Postal Regulatory Commission
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BEFORE THE POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Advance Notice of Proposed Rulemaking To Consider Regulations to Carry Out the Statutory Requirements of 39 U.S.C. 601

Docket No. RM 2020-4

COMMENTS OF FEDEX CORPORATION

(April 7, 2020)

On February 7, 2020, the Postal Regulatory Commission (Commission) issued Order No. 5422, an advance notice of proposed rulemaking (ANPRM) to consider the adoption of regulations pursuant to 39 U.S.C. 601.[1] FedEx Corporation (FedEx) respectfully submits the following comments in response to this ANPRM.

FedEx welcomes this rulemaking and commends the Commission for addressing the need to bring greater clarity to the exceptions to the postal monopoly[2] set out in 39 U.S.C. 601. In developing regulations to implement this statutory provision, the Commission should not replicate the Postal Service's regulations that purport to define the terms "letter" and "packet."[3] Instead, the Commission should act pursuant to its mandate in the Postal Accountability and Enhancement Act (PAEA) and issue new regulations under its own authority. Such Commission-issued regulations should, consistent with the postal monopoly laws enacted by Congress, enumerate in clear terms all instances where the private carriage of letters is permitted under section 601.

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[1] Docket No. RM2020-4, Order No. 5422, Advance Notice of Proposed Rulemaking (ANPRM) to Consider Regulations to Carry Out the Statutory Requirements of 39 U.S.C. 601 (Feb. 7, 2020).

[2] We use the term "postal monopoly" interchangeably with "letter monopoly" in these comments.

[3] Since the term "packet" in this context refers to a letter of several pages, the postal monopoly covers only the carriage of "letters." *See* Williams v. Wells Fargo & Co. Express, 177 F. 352 (8th Cir. 1910). As a result, and for simplicity's sake, these comments generally use the term "letter" to refer to both terms.

We also submit that the Commission should declare void the Postal Service regulations in this area.

Before addressing the specific issues the Commission raises in this ANPRM, we provide for context a brief historical summary of the postal monopoly dating from its roots in pre-constitutional English common law to the PAEA provision on which this ANPRM is based. The following summary discusses, in turn, the monopoly's statutory history, its more recent regulatory and interpretative gloss, and the revisions PAEA made to the relevant laws.[4] After the summary, our comments focus on the specific issues raised in the ANPRM most relevant to FedEx.

1 Statutory History of U.S. Postal Monopoly

The concept of the postal monopoly predates the formulation of the U.S. Constitution, descending directly from an English proclamation issued by Charles I in 1635 that temporarily banned private carriage of "letters and packets" between England and Scotland. The postal monopoly became a permanent feature of English law in 1660 immediately after the restoration of Charles II. The English postal monopoly was introduced into U.S. law in modified form by the Continental Congress in the Postal Ordinance of 1782. The present federal government, established after the U.S. Constitution replaced the Articles of Confederation, maintained the 1782 ordinance and eventually adopted its first postal law, compete with a revised postal monopoly, in 1792. The early U.S. postal monopoly laws did not prohibit the private carriage of letters — a common practice of travelers — but the private establishment of "postal" systems. In the late eighteenth century, a postal system was series of posts or stations at which horses were kept for riders who carried a "mail" (bag) containing letters and newspapers (single sheets) in a series of relays. Postal systems operated exclusively rapid communication

[4] This history largely derives from the Commission's own study of similar issues in 2008. *See* Postal Regulatory Commission, *Study on Universal Postal Service and the Postal Monopoly*, Appendix C, Postal Monopoly Laws: History and Development of the Monopoly on the Carriage of Mail and the Monopoly on Access to Mailboxes, by James I. Campbell Jr. (hereafter, "History and Development of the Monopoly"). https://www.prc.gov/docs/61/61628/Appendices.zip (last visited April 6, 2020). The full text of this study is incorporated into FedEx's comment by reference.

links between central post offices located in each city. There was no local postal collection and delivery service.

In the 1830s, the development of railroads began to transform long distance transportation in the United States. Entrepreneurs realized they could provide a better and cheaper inter-city service by collecting letters in one city, taking the railroad to a second city, and distributing the letters to addressees. These companies came to be called "private expresses." The term "express" referred to an extra, unscheduled postal rider as opposed to the regularly scheduled relay riders. The private expresses grew rapidly and were popular in the relatively well-populated portions of the United States. In a series of high-profile cases, the federal courts ruled that private expresses did not violate the law against the establishment of private postal systems.[5]

In 1845, Congress reacted to the rise of private expresses by sharply reducing postage rates. Congress also adopted a new set of restrictions on the private carriage of letters that prohibited private express services in areas served by the Post Office out of a concern that "the Post Office Department continued to run substantial deficits in spite of high postage rates."[6] These "private express laws" supplemented the earlier postal monopoly laws aimed at private postal systems.[7]

In 1872, Congress codified the postal laws for the first time since 1825. The statutes relating to the postal monopoly as set out the 1872 code, which reflect the essence of today's version of the postal monopoly, were re-codified several times. The 1872, postal monopoly statutes were included in the Revised Statutes of 1874 with minor rephrasing. In 1909, Congress adopted the first criminal code of the United States, and penal provisions of the postal monopoly law were moved from the postal

[5] *See* "History and Development of the Monopoly" at 63-71.

[6] *See* Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO, 498 U.S. 517, 526 (1991) (citing H.R. Rep. No. 477, 28th Cong., 1st Sess., 2-3, 5 (1844)).

[7] *See* "History and Development of the Monopoly" at 71-83. Since the 1930s, many stakeholders, including the Postal Service, have repeatedly used the term "Private Express Statutes" as synonymous with the postal monopoly law, citing to 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606 as the statutory basis. However, as the PRC correctly notes in the ANPRM, "[a]lthough these provisions of the U.S. Code are customarily referred to collectively as the 'Private Express Statutes,' they do not all relate to private expresses or prohibit carriage of letters out of the mails." Order No. 5422 at 2.

title to the new criminal title with rewording for editorial consistency. In 1948, a second criminal code was adopted, again with editorial rewording of the penal provisions of the postal monopoly law. Congress re-codified the civil postal laws in 1960 for the first time since the Revised Statutes and then comprehensively revised title 39 without substantive change to the postal monopoly provisions with adoption of the Postal Reorganization Act in 1970.[8]

In sum, on the eve of PAEA, the postal monopoly statutes generally prohibited: (i) the private carriage of "letters and packets" (ii) by regular trips or at stated periods (iii) over any public means of travel (road, waterway, railroad, etc.) or between any two places regularly served by postal services.[9]

2 Regulatory and Interpretative History of U.S. Postal Monopoly

In the years following adoption of the 1872 postal code, the Post Office Department took the position that authoritative interpretation of the postal monopoly was the sole province of the Attorney General of the United States. In 1881, the Postmaster General complained that the Post Office was inundated with questions about the scope of the postal monopoly and asked Attorney General Wayne MacVeagh to "define the limits of the monopoly of the Post Office Department in the carriage of first class matter." The Attorney General concluded that "it is no violation of [the postal monopoly] for an express company to transport the documents mentioned in yours of 15th instant., viz., manuscript for publication, deeds, transcripts of record, insurance policies, &c." On the definition of the crucial term "letter," the Attorney General declared, "[w]hat is a letter

[8] *See* "History and Development of the Monopoly" at 118-19 (Revised Statutes), 141-43 (criminal codes of 1909 and 1948), 180-82 (postal code of 1960), 186 (Postal Reorganization Act of 1970). Congress also adopted four minor but substantive changes to the relevant statutes between 1872 and enactment of PAEA in 2006. In 1879, Congress exempted from the monopoly private carriage of letters prior to posting. In 1909, Congress declared that common carriers could carry letters related to their current business. In 1934, Congress limited private carriage of letters by special messenger to 25 letters. In 1938, Congress expanded the exception for "stamped" letters (originally, letters in envelopes with postage embossed) to include letters on which postage had been paid by other means. *See* "History and Development of the Monopoly" at 127-28, 141-43, 169-70, and 172-74.

[9] There are also statutory exceptions to the postal monopoly. *See, e.g.*, 18 U.S.C. § 1694 (excepting "cargo letters," *i.e.*, those letters which "relate to some part of the cargo.").

I can make no plainer than it is made by the idea which common usage attaches to that term."[10]

This legally sound interpretation of the key term "letter," however, did not last long. Beginning in the 1890s, attorneys for the Post Office gradually adopted the position that *they* could issue authoritative interpretations of the postal monopoly. Unsurprisingly, these postal solicitors' opinions became more and more expansive as the Post Office sought to suppress carriage of letters by railroads and private expresses. These opinions strayed from the intent of Congress. During the Depression, for example, the Post Office faced increased competition from private entities in the delivery of bills and circulars. In response, the Post Office began to issue public pamphlets that announced a broad definition of the postal monopoly based mostly on the earlier non-public opinions of its solicitors.[11]

This departure from the intent of Congress eventually made its way into the federal regulations. After the Postal Reorganization Act, the Postal Service in 1974 issued regulations defining the scope of the postal monopoly.[12] These regulations reflected a new approach.[13] Whereas the Post Office Department had interpreted the postal monopoly as limited by its (highly elastic) definition of the term "letter," the Postal Service adopted an all-encompassing definition of "letter" that goes far beyond the term's common usage, defining it to mean:

> [A] message directed to a specific person or address and recorded in or on a tangible object [by methods which] include, but are not limited to, the use of written or printed characters, drawing, holes, or orientations of magnetic particles in a manner having a predetermined significance.[14]

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[10] *See* "History and Development of the Monopoly" at 125-26.

[11] *See* "History and Development of the Monopoly" at 186-85.

[12] 39 Fed. Reg. 33209 (Sep. 16, 1974).

[13] *See* "History and Development of the Monopoly" at 186-98.

[14] Comprehensive Standards for Permissible Private Carriage, 39 Fed. Reg. 33209, 33211 (Sep. 16, 1974), *codified at* 39 C.F.R. § 310.1(a) (2006). Advisory opinions issued by the Postal Service under these regulations confirm this point. In these opinion letters, the Postal Service declared that the postal monopoly precluded private carriage of a vast array of things which Postal Service deemed "letters" that fall far beyond the common usage of the term, including advertising circulars and handbills in a plastic bag, blueprints, legal briefs, payroll checks, driver's licenses, fishing licenses, motor carrier tariffs,

Recognizing the problems inherent in this approach (and to make the regulations more politically palatable and practically enforceable), the Postal Service coupled this flawed definition with "suspensions" of the monopoly for certain types of letters or carriage under certain circumstances, *e.g.*, for telegrams, checks and other financial instruments (but only when sent to, from or between financial institutions), catalogs (but only when eligible for an appropriate rate under Postal Service regulations), and documents sent to or from data processing centers.[15] In short, the regulations turned the postal monopoly upside down, effectively defining it by suspensions rather than by the statutory meaning of its central term.

The Postal Service, however, had no statutory authority to suspend criminal laws defining the postal monopoly. In November 1974, the Postal Service conceded as much. Two months after promulgating the 1974 regulations, a mailer requested clarification on the legal effect of a suspension on the criminal penalties that create the postal monopoly. A Postal Service lawyer replied:

> [W]e do not know how we can clarify the status of carriers or users of carriers under the criminal Private Express provisions operating under the suspension for data processing materials promulgated by the Postal Service under the civil Private Express provisions. No express authority exists in the Postal Service to suspend the provisions of the criminal laws.[16]

The Postal Service's regulations rested on flawed grounds from their inception.[17]

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merchandise with enclosed advertisements, microfiche records, price stickers for new cars, professional football tickets, posters, gasoline company credit cards, newspaper and magazine clippings, computer tapes, and airline ticket. *See* "History and Development of the Monopoly" at 198 & n. 527.

[15] Comprehensive Standards for Permissible Private Carriage, 39 Fed. Reg. 33209 (Sep. 16, 1974).

[16] Letter from R. P. Craig, Deputy General Counsel, Postal Service, to W. Malone, Vice President, General Telephone and Electronics Corp. (Nov. 22, 1974), *reprinted in* Hearings on the Postal Reorganization Act Amendments of 1975, H.R. 2445, before the Subcomm. on Postal Service of the House Comm. on Post Office and Civil Service, 94th Cong. 1st Sess. 344, 346 (1975) (emphasis added).

[17] The Postal Service's purported legal basis for suspensions, 39 U.S.C. 601(b), actually provided exactly the opposite — authority to expand the postal monopoly by suspending the effects of the stamped letter exception in certain circumstances. *See* "History and Development of the Monopoly" at 109-205. Between 1974 and 2006, the Postal Service modified its postal monopoly regulations in relatively minor respects. The primary revisions involved the addition of new "suspensions" for selected users or carriage under certain circumstances. *See* "History and Development of the Monopoly" at 214-21.

In the only significant judicial review of these Postal Service regulations, the D.C. Circuit Court considered in 1978 whether, as declared in the regulations, the "letter" monopoly prohibited private carriage of printed advertisements.[18] Although the court expressed frustration at the shifting and contradictory administrative interpretations of the postal monopoly, a divided court concluded in the end that: (i) the Postal Service was authorized under 39 U.S.C. 401(2) (1976) to promulgate regulations to further the objectives of Title 39, which included provisions concerning the postal monopoly; and (ii) in defining the term letter to include printed advertisements, "the Postal Service has settled upon a reasonable criterion the presence or absence of an address and that its definition suffers from no more than the level of arbitrariness which is inevitable."[19]

Even so, the court acknowledged that "legislative text and history" were "not dispositive"[20] and that they "belie any notion that a single definition of 'letter' flows ineluctably from the materials at hand."[21] Indeed, the court framed its decision as an invitation to Congress to reconsider the issue: "we are hopeful that our recital of the ambiguities and uncertainties will spur Congress to give the matter some attention."[22] As explained below, Congress gave the matter that attention in PAEA, casting serious doubt upon – if not outright overriding – the statutory interpretation offered by this judicial decision.[23]

[18] *See* Associated Third Class Mail Users v. U.S. Postal Serv., 600 F.2d 824 (D.C. Cir. 1979)

[19] Id. at 830.

[20] Id. at 827.

[21] Id. at 828.

[22] Id. at n. 10.

[23] In any event, *Associated Third Class Mail Users* is not – and cannot be – the last word on this important matter. When interpreting statutes within their ambit, agencies are allowed to change their minds so long as they provide a reasoned explanation for doing so. *See, e.g.*, F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); *see also* National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005). To that end, these comments show that the Commission, now charged by PAEA with this responsibility, has ample reasons to do so here.

3 PAEA's Revisions to the Postal Monopoly Law (2006)

In 2006, PAEA modified the postal monopoly in the following significant respects:[24]

(1) *Price and weight limits to the monopoly*. PAEA created two new statutory exceptions to the postal monopoly for letters charged more than six times the stamp price and for letters weighing more than 12.5 ounces.

(2) *Grandfathered exceptions to the monopoly*. PAEA codified as new statutory exceptions to the postal monopoly the portions of the Postal Service's regulations that "purport" to permit private carriage by suspension of the monopoly.

(3) *Repeal of the Postal Service's rulemaking authority over the postal monopoly*. PAEA limited the scope of the postal monopoly's rulemaking authority to exclude rules relating to the postal monopoly provisions in title 18, 39 U.S.C. 401(2), and prohibited the Postal Service from adopting rules that regulate competitors, which obviously includes the postal monopoly regulations, 39 U.S.C. 404a.

(4) *Commission rulemaking authority over section 601 exceptions to the postal monopoly.* PAEA authorized the Commission to issue regulations necessary to carry out the exceptions to the postal monopoly defined in 39 U.S.C. 601 while also repealing the authority the Postal Service relied upon for issuing suspensions in the former section 601(b).

Recognition of the repeal of the Postal Service's rulemaking authority over the postal monopoly is fundamental to understanding the current postal monopoly.[25] "It is well-settled that subsequently enacted or amended statutes supersede prior inconsistent regulations."[26] More specifically, "[w]hen a statute has been repealed, the

[24] *See also* "History and Development of the Monopoly" at 234-50.

[25] *See* "History and Development of the Monopoly" at 242-48.

[26] *See* Norman v. United States, 942 F.3d 1111, 1118 (Fed. Cir. 2019).

regulations based on that statute automatically lose their vitality. Regulations do not maintain an independent life, defeating the statutory change."[27]

As noted above, on the eve of PAEA, the Postal Service maintained regulations that defined a broad postal monopoly by adopting an all-encompassing definition of the term "letter" bearing no resemblance to common usage, coupled with purported suspensions of the monopoly statutes. PAEA included three separate, overlapping statutory provisions to quash this regulatory overreach.

First, Congress repealed the Postal Service's rulemaking authority over provisions of the criminal law that create the postal monopoly. The House committee stated that the purpose of limiting the rulemaking authority was prevent Postal Service from exercising regulatory authority over the criminal code.[28] The Senate committee declared that this provision would prevent the Postal Service from using rulemaking authority to gain an unfair advantage over competitors:

> [The Postal Service's competitors] are not exempt from most taxes and laws imposed on private businesses, as the Postal Service is, and they do not have the rulemaking powers Congress has granted the Postal Service in some areas. The Committee strongly believes that the Postal Service should operate more like a private business but, when competing head to head with a private business, we believe just as strongly that the advantages the Postal Service has as a government entity should be blunted. . . .
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> This legislation makes clear that the Postal Service is barred from using its rulemaking authority to put itself at a competitive advantage or put another party at a competitive disadvantage.[29]

Second, by adding section 404a to title 39, Congress not only forbade Postal Service from establishing regulations that implement the postal monopoly but also more

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[27] *See* Aerolineas Argentinas v. United States, 77 F.3d 1564, 1575 (Fed. Cir. 1996).

[28] *See* H.R. Rep. No. 109-66 at 59 (2005) ("This amendment is intended to make clear that the Postal Service is not, unless explicitly authorized by Congress, empowered to adopt regulations implementing other parts of the U.S. code, *e.g.*, the criminal laws.").

[29] S. Rep. No. 108-318 at 27-28 (2004). Additionally, as the Commission accurately describes PAEA's changes in this area, "Congress . . . eliminated the Postal Service's authority to adopt any future regulations creating additional exceptions or defining the scope of the postal monopoly." *See* Order No. 5422 at 3 (citing 39 U.S.C. §§ 401(2), 404a(a)(1) & 601); *see also* Order No. 5422 at 4 n.7 (citing 39 U.S.C. § 601(c) and previous PRC dockets).

generally prohibited "any rule or regulation . . . the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself." It is evident that section 404a, like that of amending section 401(2), is animated by the objective of creating a level playing field among competitors.

Third, Congress repealed former 39 U.S.C. 601(b) and replaced it with a new section 601(b). Former section 601(b) was the statutory provision that the Postal Service cited as authority for the suspensions which underpinned its overbroad definition-by-exception claim of monopoly. Congress was aware that former section 601(b) never authorized the Postal Service to suspend the monopoly statutes. At the same time, Congress recognized that by repealing the purported suspension authority, it would unjustly undercut private sector parties who established businesses in reliance upon the Postal Service's unfounded regulations. To avoid such injustice, Congress "grandfathered" the rights of private entities to continue whatever services they provided in reliance on the purported suspensions. The House committee explained this rationale as follows:

> Current subsection (b) of 601 simply authorizes the Postal Service to suspend the exception of paragraph (a) and thereby forbid the private carriage of letters even if postage is paid. The Postal Service's authority to reapply the postal monopoly to stamped letters is unnecessary and antiquated; it is repealed by the bill. Some entities in both the government and the private sector have testified that since 1974, the Postal Service has often misused the suspension power of 601(b). Since 1974, the Postal Service has, under color of subsection (b), issued regulations that rather than suspend the exception to the monopoly for stamped letters set out in subsection (a), instead suspend the postal monopoly itself (*i.e.*, the criminal prohibitions set out in chapter 83 of title 18, U.S. Code). Indeed, when the Postal Service first proposed these regulations in 1973 that purported to derive a suspension power for the private express statutes contained in Title 18 of the U.S. Code, the Postal Rate Commission's General Counsel concluded that use of the suspension authority in this way violated the legislative language and intent. The ''grandfather clause'' provided in the bill will authorize the continuation of private activities that the Postal Service has permitted under color of this section. In this way, the bill protects mailers and private carriers who have relied upon regulations that the Postal

Service has adopted to date in apparent misinterpretation of the current subsection (b).[30]

More than thirteen years after enactment of PAEA, these Postal Service regulations remain published in the Code of Federal Regulations, even though they did not survive the PAEA overhaul described above.[31]

In addition, Section 601(c) transferred to the Commission the authority and responsibility to promulgate regulations implementing the exceptions to the postal monopoly set out in section 601. The Commission's authority with respect to section 601 is exclusive. Section 601(c) states that "[a]ny regulations necessary to carry out this section shall be promulgated by the Postal Regulatory Commission." Section 601(c) thus serves a second limitation on the Postal Service's rulemaking authority. PAEA divested the Postal Service of rulemaking authority over both the criminal statutes which establish the postal monopoly and the exceptions to the monopoly set out in section 601. In this respect, it is important to note that PAEA itself – not the Postal Service regulations still published in the Code of Federal Regulations – provides the legal basis for what the pre-PAEA regulations purport to authorize. The Commission has already acknowledged this point previously.[32]

Since regulations implementing section 601 are now the exclusive preserve of the Commission, we believe the Commission must declare void Postal Service regulations that address these same exceptions to the postal monopoly. In so doing, the Commission will necessarily call into question the whole of the Postal Service's postal

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[30] H.R. Rep. No. 109-66 at 57-58 (2005).

[31] *See* Barseback Kraft AB v. United States, 121 F.3d 1475, 1480–81 (Fed. Cir. 1997) (""[T]he statutory authority upon which that regulation rested, section 161(v), was repealed by the Energy Policy Act. . . . The fact that DOE's Enrichment Criteria had not been formally withdrawn from the Code of Federal Regulations does not save them from invalidity.").

[32] Docket No. MC2012-13, Order No. 1411 Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, July 20, 2012, at 6-7 & n. 13 ("The Postal Accountability and Enhancement Act . . . amended 39 U.S.C. § 601 by, among other things, authorizing the scope of services described by Postal Service regulations 'that purport to permit private carriage by suspension of the operation of [section 601] (as then in effect).' The regulations cited by the Postal Service were in effect on January 1, 2005.") (emphasis added). We further note that the Commission recognized that the grandfather exception of section 601(b)(3) refers to purported suspensions of postal monopoly regardless of whether they were placed in Part 310 or Part 320 of the Postal Service regulations.

monopoly regulations since the suspensions are essential to the design of those regulations. Arguably, however, the Postal Service's definition of "letter" lies outside the ambit of the Commission under section 601(c), since the definition of "letter" defines the scope of the monopoly under title 18, not the scope of the exceptions under section 601. However, as noted above, the Commission's rulemaking authority under section 404a is closely related to its authority under section 601(c). Section 404a(b) vests the Commission with the authority and responsibility to promulgate regulations that ensure the Postal Service does not maintain "any rule or regulation . . . the effect of which is to preclude competition or establish the terms of competition." The definition of "letter," which the Code of Federal Regulations still maintains as a regulation under color of title 18, plainly establishes terms of competition. Section 404a(b) thus gives the Commission the authority to address portions of the Postal Service postal monopoly regulations which may lie outside the reach of section 601(c).

In sum, PAEA repealed the Postal Service's rulemaking authority over the postal monopoly statutes, both criminal and civil, and vested the Commission with the exclusive authority (and responsibility) to clarify the exceptions set out in section 601(b), which necessarily entails declaring void any regulations that are inconsistent with the Commission's authority or otherwise purport to define terms of competition.

4 Issue to be addressed

The ANPRM requests public comment on fourteen specific issues, several of which ask how "clear and concise" the various attributes of 39 U.S.C. 601 are. We believe that any assessment of the provision's clarity must be consistent with the plain meaning of its core term, "letter," as Congress used that term in the relevant 1872 statute.[33] In interpreting this statute, the Commission should employ the traditional tools of statutory construction which, among other things, look to the contemporaneous usage of the term in broader context of the statute read as a whole. In our view, the

[33] *See* Nat'l Ass'n of Letter Carriers, AFL-CIO v. Indep. Postal Sys. of Am., Inc., 336 F. Supp. 804, 807 (W.D. Okla. 1971), *aff'd*, 470 F.2d 265 (10th Cir. 1972) ("39 U.S.C. § 601, supported by its criminal counterpart 18 U.S.C. § 1696, establishes a letter monopoly in the Federal Government.").

most authoritative source in this respect is the 1881 position of the Attorney General concerning the 1872 statute.[34] Such a reading leaves no ambiguity to clarify – via regulation or otherwise – and no gaps to fill.

Against this backdrop, we address those specific issues most relevant to us separately below (using the ANPRM's numbering):

2. Are the statutory requirements of 39 U.S.C. 601(b) clear and concise, or are additional regulations necessary to carry out the intent of the statute?

For paragraphs (1) and (2) in this subsection, the Commission should consider promulgating regulations to clarify that the exemptions from the monopoly apply: (i) when several letters are sent in a single package to a specific address; and (ii) when charges for private carriage are not assessed per letter.[35]

3. Is the scope of 39 U.S.C. 601(b)(3) – permitting that the carriage of letters out of the mail provided "such carriage is within the scope of services described by regulations of the United States Postal Service (including, in particular, sections 310.1 and 320.2-320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section (as then in effect)" – sufficiently clear and concise, or are additional regulations necessary to carry out the intent of the statute?

The Commission should adopt regulations detailing the full scope of services permitted for private carriage that were grandfathered by Congress in section 601(b)(3).[36] At the same time, the Commission should declare void the *restrictions* on private carriage found in the Postal Service regulations referenced by

[34] To the extent the Commission believes any ambiguity exists after employing the approach set out above, any regulations should appreciate the significant consequences (including criminal penalties) that the monopoly involves. *See, e.g.*, United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 518 (1992) (invoking the "rule of lenity" to resolve any ambiguities against the government in a criminal prosecution).

[35] *See, e.g.*, 39 C.F.R. § 320.6(c) (providing a useful example).

[36] *See generally* "History and Development of the Monopoly" at 236-42.

section 601(b)(3) as those restrictions are no longer valid for the reasons described above.[37]

4. Do any terms that currently appear in 39 U.S.C. 601 require further definition?

For the reasons noted above, our view is that any Commission regulations must be consistent with the meaning of "letter" as used in the 1872 statute read as a whole. Any inconsistent regulations should be declared void.[38]

5. Can consumers and competitors easily determine when a mailpiece is subject to monopoly protections?

See above responses.

6. What is the current effect of the letter monopoly on consumers, small businesses, and competitors?

The net effect of the postal monopoly is most likely to harm users of the mail by decreasing the incentives for efficiency and innovation.[39]

7. Are the weight and/or price requirements found in 39 U.S.C. 601(b) still relevant?

Yes.

10. Is the term "letter" clear and concise, or can any improvements be made to the definition? If so, please provide any proposed definitions and explain how the proposed definition may better implement the intent of Congress and affect the scope of the letter monopoly.

As noted above, any regulations must be consistent with the meaning of "letter" as used in the 1872 statute read as a whole and contemporaneous interpretations.

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[37] *See, e.g.*, 39 C.F.R. § 320.8(c).

[38] *See id.*

[39] *See, e.g.*, the Frontier Economics, The Impact of Liberalisation on Efficiency: a Survey" (Jan. 2002). This study was one of several studies relied upon by the former UK postal regulator, Postcomm, in its decision to mover towards market opening. *See* Postcomm, "Promoting Effecitive Competition in UK Postal Services: A Decision Document (May 2002).

11. Do the current statutory and regulatory requirements correctly implement the intent of Congress and advance the public interest, or should consideration be given to any changes that may be implemented by regulation?

The Postal Service regulations described above should be declared void. We are aware of no current Commission regulations relevant to this matter.

13. Are there any social, economic, technological, or other trends that should be taken into account by Congress in considering the scope of the monopoly?

Yes, the Commission should take into account the separate, but related, issue of the so-called universal service obligation (USO) of the Postal Service. As the ANPRM notes, "[i]n a 2007 report, the Federal Trade Commission stated that the monopoly should only be as broad as needed to satisfy the statutory requirement of universal service."[40] We agree. However, we highlight that there is no clear and comprehensive statutory definition of universal service and, as a result, the Commission's undertaking should not be guided by unfounded and unproven presumptions about the scope of the postal monopoly and an obligation to maintain a specific set of postal services on a universal nationwide basis.

As the Commission knows, U.S. postal laws do not use the term, "universal service obligation" or contain any definition of "universal service." Instead, there are a patchwork of laws that touch upon those components generally associated with a USO, *e.g.*, some form of service to all parts of the country in order to enable citizens to communicate with every other citizen, person, or business. For example, in broadly setting out postal policy, the Postal Reorganization Act provides the following:

> The 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. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities.[41]

[40] Order No. 5422 at 4.

[41] 39 U.S.C. § 101(a).

On its surface, this appears to create a USO in its use of mandatory terms ("shall"), descriptions of geographical coverage ("all areas" and "all communities"), and scope of services ("correspondence"). The statute, however, does not define the postal services envisioned in any specific manner such as the exact frequency of pickup and delivery or the required mode of delivery (*e.g.*, in rural areas postal delivery is traditionally made to a post box located on the nearest main road, not to the addressee's house). A similar section describing the Postal Service's "general duties" provides that the agency "shall receive, transmit, and deliver throughout the United States, its territories and possessions . . . . The Postal Service shall serve as nearly as practicable the entire population of the United States."[42] As with the previous provision, this does not provide useful guidance. For instance, while envisioning universal geographic coverage, the provision implies that the Postal Service need not serve the entire U.S. population as a practical matter.

Lastly, since the early 1980's, Congress has included a provision in an annual appropriations act to require "6-day delivery and rural delivery of mail . . . at not less than the 1983 level . . . ."[43] While this represents the most numerically concrete definition of a USO component in the specific frequency it provides (6-day delivery of mail), the provision does not further define the exact nature of the service, *e.g.*, whether it extends to all mail classes. Furthermore, it is not entirely clear to what the "1983 service level" refers. It is clear, however, that there is no cohesive definition of the USO.

As the Commission is aware, the essential rationale for a government postal system has been the premise that only government is able to provide a permanent, reliable, secure, and affordable national communications service necessary to the serve society's interests. It is this premise that underlies justifications for the postal monopoly and the concept of universal service. As technological advances have led to digitizing how we communicate with one another, the focus of U.S. government policy should be

[42] 39 U.S.C. § 403(a).

[43] *See, e.g.*, Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat 13. While this particular provision first appeared in the 1983 appropriations act, a similar provision pegged to the 1982 service level appeared in the previous year's appropriations act. *See* Act of Dec. 21, 1982, Pub. L. No. 97-377, §§ 111B, 112, 96 Stat. 1830, 1912.

to shift from slow, physical delivery of communications to instant transmissions. This reality, coupled with the definitional uncertainty of the USO as explained above, should guide the Commission in this rulemaking.

Perhaps most telling is the experience of other industrialized countries. Over the last 25 years almost all have repealed their postal monopoly laws. At the same time, all of these countries have successfully maintained sufficient postal services to meet their national needs. While there are differences between the United States and these other countries, the evidence strongly suggests that there is no necessary relationship between the postal monopoly law and the provision of universal postal service. We believe this clear-eyed assessment of current law, not unfounded presumptions about possible effects on universal service, should guide its analysis.

14. Because the Commission is tasked with developing regulations to carry out 39 U.S.C. 601, to what extent should the Commission adopt regulations that replicate, in whole or in part, the Postal Service's regulations that appear at 39 CFR 310.1 and 320.2 through 320.8?

For the reasons noted above, the Commission should declare void the Postal Service's regulations that appear at 39 C.F.R. Parts 310 and 320, and the practically related regulations in Part 959.

Respectfully submitted:
_____/s/_____
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