

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

Postal Rate and Fee Changes, 2001

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Docket No. R2001-1

OFFICE OF THE CONSUMER ADVOCATE
MOTION TO REQUEST THAT THE COMMISSION INSTITUTE
A PROCEEDING TO CONSIDER THE POSTAL/NONPOSTAL
CHARACTER OF SPECIFIED SERVICES AND THE ESTABLISHMENT
OF RULES TO REQUIRE A FULL ACCOUNTING OF THE COSTS AND
REVENUES OF NONPOSTAL SERVICES
(March 20, 2002)

Pursuant to Rule 21 of the Rules of Practice of the Postal Rate Commission,¹ the Office of the Consumer Advocate (OCA) hereby requests that the Commission institute a proceeding to consider two important aspects of the Postal Service's offering of "nonpostal" services to the public: (1) the postal/nonpostal character of specified services offered to the public without a prior request by the Postal Service of a recommended decision under 39 U.S.C. §§ 3622 and 3623; and (2) the establishment of rules that would require a full accounting by the Postal Service of the costs and revenues of domestic "nonpostal" services so as to insure that domestic postal services are not cross-subsidizing domestic "nonpostal" services.

Introduction

In recent years, the Postal Service has stepped up its efforts to experiment with a variety of services offered on the Internet, others that are hybrids of electronic and traditional mail services, and services ancillary to the provision of traditional postal services. With the filing of Docket No. C99-1, it appeared that an opportunity was

¹ 39 C.F.R. §3001.21

finally presented, via a complaint brought by United Parcel Service (UPS), to examine the extent of the Commission's jurisdiction over a service characterized by the Postal Service as "all electronic." The Postal Service has just announced officially that PosteCS has been discontinued.² It is reasonable to expect that the Docket No. C99-1 complaint case will soon come to an end.

In addition to PosteCS, the Postal Service offers numerous other services and products through its Internet site, "usps.com," and in postal facilities throughout the nation. Many of these operate at a substantial loss, generating large operating expenses but virtually no revenues. OCA is concerned that the losses may be far larger than the Postal Service's public disclosures indicate, for the Postal Service refuses to release information on the fixed and investment costs of providing these services. Using Mailing Online as an example, investment costs³ for the hybrid internet/hardcopy service amounted to \$ 30.3 million. It is reasonable to believe that the annual *operating* costs that the Postal Service is willing to disclose for similar e-commerce initiatives are just the tip of the iceberg – below the surface and out of sight are likely to be additional tens of millions of dollars of information technology development costs that the Postal Service does not attribute to these services.

The Postal Service has made a series of questionable decisions on the postal/nonpostal character of many services, without coming first to the Commission for a determination whether the services are indeed "nonpostal," whether they constitute new classifications worthy of recommendation (under 39 U.S.C. §3623), and finally,

² See <http://www.usps.com/postecs>.

³ These were labeled "Product Specific IT [Information Technology] Costs." PRC Op. MC2000-2, issued June 21, 2000, Table 1, at 49.

whether the fees charged to the public (sometimes no fees are charged) are compensatory, which is an essential requirement under §3622(b)(3) of title 39.

Soon after Docket No. R2001-1 was filed, OCA began to lay the groundwork for examining the postal/nonpostal character of many services offered to the public without prior Commission approval. The first step in addressing this issue was to conduct discovery on the characteristics and terms for the services to be reviewed.⁴ The Postal Service resisted the provision of much of the data sought,⁵ arguing that the pending omnibus rate case “does not lend itself to a determination of the postal/nonpostal character of a variety of services.”⁶ Relevant to OCA’s instant motion, the Postal Service acknowledged that “the Commission can initiate a classification docket on its own motion,” and implied that the appropriate vehicle for consideration of the postal/nonpostal character of challenged services was such a classification proceeding.⁷ In his ruling on OCA’s motion to compel responses⁸ to the subject interrogatories, the Presiding Officer rejected the Postal Service’s contention that an omnibus rate case was an inappropriate forum for consideration of the postal/nonpostal

⁴ Interrogatories OCA/USPS-239–246 were filed on November 21, 2001; interrogatories OCA/USPS-248 – 253 were filed on November 23, 2001.

⁵ “Objection of the United States Postal Service to OCA/USPS-231-233, 243, 245-247, 268-285 and 290 and Partial Objection to OCA/USPS-239-242, 244, 248-253,” filed December 3, 2001; and “Opposition of the United States Postal Service to Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-231-233, 243, 245-47, and 239-42, 244, 248-53,” filed December 26, 2001 (Opposition).

⁶ Opposition at 11.

⁷ Opposition at 10 – 11.

⁸ “Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-231-233, 243, 245-47, and 239-42, 244, 248-53,” filed December 17, 2001.

character of challenged services.⁹ The Presiding Officer directed the Postal Service to answer many of OCA's interrogatories, in part to determine the "jurisdictional status" of the services at issue.¹⁰ Upon signing the settlement agreement in late December 2001, OCA gave up the right to litigate the status of challenged nonpostal services in Docket No. R2001-1. It is OCA's position, however, that serious concerns about the Postal Service's provision of alleged "nonpostal" services warrant continued examination of this matter in a new classification and rulemaking proceeding – hence the OCA's instant filing.

OCA Formally Requests a Dual Nature Proceeding.

OCA formally requests that the Commission institute a dual nature proceeding that will (1) address the postal/nonpostal character of specified services offered to the public without prior Commission approval and (2) consider the establishment of new rules for the full reporting of the costs and revenues of all nonpostal services. The services that OCA wishes to have the Commission review and examine are:¹¹

- 1) First Class Phone Cards
- 2) Retail Merchandise
- 3) Liberty Cash
- 4) Dinero Seguro
- 5) Sure Money

⁹ POR No. R2001-1/42, "Presiding Officer's Ruling Concerning the OCA's Motion to Compel Responses to OCA/USPS-231 *et seq.*," issued January 29, 2002, at 10.

¹⁰ *Id.* at 9 – 10.

¹¹ In the event that the Commission decides to institute the proceeding sought in this motion, OCA reserves the right to name other so-called "nonpostal" services as they come to light through discovery, reports issued under Congressional directives, or other media.

- 6) eBillPay
- 7) ePayments (unless this is the same as eBillPay)
- 8) USPS Online Payment Services (if different from others listed)
- 9) Pay @ Delivery
- 10) USPS Send Money
- 11) NetPost CardStore
- 12) NetPost Certified Mail
- 13) Electronic Postmark
- 14) Unisite Antenna Program
- 15) Returns @ ease
- 16) Mall Package Shipment Program

OCA requests that the Commission institute a classification *and* rulemaking proceeding that will examine the issues raised above; however, if the Commission were to prefer that these issues be split into two separate proceedings, (1) classification and (2) rulemaking, OCA would not be averse to such an alternative.

The Need for the Commission to Exercise Regulatory Oversight in the Offering of Nonpostal Services to the Public is Compelling.

During the course of the instant proceeding, OCA attempted to pave the way for consideration of these issues through a series of interrogatories, OCA/USPS-239 – 253. The Postal Service did not object to providing summary figures for *operating* expenses, revenues, and net, but refused to provide fixed and investment cost data. Furthermore, since it is the Postal Service's position that these services are outside the regulatory authority of the Commission, the Service refuses to provide primary data and

accounting documentation permitting the Commission and interested participants to verify that these summary figures are complete and accurate.

In response to interrogatory OCA/USPS-239 (the Postal Service lodged a partial objection and furnished a partial answer), the Postal Service reported that, since inception, PosteCS has been offered at an operating loss of just over \$7 million. Its revenues were close to zero (\$8000). Electronic Postmark has been offered (since inception) at an operating loss of \$8.6 million, with revenues slightly above zero.

In response to interrogatory OCA/USPS-240, it was revealed that, under undisclosed Postal Service accounting procedures:

1. First-Class Phone cards yield a net operating income of \$30.1 million;
2. Retail merchandise generates a surplus of \$26 million;
3. Post Office Online lost \$28 million, without producing any revenue;
4. Liberty Cash generates a \$12 million surplus;
5. Dinero Seguro has lost a total of \$33.3 million since inception;
6. REMITCO lost \$10.1 million before it ceased operations;
7. Sure Money has lost \$3.5 million, without generating any revenue.

In response to interrogatory OCA/USPS-241, the Postal Service stated that a family of online payment services it provides to the public, titled "USPS Online Payment Services,"¹² incurred operating expenses of \$11.5 million in FY 2001, but only took in \$1.1 million in revenues, thereby losing \$10.4 million in FY 2001. The Postal Service further explained that eBillPay, Pay@Delivery, and USPS Send Money are included

¹² Tr. 10C/3511.

within the family of USPS Online Payment Services, at least with respect to revenue measurement.¹³

Generating a somewhat smaller loss since inception, NetPost CardStore took in operating revenues of \$56 thousand and incurred operating expenses of \$74.8 thousand, for a net loss of approximately \$19 thousand.¹⁴ The Postal Service reported modest success for NetPost Certified Mail, having taken in \$837 in operating revenue, but incurring expenses of only \$569, for a profit of \$298.¹⁵

After summing the reported operating surpluses (for Phone Cards, Retail Merchandise, Liberty Cash, and NetPost Certified Mail) and the operating losses (for PosteCS, Electronic Postmark, PostOffice Online, Dinero Seguro, REMITCO, Sure Money, USPS Online Payment Services, and NetPost CardStore), OCA calculates an overall loss for the entire array of "nonpostal" services (those listed above) of approximately \$32.5 million for the years 1995 to date.

Under directives from the Senate and the House of Representatives, the General Accounting Office (GAO) has presented numerous reports to Congress on the issue of nonpostal services generally, and e-commerce initiatives, specifically. The most recent of these reports was submitted to Senator Thad Cochran, Ranking Member of the Subcommittee on International Security, Proliferation, and Federal Services,¹⁶ and served as an "Update on E-Commerce Activities and Privacy Protections," on December 21, 2001. Among many damaging findings reported to Senator Cochran

¹³ *Id.*

¹⁴ Tr. 10C/3519 (Postal Service response to interrogatory OCA/USPS-250).

¹⁵ *Id.* at 3523 (Postal Service response to interrogatory OCA/USPS-252).

¹⁶ Committee on Governmental Affairs, U.S. Senate. Report GAO-02-79.

was that the Postal Service had projected revenues of \$104 million for its e-commerce initiatives in FY 2001, but had realized less than 1 percent in actual revenues by the end of the first three quarters.¹⁷ This is evident from the near-zero revenues listed above.

OCA notes that the Postal Service has terminated two of these services – REMITCO and PosteCS. OCA speculates that had the Postal Service been obliged to come to the Commission with a request to implement new classifications for these and other major loss producers, such as Dinero Seguro and Electronic Postmark, the Postal Service might have determined not to offer these services at all (either as a result of preparing a detailed filing for Commission review or after exposing overly optimistic assumptions to public questioning and scrutiny in a Commission proceeding). The present system, in which the Postal Service makes unilateral determinations whether to request new classifications and fees for contemplated new services, seems to be seriously “broken” and in need of fixing.

The public knows very little about the decision making process followed by the Postal Service in determining whether to invest in new services such as these and how much to charge for them. From GAO’s reports it is evident that, without regulatory oversight, the Postal Service’s procedures are haphazard, inconsistent, and deficient. In an earlier report issued in September 2000,¹⁸ GAO reviewed the implementation

¹⁷ *Id.* at 17.

¹⁸ GAO/GCD-00-188, “Postal Activities and Laws Related to Electronic Commerce.” Report to Senator Thad Cochran, Chairman, Subcommittee on International Security, Proliferation, and Federal Services, Committee on Governmental Affairs, U.S. Senate, and to Representative John McHugh, Chairman, Subcommittee on the Postal Service, Committee on Government Reform, U.S. House of Representatives, submitted September 7, 2000.

procedures for many of the services discussed above and made the troubling finding that:¹⁹

[W]e identified a number of problems and inconsistencies in the information provided by USPS. . . . USPS inconsistently applied its definition of e-commerce in identifying its initiatives and provided inconsistent information on the status of its initiatives. These inconsistencies made it difficult to ensure we had a complete and accurate picture of USPS' e-commerce activities.

Also:²⁰

USPS did not consistently adhere to its process requirements and did not always document the review and approval of its e-commerce initiatives. Consequently, it is not clear whether USPS management properly reviewed and approved e-commerce initiatives to ensure that they support USPS' overall mission and goals.

Of even greater concern:²¹

[W]e identified deficiencies in the financial information USPS provided for its e-commerce activities that raised concerns about the accuracy and completeness of USPS' financial reporting for its e-commerce activities. Further, we do not believe the e-commerce financial data that USPS provided was sufficiently complete and reliable to be used to assess USPS' progress toward meeting its overall financial performance expectation that revenues generated by e-commerce products and services in the aggregate are to cover USPS' direct and indirect costs as well as make a contribution to overhead.

The most recent GAO report (the December 2001 report to Senator Cochran) demonstrates that the Postal Service continues to exercise little internal control or oversight of its e-commerce activities (many of which are the subject of this motion):

- The management of the Postal Service's e-commerce program is fragmented and inconsistent.²²

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.*

²² December 2001 report at 2.

- Required approvals of e-commerce initiatives are not always obtained; *some initiatives have been implemented before business plans were prepared or without business plan approval.*²³
- The Postal Service has difficulty even defining whether its Internet initiatives are e-commerce or not.²⁴
- There is no clear accountability or consistency in the development, approval, implementation, performance, and day-to-day monitoring of initiatives.²⁵
- There has been a steady stream of organizational changes in the development and monitoring of e-commerce initiatives – the eBusiness Opportunity Board (eBOB) was set up in May 2000 to monitor these activities; a little over a year later (July 2001) a new approval process, “BizDev” was established through a new management group, Corporate Business Development (CBD); there was still another reorganization two months after that (September 2001) in which a new management group, Product Development, was established with responsibility for the e-commerce initiatives.²⁶

The most ominous implication for postal ratemaking is the substandard financial reporting for the e-commerce initiatives. According to GAO, “financial statements . . . are not complete, accurate, and consistent.”²⁷ Indeed, GAO identified inaccuracies in the data reported for e-commerce costs and revenues.²⁸ In September 2000, GAO lacked confidence in the reliability of the Postal Service’s financial reports.²⁹ Even today, the Postal Service’s financial statements fail to capture all of the revenues and

²³ *Id.* at 10.

²⁴ *Id.* at 7.

²⁵ *Id.* at 9.

²⁶ *Id.* at 9-10.

²⁷ *Id.* at 11.

²⁸ *Id.* at 12.

²⁹ *Id.* at 11.

costs associated with the e-commerce initiatives.³⁰ The deficiencies of the Postal Service reports are numerous.³¹ As late as August 2001, the Postal Service had no system to attribute costs for the infrastructure used to support e-commerce products and services.³² Without such an attribution system, the Postal Service is unable to identify common costs of e-commerce.³³

Inaccurate, inconsistent, and unreliable financial statements are provided to the Board of Governors and the Postmaster General as the basis for overseeing the e-commerce initiatives.³⁴ The Postal Service exhibits serious fiduciary irresponsibility in the offering of these services without prior business plan approval and accurate, ongoing reporting of costs and revenues. This constitutes an abdication of management's public service responsibilities. One of GAO's chief recommendations to remedy the deficient accounting and reporting practices for e-commerce activities is an independent auditing function by the Postal Rate Commission.³⁵ In OCA's view, the Postal Reorganization Act as presently configured already gives the Commission the power (and the duty) to regulate the accounting and reporting of non-jurisdictional services.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *See id.* at 13-14.

³⁵ *Id.* at 4 and 16.

Commission Oversight of the Postal Service's Accounting and Reporting
for Alleged "Nonpostal" Services Would Remedy
Most of the Problems Identified by GAO.

Proceedings before the Commission typically involve detailed documentation rules for data, assumptions, and analyses that underlie the Postal Service's filing of financial information. These are presented publicly and are subject to question and challenge, thereby tending to produce relatively reliable, defensible outcomes.

If the Postal Service had applied to the Commission to establish its e-commerce initiatives as new classifications, a subpart of the Commission's rules of practice and procedure, "Rules Applicable to Requests for Establishing or Changing the Mail Classification Schedule,"³⁶ would appertain. A record would have been developed to prove that the new classifications comply with the classification criteria of the Postal Reorganization Act as well as its policies.³⁷ Information, data, statements of reasons, and the bases for the request would all have been submitted; these submissions would have had to be thorough enough "fully to inform the Commission and the parties of the nature, scope, significance, and impact of the proposed new mail classification"³⁸

The evidentiary submissions would include studies, information, and data of the characteristics of the users,³⁹ detailed cost information,⁴⁰ and interclass changes,⁴¹ among others.

³⁶ 39 C.F.R. §§3001.61–66.

³⁷ *Id.* at §3001.63.

³⁸ *Id.* at §3001.64(a).

³⁹ *Id.* at part (c).

⁴⁰ *Id.* at part (d).

⁴¹ *Id.* at part (e).

For purposes of setting fees for the new classifications, “Rules Applicable to Requests for Changes in Rates and Fees,” i.e., 39 C.F.R. §§3001.51–56, would govern. These rules would impose additional evidentiary requirements, such as the filing of accrued cost data,⁴² the assignment and distribution of costs,⁴³ and econometrically developed volume estimates.⁴⁴ Even under the rules for experimental changes,⁴⁵ the collection and reporting of data is an essential element of the recommended decision to proceed.⁴⁶ The need for the Commission to regulate the provision of e-commerce initiatives and like services, subjecting Postal Service records to public scrutiny is compelling.

The Commission has the Authority to Institute a Classification Proceeding to Determine the Postal/Nonpostal Character of Services Offered by the Postal Service to the Public Without Prior Commission Approval.

Under the Postal Reorganization Act, the Commission has broad authority to initiate classification proceedings – 39 U.S.C. § 3623(a) provides that “the Commission may submit to the Governors on its own initiative, a recommended decision on changes in the mail classification schedule.” The Court of Appeals for the Second Circuit described this authority as “vast discretion to recommend classification changes under 39 U.S.C. §3623.”⁴⁷ If the Commission ultimately concludes that there is merit in OCA’s motion, and institutes a classification proceeding to assess the postal/nonpostal nature

⁴² *Id.* at §3001.54(f).

⁴³ *Id.* at §3001.54(f)(3).

⁴⁴ *Id.* at §3001.54(j).

⁴⁵ *Id.* at §§3001.67–67d.

⁴⁶ *Id.* at §67c.

of the specified services, no successful challenge to the exercise of its authority to determine its jurisdiction in such a proceeding could be made.

In two recent cases, Complaint of Coalition Against Unfair USPS Competition (concerning a “Pack and Send” service)⁴⁸ and Complaint on PosteCS,⁴⁹ competitors of the Postal Service challenged the Postal Service’s unilateral determination that the services at issue (a packaging service and an electronic documents service, respectively) were nonpostal in character. Both CAUUC and UPS raised the issue of postal/nonpostal status in a pair of complaint cases; however, this is not the only method for doing so. It is OCA’s view that the institution of a classification proceeding is an equally appropriate procedural method for reviewing the postal/nonpostal character of challenged services. In fact, the Commission has held that:⁵⁰

In determining whether a previously unreviewed service challenged by the complaint of an interested party is appropriate for consideration under the regulatory procedures specified in subchapter II, the Commission *is engaged essentially in exercising its mail classification authority*, under which it is assigned primary responsibility for interpreting the status of services either proposed or offered by the Postal Service.

Therefore, litigants have the option to proceed under 39 U.S.C. § 3662 in order to seek a public report on the issue of postal/nonpostal status, or they may proceed directly under 39 U.S.C. §3623. OCA chooses the latter course in filing this motion.

⁴⁷ *Newsweek v. U.S. Postal Service*, 663 F.2d 1186, 1209 (2d Cir. 1981).

⁴⁸ Docket No. C96-1.

⁴⁹ Docket No. C99-1.

⁵⁰ Order No. 1239, “Order Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings,” Docket No. C99-1, issued May 3, 1999, at 12 (emphasis added).

The Opinion Issued by the U.S. Court of Appeals, Third Circuit, in Air Courier
Conference of America/International Committee Construes the Postal Reorganization
Act to Establish Clearly that the Commission Has Jurisdiction over
All of the Services Specified by OCA.

*Air Courier Conference of America/International Committee v. U.S. Postal Service*⁵¹ involved an action brought by Air Courier⁵² to establish a duty of the Postal Rate Commission to review international mail rates. Air Courier's claim was rejected by the Court of Appeals; however, the Court's construction of pertinent provisions of the Postal Reorganization Act leads inescapably to the conclusion that the Commission has jurisdiction over the alleged "nonpostal" services challenged in this motion.

Prior to postal reorganization, Congress set domestic postal rates, but not international rates.⁵³ "The Act drastically changed the way domestic postal rates are established" – domestic rate changes must first be proposed and submitted to the Commission.⁵⁴ In determining the extent of the Postal Service's power to set rates for international mail services without outside regulation by the Commission, the Court underscored that section 407 (a) of title 39, "International postal arrangements," allows the Postal Service to "*establish the rates of postage or other charges*" on international mail matter.⁵⁵ By contrast, chapter 36 of title 39 only gives the Postal Service the power

⁵¹ 959 F. 2d 1213 (3d Cir. 1992).

⁵² A trade association composed of companies providing domestic and international expedited letter and parcel delivery service. *Id.* at 1214.

⁵³ *Id.* at 1216.

⁵⁴ *Id.*

⁵⁵ Emphasis added.

to *request* a change in domestic postage rates (from the Commission), but not *establish* rates unilaterally.⁵⁶

Although the Third Circuit's discussion of § 404(a)(6) of title 39 concerning special nonpostal services is dictum, it still makes an important clarification of the special nonpostal services section of title 39; i.e., §404(a)(6) only grants authority to the Postal Service to *establish* special nonpostal services. It does not grant the complementary authority to *establish rates*, as is the case for international services. Based upon this distinction, i.e., between § 407(a) (international mail) and §404(a)(6) (special nonpostal services), the Court concluded that the Commission did not have the statutory authority to set the rates for international mail. The correlate for nonpostal services is evident – while the Postal Service may establish such services, it cannot charge rates or fees for them without first obtaining a recommended decision from the Commission under subchapter II of chapter 36. Therefore, any service, whether traditional or not, for which a fee is charged, is necessarily jurisdictional for the Commission and may not be offered without a recommended decision by the Commission. All of the services challenged in this motion involve the assessment of fees and, therefore, are “postal” in character and subject to the Commission's jurisdiction. OCA believes that it is appropriate to extend this principle to any retail service for which a fee is currently being charged or for which a fee ought to be charged, leading to the conclusion that all such services have “postal” status and are subject to the Commission's jurisdiction.

⁵⁶ *Id.* at 1220–22.

In order to understand what Congress contemplated a “nonpostal” service to be, i.e., one not subject to Commission regulation, it is necessary to examine the legislative history of the Postal Reorganization Act. “Nonpostal services” had a precise meaning that was well known both to Congress and the Postal Service at the time the Postal Reorganization Act was being drafted. “Nonpostal services” were defined as: “[p]ublic service costs associated with non-reimbursed services for other government agencies.”⁵⁷ Therefore, at the time that Congress drafted §§ 404 and 3621-3623 of title 39, it was well understood that “nonpostal” services were services performed on behalf of other government agencies. Examples of “nonpostal” services were: health services for the Federal Communications Commission, alien address reporting, sale of U.S. savings bonds, services performed for the Civil Service Commission, sale of migratory bird stamps, building services for other federal agencies, and transportation of military mail.⁵⁸ Non-mail, commercial services offered to the general public (such as those challenged in this motion) were never included in the phrase “nonpostal” services during the crucial period of statutory debate and development.

As a matter of statutory construction and logic, the complement to the set of “nonpostal services” defined above would be the “postal services” referred to in section 3622. The resulting construction is that the Commission does not have jurisdiction over “nonpostal services,” i.e., the public services performed by the Postal Service on behalf of other government agencies, but does have jurisdiction over “postal services,”

⁵⁷ “Background Paper, Public Service Costs,” included in Hearing Report No. 91-19, Subcommittee on Postal Rates, Committee on Post Office and Civil Service, June 24-December 10, 1969, at 59. This is the same definition used in the Kappel Commission Report at 138.

⁵⁸ Government Accounting Office Cost Ascertainment Report, Hearing Report No. 91-5, Subcommittee on Postal Rates, Committee on Post Office and Civil Service, May 13, 22, and June 11, 1969, at 16.

essentially all other services provided by the Postal Service to the public, and particularly those services *sold* to the public and/or offered in competition with other similar or equivalent services sold by private enterprises.

There are other bases on which to conclude that the services challenged by OCA are subject to Commission regulation under chapter 36. Several of the services placed at issue involve the physical mailing of items that are universally accepted as subject to the Commission's jurisdiction. For example, cards purchased under NetPost™ CardStore are mailed in First Class.⁵⁹ USPS eBillPay™ payments are sometimes entered as First-Class Mail.⁶⁰ USPS Pay@Delivery™ is a payment service offered in connection with Priority Mail and Delivery Confirmation.⁶¹ USPS SendMoney appears to function as a substitute for First-Class bill payments.⁶² NetPost™ Certified Mail appears to be a variant of Certified Mail, but with a "referral fee" added by the Postal Service.⁶³

Under the formulation of Judge Sirica, in *Associated Third Class Mail Users v. United States Postal Service*,⁶⁴ "services . . . very closely related to the delivery of mail" are deemed "'postal services' in ordinary parlance." As applied by the Commission, this has come to mean that services "which can fairly be said to be ancillary to the

⁵⁹ Tr. 10C/3518-19 (Partial response to interrogatory OCA/USPS-250).

⁶⁰ *Id.* at 3510-11 (Partial response to interrogatory OCA/USPS-241).

⁶¹ *Id.* at 3515-16 (Partial response to interrogatory OCA/USPS-248).

⁶² *Id.* at 3513-14 (Partial response to interrogatory OCA/USPS-244). In Order No. 1239 at 21 the Commission viewed such characteristics as germane to the investigation whether a challenged service is postal or nonpostal in nature.

⁶³ Tr. 10C/3521-23 (Partial response to interrogatory OCA/USPS-252).

⁶⁴ 405 F. Supp. 1109, 1115 (D.D.C. 1975)

collection, transmission, or delivery of mail are postal services.”⁶⁵ Measured against those standards, eBillPay, NetPost™ CardStore, and NetPost™ Certified Mail exhibit “postal” character in that each involves the mailing of a First-Class letter; and in the case of NetPost™ CertifiedMail, the mailing of other classes of mail as well. USPS Pay@Delivery™ is ancillary to Priority Mail. The Mail Package Shipment Program *is*, in fact, the Postal Service’s traditional pick-up service, with the important exception that no fee is charged.

The Commission’s Order establishing the PosteCS complaint docket (Order No. 1239)⁶⁶ indicated that it would entertain arguments that even an all-electronic service might be deemed “postal” in character if it accomplishes one or more of the functional components of the carriage of mail without the involvement of a physical object. UPS was said to have:

made a colorable claim that [PosteCS] not only is very closely related to the carriage of mail, it *is* the delivery of mail because it accomplishes by electronic means all the functions that would otherwise be performed by conveying a physical message or document.⁶⁷

USPS SendMoney functions as a substitute for traditional First-Class Mail.

Dinero Seguro and Sure Money involve transfers of money that could also be accomplished by placing a check or money order inside an envelope and mailing it; eBillPay and other ePayments and Online Payments do the same. Electronic postmark serves a purpose similar to a physical postmark on an envelope or package.

Returns@ease seems to be a variant of Merchandise Return service.

⁶⁵ PRC Op. R76-1, App. F at 3.

⁶⁶ Issued May 3, 1999, Docket No. C99-1, at 19.

⁶⁷ *Id.* (emphasis in original).

All of the above provide ample grounds for commencing a classification proceeding to investigate thoroughly the characteristics and terms of each service so that its "postal" status may be determined.

OCA Proposes a Three-Stage Procedural Process for Consideration of the Postal/Nonpostal Character of the Challenged Services.

OCA proposes that the Commission structure the classification portion of the requested proceeding in three phases: Phase 1 would consist of discovery against the Postal Service, hearings, presentation of evidence and counter-evidence, and legal argument on the question of the postal/nonpostal character of the challenged services. Phase 1 would culminate with a Commission order declaring the postal/nonpostal status of each challenged service.

If any of the services considered in Phase 1 is determined by Commission order to be postal in nature, Phase 2 would commence for the purpose of determining the merits of recommending these "postal" services as new classifications of mail under the Domestic Mail Classification Schedule (DMCS). OCA assumes that the Postal Service would wish to make an evidentiary presentation to the Commission on the merits of the new classifications, their consistency with the criteria of 39 U.S.C. §3623, and their conformity to the policies of the Postal Reorganization Act. In keeping with formal procedures under 39 U.S.C. §3624, discovery against the Postal Service would be held, as would hearings, presentation of evidence and counter-evidence, and legal argument on the question whether the "postal" services in dispute were worthy of recommendation as new classifications. Services deemed unworthy of recommendation would be given final treatment by the Commission in a recommended decision to the Governors of the Postal Service. Services deemed worthy of

recommendation as classifications would be declared so in a Phase 2 Commission order, and Phase 3 would be initiated.

In Phase 3, those services determined worthy of recommendation as new classifications would be subject to proceedings under 39 U.S.C. §3622 to determine a fee that would recover all attributable costs and make an appropriate contribution to the institutional costs of the Postal Service. As before, consistent with 39 U.S.C. §3624, discovery against the Postal Service would be held, along with hearings, presentation of evidence and counter-evidence, and legal argument on the proper fees for the new classifications. These would be recommended to the Governors in the form of a decision.

If the Commission Determines Any of the Challenged Services to be "Nonpostal" in Character, OCA Asks that a Proceeding be Implemented in Parallel with Phase 2 (as Discussed Above) for the Purpose of Developing Rules for Detailed Accounting and Reporting for Nonpostal Services.

In a recent ruling in the instant docket, POR R2001-1/42,⁶⁸ the Presiding Officer observed that, while:

non-jurisdictional (or nonpostal) services do not present the same regulatory issues, they are not entirely devoid of ratemaking implications. Inquiries concerning services beyond the Commission's rate and classification jurisdiction may nonetheless be appropriate to determine whether the revenues generated exceed the costs of providing the service. Without that assurance, the possibility exists that postal consumers, *i.e.*, jurisdictional services, are subsidizing the non-jurisdictional service.

This is a policy of long standing. In Order No. 1034,⁶⁹ the Commission explained that it has a duty to examine cost, revenue, and volume information for non-

⁶⁸ "Presiding Officer's Ruling Concerning the OCA's Motion to Compel Responses to OCA/USPS-231 *et Seq.*," issued January 29, 2002, at 9.

⁶⁹ "Order Denying Motion for Reconsideration," Docket No. R94-1, issued October 24, 1994, at 4.

jurisdictional services⁷⁰ because they have "an undeniable impact on the domestic mail revenue requirement."⁷¹

The GAO reports demonstrate that there is good reason to look behind the Postal Service's bare, unsupported, unexplained assertions of the costs and revenues of so-called "nonpostal" services. Current e-commerce financial statements fail to "capture" all of the revenues and costs associated with these ventures.⁷² Major expenses such as advertising and program staff costs were left out of the financial statements.⁷³ In some cases, the omitted expenses "made up a significant portion of total expenses."⁷⁴ There is a distinct possibility that e-commerce revenues and costs are not being separated from domestic jurisdictional service costs and revenues in reports submitted by the Postal Service to the Commission.⁷⁵ GAO is concerned that USPS e-commerce initiatives in the aggregate are being cross-subsidized by jurisdictional services.⁷⁶ The Postal Service has difficulty in distinguishing between jurisdictional and non-jurisdictional services; thus its financial reporting is not complete, accurate or consistent.⁷⁷

⁷⁰ The subject of Order No. 1034 was International Mail.

⁷¹ Presiding Officer's Ruling No. R87-1/78, "Presiding Officer's Ruling Granting in Part Motion of ACCA to Compel Responses from Witnesses Seeman, Burditt, and Caridi," issued August 13, 1987, at 2, first articulated this view.

⁷² December 2001 report at 11.

⁷³ *Id.* at 14.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 16.

The types of information that the Commission believes to be essential to accurate forecasts of jurisdictional *domestic* mail is delineated primarily in Order No. 1025,⁷⁸ and Presiding Officer's Ruling No. R87-1/78.⁷⁹ While these directives were issued in connection with intervenor requests for details of International Mail services, they apply equally to other non-jurisdictional services, such as alleged "nonpostal" services. The principle underlying the obligation to provide such information is that the Commission cannot accurately forecast the costs, volumes, and revenues of jurisdictional domestic postal services unless it has confidence in cost, volume, and revenue information for non-jurisdictional services and the method for separating non-jurisdictional data from jurisdictional data.

OCA submits a preliminary proposal for an amendment to Commission Rule 54(h)(1)⁸⁰ which specifies the contents of formal requests in §3622 proceedings. The proposed language would follow the last sentence of current Rule 54(h)(1):

The following must be provided for nonpostal services: A complete listing of all services that the Postal Service offers to the public as nonpostal or outside the Commission's jurisdiction shall be provided. For each such nonpostal service, the Postal Service shall provide a full description of the elements of the service.

For each such nonpostal service, the Postal Service shall describe and provide in full detail all of the costs incurred in providing the service and whether these costs are incurred solely for the nonpostal service or in common with other services (whether postal or nonpostal).

For each such nonpostal service, the Postal Service shall provide the operating costs of the nonpostal service and a description of the operations producing the operating costs. For each such nonpostal service, the Postal Service shall state which operating costs are incurred separately from other services and which are

⁷⁸ "Order Granting in Part Motion of Federal Express to Compel Responses to Interrogatories FEC/USPS/2(c) to 24 and FEC/USPS-T-4/2 to 15," Docket No. R94-1, issued August 17, 1994.

⁷⁹ Fully cited in n. 71 above.

⁸⁰ 39 C.F.R. §3001.54(h)(1).

incurred jointly. The Postal Service shall explain fully how jointly incurred costs are allocated among the services (both postal and nonpostal) involved.

For each such nonpostal service the Postal Service shall provide the development costs for the service beginning with that time that the Board of Governors first approved (whether formally or informally) the provision of the service to the public or a segment of the public (including on a pilot or test basis). Development costs shall include all of the costs to develop the nonpostal service and shall be reported on a fiscal year basis. The Postal Service shall state how development costs are being recovered from fees charged for the nonpostal service. If development costs are not able to be recovered fully from the nonpostal service, then the Postal Service shall state how the costs will be recovered from other services (whether postal or nonpostal).

The Postal Service shall report any other costs not specifically provided as operating or development costs. Each cost-causing activity or material underlying such costs shall be described. The portion of such cost involved solely in the provision of the nonpostal service shall be provided. The portion of such cost that is incurred jointly with other services shall also be provided. The Postal Service shall show all details in allocating jointly incurred costs among those services (whether postal or nonpostal) that cause them.

Workpapers reflecting the estimation and calculation of each type of cost listed above shall be provided. Upon request by the Commission or a participant, primary data and source material underlying cost estimates and calculations shall be provided.

A second amendment, to Rule 54(k)(1),⁸¹ is also submitted as a preliminary proposal. OCA proposes that the following subsection "(v)" be added just after subsection "(iv) Statement of Income and Expense by cost segment":

For each nonpostal service listed in conformance with Rule 54(h)(1), a Balance Sheet and a supporting schedule for each item appearing thereon; and a Statement of Income and Expense and a supporting schedule for each item appearing thereon shall be provided.

Conclusion

By its failure to establish and enforce procedures for approving and monitoring the performance of new services, Postal management has waived its role in protecting the public interest in the provision of such services. The Postal Service's failures to

develop adequate accounting and reporting procedures for nonpostal services have been documented by GAO for a period of years. Despite repeated promises by the Postal Service to reform its procedures, virtually no improvements have been made. The need for the Commission to exercise regulatory oversight is compelling.

⁸¹ 39 C.F.R. §3001.54(k)(1).

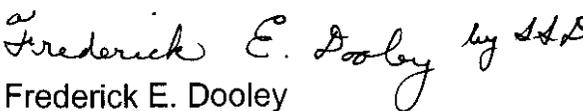
Wherefore, for the reasons set forth above, OCA respectfully requests that the Commission commence a classification proceeding to determine the postal/nonpostal character of the sixteen services listed at pages 4 – 5 of the instant motion and that the Commission initiate immediately a rulemaking proceeding to devise rules for thorough cost accounting and reporting for nonpostal services.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with Rule 12 of the rules of practice.


Shelley S. Dreifuss

Washington, D.C. 20268-0001
March 20, 2002