on goods directly related to the trademark owner’s line of business (as opposed to promotional purposes), the trademark conveys the impression that the licensor stands behind the product.

Furthermore, the Postal Service’s claim (Response to Order No. 126 at 5, n.7) that it lacks sufficient control over its licensed goods for them to be considered Postal Service products is not persuasive. Under intellectual property law, the Postal Service, as trademark owner, has an affirmative duty to control the quality of its licensed goods. Consistent with that duty, the Postal Service does, in fact, play an active role in managing its licensed products by, among other things, requiring licensees to obtain advance approval for Postal Service-branded products, imposing quality control standards, and policing product use and promotion.¹³⁹

While he notes that the Postal Service’s “brand is valuable,” Deputy Postmaster General Donahoe does not attempt to demonstrate that licensing its brand is a prerequisite for fulfilling the Postal Service’s core business functions.¹⁴⁰ For his part,

licensor’s core business, the average consumer is likely to believe, at a minimum, that the licensor stands behind the product and perhaps that the licensor produced the product.

¹³⁹ See Thuro Statement at 4-5; and Response to Order No. 126 at 3 (“the licensee must obtain Postal Service approval of the styles, design, content, workmanship and quality of the products and related promotional materials.”). See *also* Pitney Bowes Response to Order No. 126 at 9-13.

¹⁴⁰ Donahoe Statement at 8. He makes a passing claim (at 2), but unlike his discussion of the hardcopy nationwide distribution system, he does not discuss the licensing for use by third parties on consumer goods as a core function.

Thuro indicates that the licensing program has three purposes: (1) to protect the integrity of the Postal Service's intellectual property; (2) to generate revenues; and (3) to market the brand. Thuro Statement at 3-4. While he stresses the importance of the licensing program, he does not suggest it is a necessity in the transaction of the Postal Service's business.

Nor could it be shown to be a necessity. Although licensing may be an accepted practice in private industry, this does not mean that it should be extended uncritically to a government entity in all respects.¹⁴¹ To market the brand, conventional advertising is available and, if incurred, such an expense would fairly be characterized as related to the transaction of its business.¹⁴² In contrast, licensing its brand for use on consumer goods in return for royalty payments can not be so characterized, particularly when the licensed goods may serve more than a promotional role.

Aside from generating revenues, which make a contribution to institutional costs, benefiting mailers and supporting the Postal Service's universal service obligation, the Postal Service's licensing program promotes and gives recognition to its brand. Thus, the Commission finds licensing serves the public need which, given the uniqueness of the activity, can not be met by the private sector. Accordingly, the Commission finds that licensing, as a general service, should be authorized to continue as a nonpostal service and classified as competitive.

¹⁴¹ While the Postal Service notes that other Federal agencies license certain products, the common theme among those agencies identified, e.g., U.S. Army, Department of Agriculture—Forestry, the Smithsonian, and U.S. Fish and Wildlife Service, is that, unlike the Postal Service, none, with the possible exception of Amtrak, is a profit seeking enterprise or operates in commercial markets.

¹⁴² The NASCAR sponsorship with Baker Curb Racing, Inc., whereby selected Postal Service trademarks are displayed on race cars, uniforms, and the like, appears to be more of an advertising campaign than licensing agreement even though royalties are paid from the sales of items displaying both Postal Service and Baker Curb Racing, Inc. trademarks. Response to Order No. 74 at 35.

This conclusion, however, is not unqualified. As a general matter, commercial licenses unrelated to the Postal Service's operations appear to be uncontroversial. Those that relate to its operations raise a host of issues which, notwithstanding the attention given to one licensed product, are not sufficiently developed on this record for the Commission to determine, at this time, whether they should be terminated or authorized to continue. Accordingly, the Commission finds it appropriate as an interim measure to grandfather licensing of those products, categorized as Mailing & Shipping, that relate to the Postal Service's operations, *e.g.*, handling and processing of mail. Consideration of those issues will take place in Phase II of this proceeding.

Late in this proceeding, upon learning that Postal Service-branded postage meter ink cartridges were being sold, Pitney Bowes filed a motion to compel the Postal Service to submit a complete list of nonpostal services. Pitney Bowes Motion to Compel at 1. The Commission granted that motion, in part, directing the Postal Service to file supplemental material regarding its licensing program. Order No. 126 at 6. The Order also provided interested persons an opportunity to comment on the Postal Service's supplemental information. A number of interested persons submitted comments, including the licensee.¹⁴³

While focused on meter ink cartridges, Pitney Bowes' motion raises more generally the issue of the Postal Service's licensing of products that relate to its operations. The motion and Order No. 126 sparked a spate of pleadings that argue both legal and factual issues, *e.g.*, whether licensing is subject to review under

¹⁴³ Pinpoint LLC, the licensee, submitted several declarations by Randal Hooker. See *also* letters on behalf of Brothers International Corporation, November 24, 2008; the Chamber of Commerce, November 19, 2008; and Information Technology Industry Council, November 21, 2008.

39 U.S.C. § 404(e) and whether the specific license should be terminated.¹⁴⁴ Certainly, the Commission is concerned that the Postal Service's licensing program not be used to mislead or confuse the mailing public.

In commenting on the Postal Service's response to Order No. 126, Pitney Bowes distinguishes between Postal Service licenses it characterizes as promotional or commercial in nature. Pitney Bowes Response to Order No. 126 at 14. This would appear to be a reasonable distinction where commercial is interpreted to mean the licensing of products related to Postal Service operations. But, on this record, the Commission can not conclude that it must necessarily follow, as Pitney Bowes seems to suggest, that the Postal Service should be barred permanently from commercially licensing its intellectual property (related to postal operations). That issue has been the subject of numerous post-brief filings and needs to be explored systematically on a more complete record to enable the Commission to determine fairly whether to terminate or, alternatively, to authorize continuation of such programs. In addition to covering licensing of a commercial nature generally, this conclusion extends to the specific license challenged by Pitney Bowes as well. While the record does contain some information on this license, the Commission does not view it as sufficiently well developed to warrant deciding that issue ahead of deciding the broader issue of licensing of a commercial nature.¹⁴⁵

¹⁴⁴ See, e.g., Pitney Bowes Response to Order No. 126; PostCom *et al.* Response to Order No. 126.

¹⁴⁵ For example, Pitney Bowes and Pinpoint LLC make competing claims about the relevant market. Compare, e.g., Initial and Fourth Declaration of Randal E. Hooker, October 25, 2008 and November 26, 2008, respectively, with Declaration of Peter Wragg, October 15, 2008. In addition, Pitney Bowes notes the Postal Service regulatory role regarding the production and distribution of postage evidencing systems. While that might be a reasonable basis for distinguishing among licenses of a commercial nature, it is not entirely clear how that may affect the meter ink cartridge market or specific manufacturers. These and related issues may be addressed in Phase II.

Under the circumstances, therefore, the Commission will grandfather what the Postal Service has identified as existing Mailing & Shipping commercial licenses pending the outcome of Phase II of this proceeding.¹⁴⁶ This includes the meter ink cartridges. Interested persons will be given an opportunity to develop a complete record in Phase II, which the Commission anticipates will likely involve a hearing on the record.

The Commission will in the near future issue an order addressing procedures and providing for a prehearing conference in Phase II. Pending the outcome of Phase II, the Postal Service shall be permitted to maintain the status quo regarding such licenses. This Order does not provide authority for the Postal Service to execute new licenses involving products that relate to its operations.

Web-based linking agreements. Deputy Postmaster General Donahoe identifies web-based affiliates as a revenue-generating activity undertaken pursuant to 39 U.S.C. § 401(5) by which the Postal Service increases the value of its website “by maintaining and adding links to various mail service and other providers who offer value-added services that allow customers to use the mail more efficiently and effectively and to access special mail-related services.” Donahoe Statement at 12. The linking arrangements are styled by the Postal Service as affiliate marketing relationships, which commenced in 2001. Response to Order No. 74 at 29. Of its 70 current affiliate

¹⁴⁶ This Order extends to other licensing agreements, if any, the Postal Service has identified for Mailing & Shipping products that relate to postal operations. The Postal Service shall promptly notify the Commission of any other such licenses that may exist.

marketing relationships, only four (as of May 2008) generate revenue.¹⁴⁷ Briefly, these six affiliate linking agreements are

- Label Universe Inc. provides Click-N-Ship ® and Shipping Assistant customers the ability to buy labels online that are compatible with, and meet, Postal Service mailing standards for use in online shipping-label printing. Label Universe, Inc. ships its products via the Postal Service. The Postal Service receives a royalty on each sale. The agreement began in December 2002 and continues through 2008.¹⁴⁸
- Maponics LLC sells maps online to postal business customers and companies targeting direct mail campaigns. The Postal Service receives a share of revenue from the sale of maps resulting from redirection from the Postal Service website. The relationship started in September 2006 to continue through September 2009.¹⁴⁹
- Idearc Media Corporation (Idearc) operates an online, interactive directory providing various interactive services and searchable proprietary databases, including various directories providing business, residential, and email listings, interactive software tools, and an online mapping and direction service. The Postal Service receives a revenue share after paying a minimum guarantee to Idearc. This affiliate relationship started in 2001 and is currently in a wind-down period.¹⁵⁰
- Click2Mail (PosteDigital) (formerly Mailing Online provided through RGC Communications) allows web-based customers to create and send mail, including letters, brochures, and postcards, as well as certified mail. The Postal Service receives revenues based on a share of sales. Mailing Online (now Click2Mail) was first established in 2003. The Postal Service indicates it expected to enter into a standard affiliate linking agreement in June 2008. *Id.* at 30.

¹⁴⁷ *Id.* The Postal Service indicates that it expects to issue two other agreements to generate revenues once converted to affiliate linking-type agreements.

¹⁴⁸ For FY 2006 and FY 2007, the Postal Service received \$113,129 and \$115,360, respectively, in royalty amounts from the sale of labels. Revenue for the affiliate relationships are reported in GL Acct. 44030.000. *Id.* at 31.

¹⁴⁹ *Id.* Reported FY 2007 revenues are \$47,583.

¹⁵⁰ Revenue was \$27,000 in FY 2006 and \$148,000 in FY 2007, although the FY 2007 figure could have been offset by the Postal Service's share of certain development costs. *Id.*

- Premium Postcard (Amazing Mail) allows customers to create and send mail from a desktop computer, primarily as a high-gloss postcard in several sizes. The Postal Service receives revenues based on a share of sales. The Postal Service expects to convert this agreement, which has been in effect since 2001, to a linking-type agreement. *Id.*
- CardStore (Ink2/Touchpoint Inc.) permits customers to create and send mail from a desktop computer, primarily as a high-gloss postcard and greeting cards. CardStore can also provide retail gift cards to include with a greeting card. The Postal Service receives revenues based on a share of sales. The Postal Service expects to convert this agreement, which has been in effect since 2001, to a linking-type agreement.¹⁵¹

A related revenue-generating program is known as the Mail Service Providers (MSP) program, which enables customers to find vendors who supply mail-related services such as mail preparation; mailing lists; mail printing; mailing supplies; and mailing equipment. Each nationally linked vendor pays a flat fee for the term of the agreement. Currently there are only two nationwide MSP linked vendors.¹⁵²

Deputy Postmaster General Donahoe characterizes these web-based linking agreements as leases of “virtual real estate.” Donahoe Statement at 13. The Commission finds that characterization reasonable. Consequently, on this record, the Commission concludes, for the same reasons ascribed to the leasing of real estate discussed above, these lease agreements constitute a nonpostal service subject to review under 39 U.S.C. § 404(e), that are authorized to continue and are classified as competitive.¹⁵³ However, given that these lease agreements provide “access to these

¹⁵¹ For reporting purposes Click2Mail, Premium Postcard and CardStore were aggregated into a category called “Hybrid Mail.” Over the last two years, the three agreements generated total revenue share amounts of \$1,142,883 in FY06, and \$1,305,746 in FY07. *Id.* at 31-32.

¹⁵² Revenue for FY 2006 and FY 2007 for the MSP program was \$10,000 and \$10,001, respectively. *Id.* at 32.

¹⁵³ The scope of regulation to be applied to these web-based agreements will be determined in the subsequent rulemaking.

mailing resources through the internet,” it may be that in the next phase of this proceeding one or more of these linking arrangements would be more properly classified as a postal service. On this record, that determination can not be made.

Leasing (virtual) space for links to vendors selling mail-related products serves a public need. The service provides very convenient means for customers to access information about mail-related products to assist them in the preparation and handling of their mail. This service may also lead to an increase in mail volumes or use of related services. Overall, this affiliate website-linking service encourages not only the use of the mails, but by increasing product knowledge for all customers visiting the sites, it can have a positive impact on the mailing industry and the economy.

The Postal Service's links to third-party vendors under the affiliate program provide information about products relating to the mail. Thus, it is uniquely postal in character and not conducive to being met through the private sector. To be sure, other websites may also provide information on or links to other delivery services, but as competitors, their focus will necessarily be different than the Postal Service's. Furthermore, no party objected to the Postal Service affiliate linking arrangements.

Based upon the information in the record, and taking into account the public need for the service and the lack of a demonstration of an ability of the private sector to meet the public need, the Commission finds the affiliate website-link program should be authorized to continue as a nonpostal service and classified as competitive. Unless otherwise demonstrated, each of the ongoing affiliate linking arrangements represents a separate product and should be separately classified as competitive in the classification schedule.

MoverSource Program. MoverSource is a partnership between the Postal Service and Imagitas, a subsidiary of Pitney Bowes, that centers on change-of-address orders.¹⁵⁴ It consists of three programs:

- Mover's Guide, the Postal Service's Official Change-of-Address Kit, provides, among other things, a copy of form 3575, catalogue request card, magazine request card, move-related tips, and advertising. *Id.*; and Pitney Bowes Brief at 3-4.
- Welcome Kit, the Postal Service's Official Change-of-Address Confirmation, contains a letter from the Postal Service to the new address confirming the change order and provides information about the new community and move-related advertising. *Id.*
- Mover's Online Guide, the Postal Service's Official Change-of-Address Form is available via a link on the Postal Service's website. It provides move-related coupon savings internet catalogue request cards. Mover's Guide users are charged a \$1.00 fee for using the online change-of-address process.¹⁵⁵

Imagitas is responsible for the costs associated with the change-of-address program and for arranging advertising. To the extent that revenues exceed costs, Imagitas and the Postal Service share the net revenues. Donahoe Statement at 17; and Pitney Bowes Brief at 6-7. The revenue from MoverSource for FY 2007 was approximately \$27 million and approximately \$21 million in FY 2006. Response to Order No. 74 at 27.

Through its partnership with Imagitas the Postal Service has essentially outsourced a mail-related function, change-of-address, to a third party. According to the parties, the arrangement works well. VanGorder states that over the life of the program,

¹⁵⁴ VanGorder Statement at 9. The program began in 1995.

¹⁵⁵ VanGorder Statement at 10; Pitney Bowes Brief at 6. The fee is classified as a special service in the Mail Classification Schedule.

the Postal Service has realized over \$250 million. VanGorder Statement at 10. While the responsibility for managing the program appears to rest with Imagitas, the Postal Service still plays an active role in the process,. For example, the Postal Service maintains the mover's personal information. In addition, it licenses (or otherwise authorizes) Pitney Bowes to use "official" change of address forms as part of the program.¹⁵⁶ Essentially, the Postal Service has sold a property right to Imagitas which has combined it with advertising to enhance the value of the change-of-address process.

The Postal Service's role in the MoverSource program represents a service. While, arguably, it may satisfy the criteria to be considered a postal service, on this record and for purposes of its review under 39 U.S.C. § 404(e), the Commission finds the MoverSource program not to be a postal service. This finding is influenced by the prominent role of third-party advertising and the more limited role of change-of-address information in MoverSource. Should new facts be presented subsequently, the Commission can revisit its finding at that time.

Having found it to be a service, but not, for purposes of this proceeding, a postal service, the Commission concludes that the MoverSource program is a nonpostal service since it is an ongoing commercial activity offered to the public for the purpose of financial gain. As a nonpostal service, it is eligible for grandfathering since it was being offered as of January 1, 2006.

Pitney Bowes amply demonstrates the public need for this service. It notes the MoverSource program is a unique public/private partnership and that the change-of-

¹⁵⁶ None of the Postal Service filings in this proceeding indicates specifically the statutory basis for the "strategic alliance" with Imagitas. See Donahoe Statement at 17; and VanGorder Statement at 1-10; and Response to Order No. 74 at 14-15. In its brief, the Postal Service cites section 401(1), but likely intended 401(3) or 401(5). See Postal Service Brief, Attachment A.

address process is “a ‘vital and necessary part’ of maintaining basic postal services to the public.” Pitney Bowes Brief at 7-8. The program helps defray the costs associated with change orders and generates revenues for the Postal Service.

The Postal Service participation in the program is essential. Thus, there is no private ability to meet the need. Without Postal Service partnership, private sector entities could not issue Move Validation Letters and Customer Notification Letters sent on behalf of the Postal Service with move-related advertising. Although there are private organizations that provide welcome kits with advertising to persons moving into an area, there is no evidence that the unique aspects of the Postal Service MoverSource program can be met by the private sector.

No party has come forward objecting to the MoverSource program. Pitney Bowes suggests that MoverSource be classified as market dominant. *Id.* at 9. Given the Postal Service’s pivotal role in and the importance of the change of address process to it, the Commission finds that suggestion reasonable and will adopt it.

Accordingly, based upon information in the record, and taking into account the public need and the ability of the private sector to meet that need, the Commission finds the MoverSource Program should be authorized to continue as a nonpostal service and classified as competitive.

E. Miscellaneous Revenue-Generating Activities

In its response to Order No. 74, the Postal Service identified various activities that generate revenues due to the Postal Service’s status as a government entity, ongoing purchasing arrangements, and realized during the normal course of

business.¹⁵⁷ In his statement, Deputy Postmaster General Donahoe provides additional detail concerning certain purchasing arrangement and miscellaneous sources of revenues. Donahoe Statement at 13-16, 18-19. The miscellaneous revenue-generating activities may be categorized as follows.

Statutorily based duties. By statute, the Postal Service is required to perform certain duties, some of which are unique to its status as a government entity. These are:

- Copying and other fees generated pursuant to requests for records under the Freedom of Information Act and the Privacy Act.
- Fees associated with maintaining the sexually oriented advertising (SOA) list.¹⁵⁸
- Appropriations pursuant to the emergency preparations.
- Revenue generated for collecting employee debts results from the directive of the Debt Collection Act.¹⁵⁹

None of the foregoing involves a commercial activity. The Postal Service does not set a fee to perform any of these statutory, Congressional, or court ordered requirements. Thus, none is a service subject to review under 39 U.S.C. § 404(e).

Postal Inspection Service investigations. The Postal Inspection Service is authorized to conduct criminal investigations involving use of the mails. Forfeitures and civil penalties resulting from certain of these investigations are recorded in either the

¹⁵⁷ Response to Order No. 74, June 9, 2008 at 6-8, Attachments One and Two.

¹⁵⁸ Pursuant to 39 U.S.C. § 3010(b), the Postal Service is required to maintain a list of persons who desire to receive no sexually oriented advertisements through the mails, and to make that list available to persons or firms that may wish to mail such advertisements to some or all persons whose names do not appear on the SOA list. This list is available to mailers for a fee.

¹⁵⁹ Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692.

Asset Forfeiture Fund or the Consumer Fraud Fund.¹⁶⁰ The law enforcement activities of the Postal Inspection Service are, obviously, not commercial activities. Thus, they are not services for purpose of review under 39 U.S.C. § 404(e).

Purchasing arrangements that generate revenues. Deputy Postmaster General Donahoe identifies several programs which generate revenues but which he categorizes as purchasing arrangements. Donahoe Statement at 13. These include (1) the CMC transportation asset management program under which the Postal Service receives rebates for fuel purchases and refunds on state excise taxes;¹⁶¹ (2) warranty repair program under which the Postal Service is compensated by Original Equipment Manufacturers (OEMs) for repairs done by the Postal Service to the OEM's equipment still under warranty;¹⁶² and the NASCAR sponsorship with Baker Curb Racing, Inc., whereby selected Postal Service trademarks are displayed on racecars, uniforms, and the like.¹⁶³

As a general matter, the Postal Service makes a reasonable case that any revenues generated from these programs are a consequence of what may fairly be characterized as rebates associated with the specific purchasing arrangement. Thus,

¹⁶⁰ The Postal Inspection Service's Asset Forfeiture Program began with the Child Protection Act of 1986 granting forfeiture authority to the Postal Service in child exploitation cases having a nexus to the mail. Subsequent amendments to the Money Laundering Control Act of 1984 gave the Postal Service forfeiture authority for the majority of financial crimes that the Postal Service investigates. In 1997, the Postal Inspection Service created the Consumer Fraud Fund. It was initially funded from an Inspection Service mail fraud investigation in the Southern District of Iowa. See Response to Order No. 74 at 24.

¹⁶¹ *Id.* at 14; see also Response to Order No. 74 at 25.

¹⁶² *Id.* at 15; see also Response to Order No. 74 at 28. Repairs are performed at the Central Repair Facility located in Topeka by Northrop Grumman Technical Services. An OEM reimburses the Postal Service for the time and materials charges paid by the Postal Service to Northrop Grumman Technical Services, and pays an additional 25 percent markup above those charges which is retained by the Postal Service. The Postal Service expresses an interest in expanding this program to other customers of this manufacturer. *Id.* at 28-29.

¹⁶³ *Id.* at 15-16; see also Response to Order No. 74 at 35.

with one possible exception, because they are not commercial activities offered to the public for purposes of financial gain, they are not subject to review under 39 U.S.C. § 404(e). The possible exception concerns the warranty repair program, which the Postal Service indicates a desire to expand, and based on Deputy Postmaster General Donahoe's statement may already have done so, to encompass other customers of the OEM for which the repair program was initiated. That would appear to be a line of business unrelated to the Postal Service's core function. It may (or may not) be a permissible activity under the PAEA. In Phase II, the Postal Service shall provide details of this expanded program if it wishes to continue the program as an authorized competitive nonpostal service. Until a final determination in that proceeding, the status quo may be continued.

Service-wide costs. The service-wide costs finance number serves as a catchall (or default account) for a wide variety of miscellaneous revenue. Examples include revenue from escheated stale checks; unclaimed meter deposits; unidentified cash receipts; reimbursements; and one-time non-routine transactions.¹⁶⁴ None of these activities represents a commercial activity. Thus, they are not services subject to review in this proceeding.

Miscellaneous sources of revenue. Deputy Postmaster General Donahoe identifies various other revenue-generating activities which he characterizes as occurring during the normal course of business. Donahoe Statement at 18-19. These myriad sources of revenue include, for example, recovery of judgments; income for interest; sale of securities; and repurchase of debt; unclaimed monies found in the mails; and fees for employee parking. *Id.* None of these revenue-generating activities

¹⁶⁴ Response to Order No. 74 at 24-25.

Chapter VI: Activities that the Postal Service
Claims are Unreviewable

is commercial in nature. Therefore, they are not subject to review under 39 U.S.C. § 404(e).

For the most part, the Postal Service has made a reasonable case that any revenues generated by these activities are not subject to review under 39 U.S.C. § 404(e) because they are not, with one possible exception, commercial activities offered to the public for purposes of financial gain. Instead they derive from statute (where any revenues generated are a consequence of the duty imposed) from a statutorily imposed duty, or are directly related to the transaction of its core business (where any revenues generated are ad hoc occurrences).

VII. FUTURE PROCEEDINGS

In the near future, the Commission will request comment on rules to provide for the appropriate level of future oversight of nonpostal products and to ensure that sufficient financial information will be available to allow the Commission to provide that level of regulation. That rulemaking proceeding will also provide the opportunity for comment on any necessary modifications to the form and content of the product lists to accommodate the nonpostal services in the classification schedule.

Although the Commission believes its primary responsibilities relate to activities attendant to providing postal products, and that regulation of nonpostal products should be minimally intrusive, the approach and procedures to provide for the future regulation of nonpostal products pursuant to title 39 will require the opportunity for public input and further consideration by the Commission.

In this Order, the Commission has determined whether the products for each of the continuing nonpostal services are market dominant or competitive in accordance with 39 U.S.C. § 404(e). The content and format of the nonpostal product lists in the classification schedule also will require further Commission consideration. The Commission will consider as well whether current rules for changing, adding, or deleting products from the classification schedule are appropriate for nonpostal services.¹⁶⁵

The Postal Service explains the Mail Classification Schedule as follows: “[T]he MCS summarizes and structures the universe of postal services (*and eventually, grandfathered non-postal services*) offered by the Postal Service in a way that is suitable for the exercise of the Commission’s regulatory responsibilities under the Act.

¹⁶⁵ Pursuant to section 404(e) new nonpostal services may no longer be initiated by the Postal Service.

(emphasis added).¹⁶⁶ The Postal Service appears to believe that the PAEA provides that grandfathered nonpostal services designated as either market dominant or competitive “would place the activity under the corresponding regulatory scheme for that particular product group.” Postal Service Reply Brief at 53.

At this juncture, the Commission does not share this view. The Commission expects that a separate, more light-handed approach to nonpostal services will allow it to fulfill its regulatory responsibilities in this area.

At this time, the Commission anticipates that upon the approval of nonpostal product descriptions, the structure of the MCS will include two distinct parts, one for market dominant products and another for competitive products. Each MCS segment will be further divided into postal products and nonpostal products, to include listings of specific products.

The required details within the product list may not need to be as specific for nonpostal products as for postal service products. However, there may be several categories within a nonpostal product. For example, the service of the licensing of intellectual property is a nonpostal service. There are several categories of licensing within that service, each of which is competitive: the categories of patent, trademark, and copyright licensing. It appears there may be important distinctions in the products utilizing licensed intellectual property. Details to be included in the classification schedule will be considered in the proposed rulemaking.

¹⁶⁶ United State Postal Service Submission of Initial Mail Classification Schedule in Response to Order No. 26, *Regulations Establishing System of Ratemaking*, Docket No. RM2007-1, September 24, 2007 at 2.

During this proceeding and at the direction of the Commission,¹⁶⁷ the Postal Service filed proposed classification language for the nonpostal services that it requested the Commission to authorize.¹⁶⁸ The proposed language for the grandfathered nonpostal services includes sufficient information at this time to identify the nonpostal services in the classification schedule. It will be inserted provisionally into the MCS, subject to minor editorial changes as necessary, pending the conclusion of the rulemaking that establishes the form and content for nonpostal services product listings.

The Commission also has authorized the continuation of additional nonpostal services for which the Postal Service has not filed proposed classification language. The Postal Service shall file within 30 days from the date of this order proposed classification language for those additional services and the products thereunder, as either market dominant or competitive products, as specified in this order, that shall be evaluated in the above-described rulemaking.

It is Ordered:

1. Address Management Services, Customized Postage, Greeting Cards, International Money Transfer Service, ReadyPost, and Stamp Fulfillment Services are each determined to meet the definition of a postal service. The Postal Service shall file an appropriate request to add them to the Mail Classification Schedule within 60 days, as discussed in the body of this Order.

¹⁶⁷ Order Denying, In Part, Motion to Compel, Order No 120, October 23, 2008.

¹⁶⁸ United States Postal Service Notice of Filing of Proposed Mail Classification Schedule Language for Six Nonpostal Services Pursuant to Order No. 120, November 7, 2008.

Chapter VII: Future Proceedings

2. The nonpostal services of the Postal Service as determined in the body of this Order shall continue as market dominant or competitive products as designated. The Postal Service shall file proposed classification schedule language within 30 days of the date of this order, pending further order of the Commission.
3. “Stored Value Cards,” in the form requested, were not offered on January 1, 2006. The Postal Service’s request for authorization to continue the nonpostal service is denied.
4. The Motion in the Alternative of Epostmarks, Inc. to file a Supplemental Brief is granted.
5. Other outstanding motions to file out of time are granted.

By the Commission.

Steven W. Williams
Secretary

APPENDIX I

TREATMENT OF REVENUE PRODUCING ACTIVITIES IDENTIFIED IN POSTAL SERVICE RESPONSE TO ORDER NO. 74

A. Postal Services (6 Activities)

1. Address Management Services
2. Customized Postage
3. Greeting Cards
4. International Money Transfer Service (IMTS)
5. ReadyPost
6. Stamp Fulfillment Services

B. Nonpostal Services (15 Activities)

Market Dominant (7 Activities)

1. Affiliates for Website
2. Affiliates—Other (Linking Only)
3. Fed Ex Drop Boxes
4. Licensing Programs Other than Officially Licensed Retail Products (OLRP)
5. Meter Manufacturers Marketing Program
6. MoverSource
7. Philatelic Sales

Competitive (7 Activities)

1. Electronic Postmark
2. Non-Sale Lease Agreements (Non-Government)
3. Officially Licensed Retail Products (OLRP)
4. Passport Photo Service
5. Photocopying Service
6. Training Facilities (In Part)
7. Warranty Repairs Program (In part, subject to review in Phase II)

Not Authorized (1 Activity)

1. Stored Value Cards

Appendix I—Treatment of Revenue Producing Activities

C. Not Services Under 39 U.S.C. § 404(e) (26 Activities)

1. Asset Forfeiture Fund
2. CMC Transportation Asset Management
3. Consumer Fraud Fund
4. Debt Collection Act (from employees)
5. Equal Employment Opportunity Processing
6. Emergency Preparedness Appropriations
7. Freedom of Information Act, Privacy Act Fees
8. Forfeiture Proceedings/Civil Penalties
9. Inspection Service Reimbursements
10. Interest Income
11. Interest on Escrow Accounts
12. Interest on Overdue Accounts Receivable
13. Mail Recovery Center
14. Migratory Bird Stamps
15. Mortgage Interest
16. Non-Sale Lease Agreements with Government Agencies
17. Notary Public
18. Parking Fees from Employees
19. Passport Application Acceptance
20. Real Property and Equipment Sales
21. Repurchase of Debt
22. Sale of Securities/Debt Repurchase
23. Service-wide Costs
24. Sexually Oriented Advertising List
25. Unclaimed Merchandise
26. Vehicle Supplies/Service to Government Agencies

APPENDIX II

PROCEDURAL HISTORY

In Order No. 50, the Commission adopted a procedural schedule designed to afford the Postal Service and interested parties an opportunity to develop a record of nonpostal services offered by the Postal Service and which of those services should continue. To that end, the Commission directed the Postal Service to provide a complete description of each nonpostal service offered on the date of enactment of the PAEA, including the current status of each nonpostal service and the Postal Service's proposed classification for any nonpostal service it wished to continue. The order also directed the Postal Service to provide a sworn statement from a knowledgeable person (or persons) addressing the public need for each service and such other matters the Postal Service deems relevant. Order No. 50 at 2.

Interested parties were provided an opportunity to respond to the Postal Service filing in the form of a sworn statements by a knowledgeable person (or persons) addressing, at a minimum, the ability of the private sector to meet the public need for any nonpostal service the party asserts should not be offered by the Postal Service, as well as other matters deemed relevant. *Id.*

The procedural schedule also provided an opportunity for the Postal Service and any interested person to submit a reply to any party's statement, again in the form of a sworn statement by a knowledgeable person (or persons). Finally, the order also established dates for filing initial and reply briefs. *Id.* at 3.

Postal Service's initial filing. In response to Order No. 50, the Postal Service identified five nonpostal services it wishes to continue as "grandfathered" pursuant to 39

U.S.C. § 404(e)(2).¹ The Postal Service also identified “a number of services not previously regulated by the Commission” which it believes should be added to the Mail Classification Schedule as “postal services.”²

The Postal Service argues that it is authorized to provide three types of services to the public: (1) “postal services” as defined in 39 U.S.C. § 102(5); (2) “nonpostal services,” which it defines as “services that are ‘nonpostal’ within the meaning of former section 404(a)(6);” and (3) services that are not “postal services” but are authorized by separate grants of authority in title 39. *Id.* at 3. It contends that only services within the second category are directly implicated in this proceeding. *Id.*

Order No. 74. Following the Postal Service’s response to Order No 50, the Public Representative filed a motion to compel seeking a complete list of nonpostal services.³ He argued that the Postal Service had improperly excluded large segments of its product offerings without allowing the Commission to review the offerings, and that it is the Commission’s responsibility to determine which offerings should be subject to review. He moved for an order directing the Commission to direct the Postal Service to file a complete list and description “of those offerings the Postal Service is describing in its Notice...and which a reasonable person could read as being a nonpostal service offered by the Postal Service. Public Representative Response to Order No. 126 at 4.

While acknowledging “some merit in what the Public Representative appears to be trying to achieve,” the Postal Service nonetheless opposed the motion, but provided

¹ See March 19 Notice. In support, the Postal Service filed contemporaneously the Statement of Tina M. Lance on Behalf of the United States Postal Service, which addressed the following five nonpostal services: passport photo service; photocopying service; notary public service; stored value cards; and Officially Licensed Retail Products (See Lance Statement).

² Address Management Services, ReadyPost, International Money Transfer Services, and Greeting Cards. March 19 Notice at 2, 5-10.

³ Public Representative Response to Order No. 126.

additional information in a more systematic listing of Postal Service offerings within two attachments to its response to the motion.⁴ Attachment One follows the categorization of the earlier Submission listing three groups of services with references to their descriptions. The Postal Service lumped together, as one group of services, four separate services treated as nonpostal in the past, but which the Postal Service now wishes to be classified as postal services.⁵ The second group of services included five nonpostal services to be grandfathered pursuant to 39 U.S.C. § 404(e).⁶

The third service group included 11 offerings treated as nonpostal in the past, and which the Postal Service claims are also authorized under separate grants of statutory authority, primarily sections 411, 401(5) or 404(a)(5). *Id.* at 2-3. Attachment Two provides program descriptions of the listings in Attachment One except for those described in the statement of Tina Lance.⁷ The Postal Service also cited to several interrogatory responses and an attachment to its rate request in Docket No. R2006-1 as having previously provided detailed program descriptions to the Commission. The Postal Service concluded its response should be sufficient to moot the Public Representative's motion.

In ruling upon the Public Representative's motion, the Commission noted that it, rather than the Postal Service, must determine which nonpostal services to review in order to comply with the law requiring review of a complete list of nonpostal services. The Commission also found no provision in the PAEA for a third category of services that is neither "not postal" nor "not non postal." *Id.* at 7. The legislative history cited by

⁴ Postal Service Response to Order No. 126 at 3-4.

⁵ Address Management Services; ReadyPost; International Money Transfer Services; and Greeting Cards. *Id.* at Attachment One.

⁶ Passport Photo Service; Photocopying Service; Notary Public Service; Stored Value Cards; and Officially Licensed Retail Products (OLRP). *Id.* Fax service offered at some post offices is to be discontinued and is not listed on Attachment One. *Id.* at 3, n.1.

⁷ Attachment Two does not include descriptions for the "currently inactive" programs, Collaborative Logistics, and Phone Cards.

the Postal Service failed to demonstrate the intent of Congress at variance with the express language of section 102 of the PAEA. Rather, by giving the words their ordinary meaning and applying the straightforward definition of nonpostal services in section 404(e)(1), section 404(e) encompasses nonpostal services provided for under sections 404(a)(5) and 411. To ensure the Postal Service can not “deviate” from its basic function to provide postal services, section 404(e) does not exempt any nonpostal service from the review process, unlike some of the previous reform bills which specifically exempted section 411. Although section 401 grants the Postal Service’s authority to operate as a going concern, including the management of its property resources pursuant to section 401(5), its powers are not unfettered. Those activities are not shielded from oversight merely because they are claimed to be revenue generating activities authorized by section 401(5). Section 404(e) was designed to avoid Postal Service claims that it has broad authority to engage in commercial activities.

In Order No. 74, the Commission granted the Public Representative’s motion to compel, directing the Postal Service to file a complete listing and comprehensive description of each nonpostal service including all existing agreements (contracts, arrangements, or however characterized) that generate revenues or compensation regardless of the statutory authority claimed for the agreements. See Order No. 74. Upon request for clarification of Order No. 74, the Commission noted that the order represented its preliminary view on the issues.⁸

Postal Service Response to Order No. 74. In response to the Commission’s directive, the Postal Service filed a comprehensive listing and descriptions with two attachments listing general ledger accounts with FY06 and FY07 annual revenues for all revenue-generating activities that are not postal services.⁹ The revenue-generating

⁸ PRC Order No. 77, Order Granting Motion for Clarification, May 28, 2008.

⁹ Response to Order No. 74 at 1-2.

activities described are the services the Postal Service proposes to be authorized as nonpostal services and those proposed to be defined as postal services, as well as other sundry revenue generating activities.

Attachment One of the response is a spreadsheet of the 64 General Ledger (GL) accounts identifying sources of revenue other than postal revenue. The accounts aggregate the Miscellaneous Items that tie back to the total amounts reported within the Postal Service's Cost and Revenue analysis (CRA) for fiscal years FY 2006 and FY 2007. Total revenue reported for Miscellaneous Items in the FY 2006 CRA was \$877.1 million, and revenue in the FY 2007 CRA was \$949.0 million. *Id.* at 2.

Attachment Two of the response is also a spreadsheet. It breaks out accounts administered by headquarters and by the field into finer components. The Postal Service supplemented Attachment Two and provided further explanations for additional entries.¹⁰ The bulk of the response's narrative describes activities for entries in both attachments which are of relatively substantial dollar amounts or which historically have been the focus of nonpostal discussions or activities similar to those with substantial revenue. Response to Order No. 74 at 3-4.

Subsequently, the Postal Service filed a Further Response and Notice of Sworn Statements, which, among other things, added Customized Postage to the four services it had previously identified for classification as postal services.¹¹ In addition, it proposed to add Electronic Postmark to the five grandfathered nonpostal services previously identified. *Id.* at 6. The Postal Service also maintained the contention that under its

¹⁰ Supplement to the Initial Response of the United States Postal Service to Order No. 74, June 24, 2008.

¹¹ Further Response to Order No. 74 at 3.

legal theory, its other activities and certain nonpostal services authorized by other sections of title 39 are not subject to 39 U.S.C. § 404(e) review.

Concurrently, the Postal Service filed sworn statements by the following individuals to support its requested treatment of these various activities: Thomas J. Foti, addressing EPM and Customized Postage; Margot A. Myers, addressing Greeting Cards and ReadyPost, Pranab Shah addressing International Money Transfer Service, and Alice VanGorder discussing Address Management Services.

The Postal Service also submitted a sworn statement by Patrick Donahoe, Deputy Postmaster General and Chief Operating Officer of the Postal Service. He addresses certain of the Postal Service's activities and programs not discussed elsewhere.¹² His statement divides the Postal Service activities into two categories, those he labels as core business-related activities and as government-related services. In his view, core business-related activities involve real property; disposal of property other than real property; web-based affiliates; purchasing arrangements (including the CMC Transportation Asset Management program; the warranty repair program (and the NASCAR related sponsorship); and MoverSource, a strategic alliance for change-of-address orders. He also references revenue generated in the normal course of business obtained from lawsuits, financial management, and recovery of unclaimed monies.¹³

¹² The statement of Alice VanGorder discussing Movers Guide is cited as support for a nonpostal service, although her statement appears intended primarily to support classification of all Address Management Services as a postal service rather than offering support for Movers Guide as a nonpostal service. Further Response to Order No. 74 at 7.

¹³ Government-related services discussed include law enforcement activities and government functions including the collection of Freedom of Information Act and Privacy Act processing fees, philatelic services, and interagency agreements.

*Parties' Statements.*¹⁴ Three parties submitted statements responsive to the Postal Service filings:

- ASC, Inc. through the statement of Charles P. Naumoff, supports continuation of both the OLRP program and the offering of philatelic products and services.¹⁵
- DigiStamp, Inc., through the statement of Rick Borgers, strenuously opposes the continuation of the electronic postmark program (EPM).¹⁶
- Adam Grossman, on behalf of Epostmarks, Inc. urges that there is a public need for the Postal Service-branded version of EPM which can not be met by the private sector.¹⁷

In lieu of a statement, Stamps.com submitted a response stating its position on, among other things, Customized Postage and EPM.¹⁸

Three reply statements were filed. DigiStamp and Epostmarks comment on one another's initial comments on EPM.¹⁹ Microsoft Corporation supports EPM as a "key component of the Post of the future" because it allows the Postal Service to meet the public need for trusted electronic communication unrivaled by the private sector.²⁰ Microsoft is working to integrate postmark capabilities into its software suite and has developed an electronic Postal Certification Mark that allows users of Microsoft software

¹⁴ The due dates for parties statements were extended until July 30, 2008, and replies to the responses were extended until August 6, 2008. Order Granting Motion for Extension of Time, Order No. 82, June 11, 2008. The date for replies was further extended until August 20, 2008. PRC Order No. 93, Order Granting Motion for Extension of Time, August 5, 2008.

¹⁵ See Charles P. Naumoff Statement, *supra*.

¹⁶ See Rick Borgers Statement, *supra*.

¹⁷ See Adam Grossman Statement, *supra*.

¹⁸ Response [of Stamps.com], *supra*.

¹⁹ See Supplemental Statement of Rick Borgers *supra*.

²⁰ Microsoft Reply Comments, *supra*, at 2.

to apply a certified timestamp and seal the document using the UPU standard S43-3. *Id.* at 4-5.

Briefs. Initial briefs were filed on September 10, 2008 by eight participants.²¹ Six reply briefs were filed on September 30, 2008.²²

Miscellaneous comments and filings. Several miscellaneous motions and comments have been submitted during the proceedings. The comments filed by Epostmarks, and endorsed by other entities, were intended to define the EPM technology, its potential, and the value of EPM to various interest groups and the Postal Service and to express the belief that the Postal Service should continue offering the EPM service.²³

Two state legislators filed letter comments regarding EPM. Jeannie Haddaway-Riccio, Delegate, Maryland House of Delegates, states that a new law she introduced in 2005 amending the Maryland Universal Electronic Transactions Act recognizes “an electronic record authenticated by the USPS Electronic Postmark (EPM), as having the same legal protections as U.S. Mail.” Letter received August 26, 2008. Donna Stone, Delaware State Representative, commented in support of EPM, referring to the

²¹ Initial Briefs were filed by the United States Postal Service; ASC, Inc.; DigiStamp, Inc.; Epostmarks, Inc.; Pitney Bowes, Inc.; PostCom, *et al.* (Association for Postal Commerce, Direct Marketing Association, and Mail Order Association of America); the Public Representative; and Valpak (Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc.).

²² Reply Briefs were filed by the United States Postal Service; DigiStamp Inc.; Epostmarks, Inc.; the Public Representative; American Postal Workers Union, AFL-CIO; and PostCom, *et al.* (Association for Postal Commerce, Alliance of Nonprofit Mailers, Direct Marketing Association, Magazine Publishers Association, National Postal Policy Council, and Parcel Shippers Association).

²³ Comments of Epostmarks, Inc. Endorsed by Microsoft Corp, Striata, Goodmail Systems, Inc., Govdelivery, Inc., and Iconix, Inc. on the Value of Electronic Postmark Platform and Applications, September 10, 2008.

adoption of a Delaware law accepting EPM and the public need for EPM that facilitates trusted communications.

Letter comments were filed by the Information Assurance Consortium (IAC).²⁴ IAC sees a public need for EPM. It is not opposed to EPM if the Postal Service, provided that the Postal Service acts as a responsible vendor, ensures that EPM is reliable and secure by adding technical expertise in time stamp methods, and makes EPM compliant with a comprehensive protocol that is a global standard.

Epostmarks, Inc. moved to strike the comments of IAC (and a summary of the comments in the reply brief of DigiStamp) as raising, for the first time, a new issue in its comments.²⁵ IAC, in turn, moved to file the above mentioned letter response dated October 31, 2008, to Epostmark's Supplemental Brief.²⁶

The Public Representative moved the Commission to compel the Postal Service to file MCS language for all postal and nonpostal services to allow the Commission to classify nonpostal services in the MCS by the statutory deadline.²⁷ The Postal Service opposed the motion arguing the deadline for authorizing nonpostal services does not include classification within the MCS.²⁸ Although finding that nonpostal services will not

²⁴ IAC defines itself as a "member-driven 501(c)(6) organization dedicated to education, promoting awareness, and facilitating the use of standards-based, trusted information architectures, products and services by the public and private sectors." Founding members includes trusted time stamping companies. Letters were received on September 30, 2008 and October 31, 2008.

²⁵ Motion of Epostmarks, Inc. to Strike or, in the Alternative, for Leave to File Supplemental Brief, October 14, 2008.

²⁶ Information Assurance Consortium Motion (1) For Leave to File A Late Response to the Motion of Epostmarks, Inc. to Strike or, in the Alternative, for Leave to File Supplemental Brief (2) for Leave to File a Response to Epostmarks Supplemental Brief, November 3, 2008.

²⁷ Public Representative Motion to Compel United States Postal Service to File Proposed Mail Classification Schedule Language, October 1, 2008.

²⁸ Response of the United States Postal Service to Public Representative Motion to Compel United States Postal Service to File Proposed Mail Classification Schedule Language, October 8, 2008.

terminate without adoption of specific classification language for nonpostal services by December 20, 2008, to assist in its consideration of this case, the Commission requested the Postal Service to file proposed language for the six proposed nonpostal services.²⁹ The Postal Service thereafter filed proposed classification language for six nonpostal services.³⁰

Postal Service's Response to Order No. 126. Pitney Bowes filed a motion after the briefs were submitted when it learned of a line of Postal Service-branded postage meter cartridges. The motion requested the Commission to compel the Postal Service to file a complete list and description of all existing and new nonpostal services that may be subject to this proceeding.³¹ Statements in support of Pitney Bowes' motion were received from PostCom, *et al.*,³² Hasler, Inc. and Neopost Inc.³³ The Public Representative also responded in support of the motion.³⁴

The Postal Service opposed the motion indicating it had fully complied with the Commission's orders in this proceeding, that this licensing is not subject to this proceeding, and responded to a variety of other arguments of Pitney Bowes.³⁵ A reply was filed by Pinpoint LLC, the manufacturer of ink cartridges and ribbons for the Postal Service, arguing that the Postal Service has no involvement in the manufacture or sale

²⁹ Order Denying, In Part, Motion to Compel, Order No. 120, October 23, 2008.

³⁰ United States Postal Service Notice of Filing of Proposed Mail Classification Schedule Language for Six Nonpostal Services Pursuant to Order No. 120, November 7, 2006.

³¹ See Pitney Bowes Inc. Motion to Compel. In support, Pitney Bowes filed a declaration by its Vice President of Merchandising: Declaration of Peter Wragg in Support of Pitney Bowes Inc.'s Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, October 15, 2008.

³² See PostCom *et al.* Response to Pitney Bowes Motion to Compel.

³³ See Hasler and Neopost Response to Pitney Bowes Motion to Compel.

³⁴ Public Representative Response to Pitney Bowes Inc. Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, October 22, 2008.

³⁵ See Postal Service Response to Pitney Bowes Motion to Compel.

of its products, and the postage meter print cartridge, in particular. It further took issue with Pitney Bowes's claim that the specific market for postage meter supplies is "highly competitive." As a competitor of Pitney Bowes in this field, it calculated that Pitney Bowes holds a market share of 94 to 96 percent of the market for postage meter cartridges.³⁶ The Commission granted the Pitney Bowes motion, in part, and directed the Postal Service to file detailed supplemental information regarding its commercial trademark license agreements and the products (or services) offered.³⁷ The order provided opportunity for participants to comment upon the Postal Service's supplemental information.

The Postal Service responded on November 17, 2008 with a detailed listing of its licenses and a general description of its licensing practices and provisions, including the degree of control the Postal Service exercises over its licensees. It continued to assert its view that section 404(e) does not apply to licensing its intellectual property or that, if it does, individual dispositions of licenses should not be viewed as separate nonpostal services.³⁸

Several comments on the Postal Service filing were received, most of which raise similar arguments. Pitney Bowes sees the ink cartridge license as commercial rather than promotional and misleading the public about the Postal Service's involvement in

³⁶ Pinpoint LLC filed Reply and Motion for Late Acceptance, October 28, 2008. The reply requested acceptance of a declaration of Randall E. Hooker, Managing Member of Pinpoint, to provide a viewpoint not before the Commission. Pitney Bowes responded to Pinpoint on October 31, 2008. A second declaration by Hooker was received November 7, 2008.

³⁷ Order Granting, In Part, Pitney Bowes Inc. Motion to Compel, Order No. 126, November 3, 2008.

³⁸ Response of the United States Postal Service to Order No. 126 Regarding Licensing Agreements and Notice of Filing of Sworn Statement, November 17, 2008. With its response, the Postal Service filed the sworn statement of Gary A. Thuro, Postal Service Manager of Licensing.

the product.³⁹ The Public Representative is also concerned about the public's perception of products bearing the Postal Service's trademark.⁴⁰

Pitney Bowes and others who commented did not see a public need for the ink cartridge product that cannot be met by the private sector and contend that the Postal Service, as a government entity, should not compete in commercial markets. In particular, the Postal Service should not be in competition with companies over which it exercises control. They urged termination of the ink cartridge license as either a new product not meeting the January 1, 2006 cut-off date, or for injecting government sponsored competition into the market where there is not a public need that cannot be met by the private sector.⁴¹ Comments in support of the Postal Service received from Pinpoint, LLC. emphasized that the limited control the Postal Service exercises over licensees is an indication the Postal Service has not entered the ink cartridge market which, it countered, is not vibrant and competitive.⁴²

³⁹ Pitney Bowes Inc. Comments on United States Postal Service Response to Order No. 126 Regarding Licensing Agreements, November 24, 2008. See Order Granting Motion for Extension of Time, Order No. 136, November 19, 2008 extending the times for reply comments on Order No. 126 and responses thereto.

⁴⁰ Public Representative Response to Order No. 126: Supplemental Briefing on Licensing Agreements, November 24, 2008.

⁴¹ Comments were received on November 24, 2008 from: jointly, Association for Postal Commerce, Alliance of Nonprofit Mailers, Direct Marketing Association, National Postal Policy Council and Parcel Shippers Association; Francotyp-Postalia, Inc. and Brother International Corporation. Other comments on Order No. 126 were received from the Chamber of Commerce of the United States of America on November 19, 2008, and Information Technology Industry Council (ITI) on November 21, 2008.

⁴² See, on behalf of Pinpoint, LLC, the Third and Fourth Declarations of Randall E. Hooker in Response to Pitney Bowes, Inc.'s Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, November 21 and November 26, 2008, respectively.