

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

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POSTAL RATE COMMISSION
OFFICE OF THE CLERK

Petition for Review of Unclassified Services)

PETITION OF CONSUMER ACTION REQUESTING THAT THE
COMMISSION INSTITUTE PROCEEDINGS TO (1) REVIEW THE JURISDICTIONAL
STATUS OF FOURTEEN SPECIFIED SERVICES AND
(2) ESTABLISH RULES TO REQUIRE A FULL ACCOUNTING OF THE COSTS
AND REVENUES OF NON-JURISDICTIONAL DOMESTIC SERVICES
(October 15, 2002)

Pursuant to §553 of the Administrative Procedure Act¹ and Rule 21 of the Rules of Practice of the Postal Rate Commission,² Consumer Action ("CA") hereby requests that the Commission institute a proceeding to consider two important aspects of the Postal Service's offering of fourteen services to the public: (1) whether the Commission has jurisdiction over fourteen specified services offered to the public without a prior request by the Postal Service for a recommended decision under 39 U.S.C. §§ 3621, 3622, and 3623 of the Postal Reorganization Act ("PRA"), and (2) the establishment of rules that would require a full accounting by the Postal Service of the costs and revenues of non-jurisdictional domestic services so as to ensure that they are not being cross-subsidized by jurisdictional domestic services.³

¹ 5 U.S.C. §553(e). The section provides, "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

² 39 C.F.R. §3001.21

³ A motion requesting similar relief was filed with the Commission by the Office of the Consumer Advocate ("OCA") in Docket No. R2001-1 after the record closed but while the Commission was considering its decision. "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,"

The fourteen services at issue in this Petition are:⁴

- 1) Liberty Cash
- 2) Sure Money
- 3) Online Payment Services (3 of them)
 - a. eBillPay
 - b. Pay @ Delivery
 - c. USPS Send Money
- 4) ePayments (unless this is the same as eBillPay)
- 5) NetPost CardStore
- 6) NetPost Certified Mail
- 7) Electronic Postmark
- 8) Unisite Antenna Program
- 9) Returns @ ease
- 10) Mall Package Shipment Program
- 11) First Class Phone Cards
- 12) Retail Merchandise

CA is an independent non-profit membership organization founded in San Francisco in 1971. It serves consumers nationwide by advancing consumer rights, referring consumers to complaint-handling agencies through a free hotline, publishing educational materials in English, Spanish and a variety of major Asian languages including Russian, and advocating for consumers in the media and before legislators. The organization also assists consumers by comparing prices on credit cards, bank accounts, and long distance services.

March 20, 2002. The motion was denied without discussion in PRC Op. R2001-1, ordering paragraph 2, March 22, 2002.

⁴ CA asks for permission to supplement this list as knowledge of other unclassified services is gained through the conduct of the proceeding.

In support of this petition, CA refers to, and incorporates herein by reference (attached hereto), a letter of today's date signed by Ken McEldowney, Executive Director of CA, and Shelley Dreifuss, Director of the Office of the Consumer Advocate of the Postal Rate Commission ("OCA"), addressed to the Hon. Steven W. Williams, Chief Administrative Officer and Secretary of the Commission, for the attention of the Commission. That letter sets forth in detail the facts and reasons supporting the need for this petition, the legal underpinnings of this request for relief, and the specific substantive and procedural relief requested from the Commission.

In recent years, the Postal Service has introduced a wide range of non-traditional retail and commercial products and services in an effort to generate additional revenues in anticipation of declining mail volumes. CA has identified fourteen such unregulated services (and products) that the Postal Service is selling or plans to sell to the public without first coming to the Postal Rate Commission with requests for new classifications and accompanying rates. Many of these services operate at a substantial loss, generating large operating expenses but virtually no revenues. Furthermore, the Postal Service refuses to release information on the fixed and investment costs of providing these services. This creates concern that costs such as these, which are caused by the development of the specific services, are not being covered by revenues from the services offered. A corollary concern is that consumers and other jurisdictional ratepayers are likely paying for such costs and losses.

Based upon its incorrect interpretation of the PRA, the Postal Service has decided unilaterally that the challenged services are outside the Commission's regulatory authority. Hence they have been offered to the public without having first

been recommended by the Commission as new classifications worthy of recommendation (under 39 U.S.C. §3623). Likewise, the Commission has been deprived of the opportunity to set compensatory fees for these services under §3622(b)(3) of title 39.

If the Commission finds that it is lawful for the Postal Service to offer one or more of the challenged services without approval under §§3621, 3622, and 3623, then CA asks that detailed accounting and reporting rules be established that would require sufficient information to ensure that non-jurisdictional services are not being cross-subsidized by jurisdictional services. Commission oversight of the Postal Service's accounting and reporting for unreviewed services would remedy most of the problems identified by the Government Accounting Office ("GAO") in recently issued reports to Congress.⁵

By its failure to establish and enforce procedures for approving and monitoring the performance of new services, Postal Service management has failed to follow the requirements of the PRA and has failed to ensure the protection of the public interest in providing such services. The Postal Service's failures to develop adequate accounting and reporting procedures for unreviewed 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. Such failures by the Postal Service give rise to serious concern that jurisdictional postal services are bearing the costs and losses for the non-jurisdictional services listed above. The need for the Commission to exercise regulatory oversight is compelling.

⁵ Relevant GAO reports are cited and discussed throughout the attached letter.

Wherefore, for the reasons set forth in this Petition, including the letter from CA and OCA to the Commission incorporated by reference and attached hereto, CA respectfully requests that the Commission commence, pursuant to its classification authority, a review of the jurisdictional status of the fourteen services listed in the aforementioned letter to the Commission as well as any other similar services that the Postal Service may initiate or that otherwise come to the attention of the Commission.

CA also respectfully requests that the Commission initiate as a second phase within the same proceeding a rulemaking to devise rules for thorough cost/revenue accounting and reporting for any of the above-mentioned services determined to be non-jurisdictional.

Respectfully submitted by

Consumer Action

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Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Request for Commission Review
of Unclassified Services

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Docket No. _____

SIGNATURE PAGE FOR CONSUMER ACTION

Ken McElly

October 15, 2002

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October 15, 2002

Hon. Steven W. Williams
Secretary
Postal Rate Commission
1333 H. St. N.W.
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Washington, D.C. 20268-0001

Re: Request for Commission Review of
Unclassified Services

Dear Mr. Williams:

This letter is being submitted to the Postal Rate Commission ("Commission") jointly by Consumer Action ("CA"), an independent non-profit membership organization founded in San Francisco in 1971, and the Commission's Office of the Consumer Advocate ("OCA"). In this letter we request that the Commission initiate review and other procedures relating to unclassified services of the United States Postal Service.

SUMMARY OF ACTION REQUESTED BY CA AND OCA.

In recent years, the Postal Service has introduced a wide range of non-traditional retail and commercial products and services in an effort to generate additional revenues

in anticipation of declining mail volumes. CA and OCA have identified fourteen such unregulated services (and products) that the Postal Service is selling or plans to sell to the public without first coming to the Postal Rate Commission with requests for new classifications and accompanying rates.

CA and OCA are strongly opposed to the continued offering of such unauthorized products and services to the public absent the discipline that comes with classification and rate review. Such review would include the presentation of evidence and arguments to convince the Commission and intervenors that these new products and services meet the requirements of the Postal Reorganization Act ("PRA") and, most importantly, that they will, in fact, generate revenue. The current status of these services—imposing significant additional costs on monopoly and other postal ratepayers—is unconscionable and must be rectified by having the Commission exercise its regulatory authority over these products and services.

Nearly all of the Postal Service's e-commerce and other commercial ventures not reviewed by the Commission have involved large expenditures with near-zero revenues. The external discipline of preparing filings for proceedings under §§3622 and 3623 of Title 39 would expose the large expenditures supporting the initiation of new products and services and would likely cause the Postal Service to reconsider a number of decisions to proceed with risky new ventures. For those requests that do ripen into requests before the Commission, unsupported volume and revenue estimates could be challenged in proceedings conducted pursuant to the Administrative Procedure Act. Moreover, rates for new services could be set high enough so that startup, as well as operating costs, would be included in the rates set for proposed new services. It is

apparent that the rates designed for at least some of the new services will not recover startup costs.

The Postal Service's failure to introduce these new services under the §§3622-23 regulatory framework is based upon its erroneous, unfounded interpretation of the PRA, particularly of §404(a)(6) which grants the Postal Service the power to establish nonpostal services. CA and OCA will prove in arguments set forth in this letter that Congress never intended to invest the phrase "nonpostal services" with the broad meaning given it by the Postal Service.

The use of the phrase "nonpostal services" throughout Congress¹ and the Kappel Commission's² discussions on how to transform the Post Office Department into today's Postal Service amply demonstrates that all who shaped the current postal laws understood the phrase to mean just what it had meant in the statutes immediately antecedent to the PRA; that is, services provided by the Postal Service to other federal agencies. Even apart from such an interpretation of the PRA, most of the services at issue are of a type that are customarily subject to Commission authority, i.e., they are closely related, or are equivalent, to traditional postal services.

It is essential to bear in mind that Congress delegated the authority to establish rates and fees for services sold to the public in only two places in the Postal Reorganization Act: §§3621 and 3622 for domestic services and §407 for international mail services. Congress' delegation of its own constitutional power to set rates for services offered by the Postal Service is unambiguous and extremely limited—for the

¹ "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.

services challenged in this letter, only one mechanism has been prescribed for establishing rates, i.e., a request presented to the Commission under §3622. Other sections of the PRA, including §404(a)(6), may give the Postal Service an array of powers to fulfill its mission, but establishing *rates* for services is not one of them. *For domestic services, the sole procedure for establishing rates and fees is §3622.*

If the Commission decides, however, that some of the challenged services are not required to be reviewed under §§3622 and 3623, CA and OCA propose new, stringent accounting and reporting rules that will ensure that jurisdictional postal ratepayers do not bear the costs and losses generated by non-jurisdictional services.

The specific actions that CA and OCA request of the Commission are:

- Review and determine that the fourteen challenged services are subject to the Commission's classification and rate jurisdiction under §§3622 and 3623.
- Establish stringent new accounting and reporting rules to ensure a complete separation of "non-jurisdictional (domestic)" costs and revenues from those of the jurisdictional services.³

² *Kappel Commission, Towards Postal Excellence: The Report of the President's Commission on Postal Organization* (1968) at 138.

³ A motion requesting similar relief was filed with the Commission by OCA in Docket No.R2001-1 after the record closed but while the Commission was considering its decision. "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. The motion was denied without discussion in the Commission's "Opinion and Recommended Decision Approving Stipulation and Agreement," March 22, 2002, Recommended Decision, ordering paragraph 2, "Except to the extent granted or otherwise disposed of herein, all motions, exceptions, and other outstanding requests filed in Docket No. R2001-1 hereby are denied."

The fourteen services challenged by CA and OCA are:⁴

- 1) Liberty Cash
- 2) Sure Money
- 3) Online Payment Services (3 of them)
 - a. eBillPay
 - b. Pay @ Delivery
 - c. USPS Send Money
- 4) ePayments (unless this is the same as eBillPay)
- 5) NetPost CardStore
- 6) NetPost Certified Mail
- 7) Electronic Postmark
- 8) Unisite Antenna Program
- 9) Returns @ ease
- 10) Mall Package Shipment Program
- 11) First Class Phone Cards
- 12) Retail Merchandise

⁴ In the event that the Commission decides to institute the proceeding sought in this letter, we reserve the right to name other unreviewed services as they come to light through discovery, reports issued under Congressional directives, or other media, including the USPS website.

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DISCUSSION

I. INFORMATION ABOUT CA AND OCA.

Consumer Action is a non-profit, membership-based organization founded in San Francisco in 1971. It serves consumers nationwide by advancing consumer rights, referring consumers to complaint-handling agencies through a free hotline, publishing educational materials in English, Spanish and several Asian languages including Russian and advocates for consumers in the media and before lawmakers, and compares prices on credit cards, bank accounts, and long distance services. CA distributes more than two million free publications annually in California and around the nation. CA conducts outreach with Community Advocates through a network of 6,500 community-based and government agencies. An advocacy department mobilizes support for pro-consumer legislation and access to financial and telephone services, and educates people on consumer issues. CA also aims to protect young children from preventable diseases caused by environmental hazards in San Francisco.

The Office of the Consumer Advocate is an Office within the Commission charged with the responsibility of advocating for the interests of the general public in Commission matters including "preparation for consideration of issues likely to reflect the interests of the general public in subsequent proceedings." 39 C.F.R. §3002.7.

II. THE CURRENT CONDITION OF UNRESTRAINED, UNREGULATED FORAYS INTO RETAIL VENTURES HAS LED TO LARGE LOSSES THAT THE POSTAL SERVICE IMPOSES ON JURISDICTIONAL RATEPAYERS.

In recent years, the Postal Service has vainly made attempts to generate additional revenues by offering a variety of services and products through its Internet site, "usps.com," and in postal facilities throughout the nation. Many of these are

hybrids of electronic and traditional mail services; still others are ancillary to the provision of traditional postal services or are equivalent to such services. Numerous investigations performed by the General Accounting Office ("GAO") at the request of Congress reveal that many of the Postal Service's e-commerce services operate at a substantial loss, generating large operating expenses but virtually no revenues. OCA discovery requests in the past two omnibus rate cases have adduced evidence showing that the problem is even more acute than the GAO reports indicate.

A. Losses Reported by GAO

Under directives from the Senate and the House of Representatives, 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, entitled an "Update on E-Commerce Activities and Privacy Protections," dated December 21, 2001, was submitted to Senator Thad Cochran, Ranking Member of the Subcommittee on International Security, Proliferation, and Federal Services.⁵ Among many damaging findings reported to Senator Cochran 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.⁶ The Postal Service's tracking of the costs associated with these revenue projections are so seriously deficient that it is not possible to identify all of the costs caused by these services. GAO censured the Postal Service for failing to report the total planned costs associated with total planned revenues.

⁵ Committee on Governmental Affairs, U.S. Senate. Report GAO-02-79.

⁶ *Id.* at 17.

Planned advertising and program staff costs were not included in financial statements, even for services whose costs were significantly comprised of such expenses.⁷ NetPostCertified and ePayments, services challenged in this filing, were among those services whose expenses were significantly understated.⁸ GAO was concerned that the Postal Service had neither developed reliable documentation on expenses related to information systems for e-commerce initiatives nor on infrastructure costs generally.⁹ Those concerns had not abated more than a year later.¹⁰

ABC News cited GAO's findings to report a loss of \$80 million for so-called "nonpostal" services.¹¹

B. Losses Disclosed by the Postal Service in Responding to OCA Discovery Requests

In Docket No. R2001-1, OCA submitted interrogatories¹² to the Postal Service that sought revenue and cost information for all of the so-called "nonpostal" services that were known to OCA staff. The Postal Service did not object to furnishing summary figures for *operating* expenses, revenues, and net results, but refused to provide fixed and investment cost data. Furthermore, the Postal Service took the position that these

⁷ *Id.* at 14.

⁸ *Id.*

⁹ "Postal Activities and Laws Related to Electronic Commerce," Report GAO/GGD-00-188, issued September 7, 2000, at 29, in response to requests by Senator Thad Cochran, Chairman, Subcommittee on International Security, Proliferation, and Federal Services, Committee on Governmental Affairs, U.S. Senate; and Representative John M. McHugh, Chairman, Subcommittee on the Postal Service, Committee on Government Reform, U.S. House of Representatives.

¹⁰ Report GAO-02-79 at 15.

¹¹ Commentary by John Stossel, July 19, 2002 at: http://abcnews.go.com/sections/2020/2020/stossel_gmab_020719.html

¹² See OCA/USPS-239-253 (excluding interrogatory no. 247).

services are outside the regulatory authority of the Commission.¹³ As a consequence of that legal posture, the Postal Service refused to provide primary data and accounting documentation permitting the Commission and interested participants to verify that the summary figures were complete, accurate, and reliable. The responses they did provide indicated, at a minimum, significant operating losses for many of the services.

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 had 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:¹⁴

1. First-Class Phone cards yield a net operating income of \$30.1 million;
2. Retail merchandise generates a surplus of \$26 million;

¹³ "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 at 5-6: "The Postal Rate Commission does not have jurisdiction over non-postal products or services. The Postal Service thus does not see the relevance of the requested information." The same objection is repeated throughout the document.

The Presiding Officer rejected the Postal Service's arguments based upon the following findings:

- When a party at interest suggests that the statutory factors should be applied to a particular Postal Service product, the Commission must determine whether or not that product is "postal" for jurisdictional purposes.
- Even if challenged services do not have rates set by the Commission, the Commission still has the authority to require the production of cost, revenue, and volume data because of their undeniable impact on the domestic mail revenue requirement.
- The Commission also has a duty to evaluate the public policy ramifications of Postal Service proposals, including their effect on competition in general, and on competitors and users, specifically.
- The Commission must be assured that the revenues of non-jurisdictional services exceed their costs, otherwise the possibility exists that jurisdictional services are subsidizing them.

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 5-11.

¹⁴ The net position of LibertyCash is unclear. More information is needed to evaluate it.

3. Post Office Online lost \$28 million, without producing any revenue;
4. Dinero Seguro has lost a total of \$33.3 million since inception;
5. REMITCO lost \$10.1 million before it ceased operations; and
6. 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,”¹⁵ 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 within the family of USPS Online Payment Services, at least with respect to revenue measurement.¹⁶

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.¹⁷ 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 surplus of \$298.¹⁸ Of course, these particular cost figures are known to be incomplete, inaccurate, and unreliable—as was pointed out above, the Postal Service does not include the advertising or program staff costs of NetPost Certified Mail in its financial statements.¹⁹

¹⁵ Tr. 10C/3511.

¹⁶ *Id.*

¹⁷ *Id.* 3519 (Postal Service response to interrogatory OCA/USPS-250).

¹⁸ *Id.* at 3523 (Postal Service response to interrogatory OCA/USPS-252).

¹⁹ Report GAO-02-79 at 14.

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), an overall loss can be estimated based on the available figures for the entire array of "nonpostal" services (those listed above) of approximately \$44.5 million for the years 1995 to the spring of 2002.

CA and OCA are concerned that the losses may be far larger than the Postal Service's public disclosures indicate, for the Postal Service refuses to release to the Commission and intervenors information on the fixed and investment costs of providing these services. Using the three-year Mailing Online ("MOL") experiment as an example, investment costs for the hybrid internet/hardcopy service were projected, halfway into the experiment, to be approximately \$15 million, while the Postal Service has reported operating expenses for MOL at a little over \$11 million at the halfway point.²⁰ Thus, the investment costs are running roughly one-third higher than the operating costs. It is reasonable to believe that the annual *operating* costs that the Postal Service is willing to disclose for similar e-commerce initiatives are also just the tip of the iceberg. Below the surface and out of sight there 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. In addition, it is not at all clear that the

²⁰ These were labeled "Product Specific IT [Information Technology] Costs" and were estimated to be \$30.3 million over three years. PRC Op. MC2000-2, June 21, 2000, Table 2 at 60. To generate the \$11 million figure, we have summed the MOL costs provided in three reports filed with the Postal Rate Commission for AP 1-13, FY 2001 through AP 1-6, FY 2002, on November 8, 2001; May 11, 2001; and May 1, 2002. All MOL costs figures were rounded to the nearest thousand, and shared costs were included. However, system development costs not incurred to manage and maintain the system (reported in Tables 23 or 24 of the three reports) were not included as operating costs.

Postal Service attempts to identify and isolate those portions of operating costs that are incurred in common with jurisdictional services, but which are caused solely by the unauthorized services. Since there is no oversight by a regulator, it is likely that the Postal Service goes to little or no effort to root out and report the costs caused by unregulated services.²¹

III. THE POSTAL SERVICE'S RECORD-KEEPING AND ACCOUNTING FOR SERVICES OFFERED TO THE PUBLIC WITHOUT COMMISSION APPROVAL ARE IN A STATE OF DISARRAY, THEREBY COMPELLING INTERVENTION BY THE COMMISSION TO DETERMINE FULLY AND ACCURATELY THE COSTS CAUSED BY THESE SERVICES.

From GAO's reports it is evident that, absent regulatory oversight, the Postal Service's procedures for monitoring its non-jurisdictional domestic services have been, and continue to be, haphazard, inconsistent, and deficient. In its Report issued in September 2000,²² GAO reviewed the implementation procedures for many of the services discussed above and made the troubling finding that:²³

[W]e identified a number of inconsistencies and other problems 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.

²¹ These suspicions are confirmed in the GAO Report cited above. As of September 2000, GAO found that the Postal Service had neither developed reliable documentation on expenses related to information systems for e-commerce initiatives nor on infrastructure costs generally. Even the Postal Service acknowledged the necessity of doing so. Report GAO/GCD-00-188 at 29. However, fifteen months later, when GAO was charged with updating its investigation of the financial status of the Postal Service's e-commerce activities, it informed the Subcommittee that the Postal Service had still not devised a system for reporting all of the expenses of its e-commerce initiatives and that it continued to harbor concerns that jurisdictional services were cross-subsidizing the e-commerce initiatives. Report GAO-02-79 at 14-15.

²² GAO/GCD-00-188.

²³ *Id.* at 22.

Also:²⁴

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

Of even greater concern:²⁵

[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.

GAO admonished:²⁶

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.²⁷
- 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.*²⁸
- Financial information related to Postal Service e-commerce and internet-related activities is not complete, accurate and consistent.²⁹

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 4.

²⁷ Report GAO-02-79 at 9.

²⁸ *Id.* at 10.

- The Postal Service has difficulty even defining whether its Internet initiatives are e-commerce or not.³⁰
- There is no clear accountability or consistency in the development, approval, implementation, performance, and day-to-day monitoring of initiatives.³¹
- 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.³²

The most ominous implication for postal ratemaking is the substandard financial reporting for the e-commerce initiatives. Indeed, GAO not only identified significant deficiencies in the financial statements but also found inaccuracies in the data reported for e-commerce costs and revenues.³³ In September 2000, GAO lacked confidence in the reliability of the Postal Service’s financial reports.³⁴ Even today, the Postal Service’s financial statements fail to capture all of the revenues and costs associated with the e-commerce initiatives.³⁵ The deficiencies of the Postal Service reports are numerous.³⁶ As late as August 2001, the Postal Service had no system to attribute

²⁹ *Id.*

³⁰ *Id.* at 7.

³¹ *Id.* at 9.

³² *Id.* at 9-10.

³³ *Id.* at 12.

³⁴ *Id.* at 11.

³⁵ *Id.*

³⁶ *Id.*

costs for the infrastructure used to support e-commerce products and services.³⁷ Without such an attribution system, the Postal Service is unable to identify common costs of e-commerce.³⁸

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.³⁹ The Postal Service exhibits serious fiduciary irresponsibility in offering these services without prior and adequate 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,⁴⁰ as is the case with International Mail.⁴¹ In our view, the PRA as presently configured already gives the Commission the power (and the duty) to consider not only the jurisdictional nature of these services and to exercise rate and classification jurisdiction, but to regulate the accounting and reporting of non-jurisdictional services as well.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See id.* at 13-14.

⁴⁰ *Id.* at 4 and 16.

⁴¹ Under 39 U.S.C. §3663.

IV. THE REMEDY FOR PROBLEMS IDENTIFIED BY GAO IS EXERCISE BY THE COMMISSION OF ITS STATUTORY OVERSIGHT RESPONSIBILITY REGARDING THESE SERVICES.

The remedy for most of the problems identified by GAO is Commission review and determination of the “postal service” nature of the allegedly “nonpostal” services and careful oversight of the Postal Service’s accounting and reporting for non-jurisdictional services. 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,”⁴² would have appertained. 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.⁴³ 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[s]”⁴⁴ The evidentiary submissions would include studies, information, and data on the characteristics of the users,⁴⁵ detailed cost information,⁴⁶ and interclass changes,⁴⁷ among others.

⁴² 39 C.F.R. §§3001.61–66.

⁴³ *Id.* at §3001.63.

⁴⁴ *Id.* at §3001.64(a).

⁴⁵ *Id.* at part (c).

⁴⁶ *Id.* at part (d).

⁴⁷ *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,⁴⁸ the assignment and distribution of costs,⁴⁹ and econometrically developed volume estimates.⁵⁰ Even under the rules for experimental changes,⁵¹ the collection and reporting of data is an essential element of the recommended decision to proceed.⁵²

Proceedings before the Commission typically involve detailed documentation rules for providing 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 reliable, defensible outcomes. In this way, the Commission and the public can be assured that postal services are appropriately classified and rated and are not cross-subsidizing other services. The need for the Commission to exercise its regulatory oversight responsibilities over e-commerce initiatives and like services, subjecting Postal Service records to public scrutiny, is compelling.

⁴⁸ *Id.* at §3001.54(f).

⁴⁹ *Id.* at subpart (f)(3).

⁵⁰ *Id.* at part (j).

⁵¹ *Id.* at §§3001.67–67d.

⁵² *Id.* at §67c.

V. THE COMMISSION HAS THE AUTHORITY TO INSTITUTE A CLASSIFICATION PROCEEDING TO DETERMINE ITS JURISDICTION OVER SERVICES OFFERED TO THE PUBLIC WITHOUT PRIOR COMMISSION APPROVAL.

Under the PRA, the Commission has broad authority to initiate classification proceedings. Section 3623(a) of Title 39 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.”⁵³ The Commission has already determined in Order No. 1239 that upon complaint it may consider the jurisdictional nature of so-called “nonpostal” services. If, upon complaint, the Commission may determine in the first instance its own jurisdiction to investigate a claim that policies of the Act are being violated, then surely the Commission holds similar power when it undertakes its own investigation into a classification matter to determine the appropriate actions necessary to assure compliance with the policies of the Postal Reorganization Act.

Such an interpretation of the Commission’s authority is also consistent and supported by the well-established proposition that agencies have the authority to determine in the first instance their own jurisdiction, and an agency’s determination carries much weight against those who would have the agency’s decision overturned.⁵⁴ If the Commission ultimately concludes that there is merit in this request, and institutes a classification proceeding to assess the postal/nonpostal nature of the specified

⁵³ *Newsweek v. U.S. Postal Service*, 663 F.2d 1186, 1209 (2d Cir. 1981).

⁵⁴ See *Chevron, U.S.A., Inc. v. Nat’l Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984); *Commodity Futures Trading Commission v. Shor*, 478 U.S. 833, 844 (1986); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

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

In two recent Commission cases, *Complaint of Coalition Against Unfair USPS Competition* ("CAUUC") (concerning a "Pack and Send" service)⁵⁵ and *Complaint on PosteCS*,⁵⁶ 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 our 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:

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.⁵⁷

In short, upon complaint, the Commission has the option to proceed under 39 U.S.C. §3662 to develop a public report on the issue of postal/nonpostal status, or it may proceed unilaterally under 39 U.S.C. §3623. The latter course is appropriate in this case.

⁵⁵ Docket No. C96-1.

⁵⁶ Docket No. C99-1 (Complaint by United Parcel Service ("UPS")).

⁵⁷ Order No. 1239, "Order Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings," Docket No. C99-1, May 3, 1999 at 12. (Emphasis added.)

VI. A RATIONAL CONSTRUCTION OF THE PRA DEMONSTRATES THAT THE POSTAL SERVICE DOES NOT HAVE THE AUTHORITY TO OFFER THE SUBJECT SERVICES TO THE PUBLIC WITHOUT FIRST COMING TO THE COMMISSION FOR A RECOMMENDED DECISION.

A. Section 404(a)(6) of the PRA does not give the Postal Service the unilateral authority to set fees for services it provides to the public.

Section 404(a)(6) grants to the Postal Service “specific powers” to “provide, establish, change, or abolish special nonpostal or similar services.” Thus, the Postal Service may establish, change, or withdraw the types of services listed in subsection (a)(6). However, it is essential to observe that section (a)(6) is silent about the power to set a rate or fee for such services. Rates for such services (as for all domestic services sold by the Postal Service to the public) may only be established pursuant to §§3621 and 3622 of the PRA. “Nonpostal” services, as discussed below, have no rates associated with them. Rather, they involve a reimbursement arrangement between the Postal Service and governmental agencies for “public service” activities that the Postal Service provides on behalf of such agencies.

In only two places in the PRA has Congress delegated its power to set or change postal rates.⁵⁸ The first is §407, in which it is stated, “The Postal Service, with the consent of the President . . . may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries.” The second is a pair of sections, §§3621 and 3622, which authorize the Governors to establish reasonable and equitable rates of postage and fees for postal services (§3621), but

⁵⁸ Under Article 1, Section 7, of the Constitution. Prior to the passage of the Postal Reorganization Act, through nearly two centuries, Congress had reserved for itself the power to set postage rates. *Accord Air Courier Conference of Am./Int'l Comm.*, 959 F.2d 1213, 1216 and 1221 (3d Cir. 1992) (hereinafter “*Air Courier*”); the Third Circuit Court of Appeals stated that, “Before the Act was adopted in 1970, the burden of setting domestic postal rates fell on Congress.”

only after the Postal Service requests that the Postal Rate Commission submit a recommended decision on “changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest [§3622].” The only reasonable interpretation of these statutes is that Congress’ delegation of its power to establish rates and fees for postage and postal services is explicit and limited.

The Postal Service’s apparent construction of §404(a)(6) as a grant of the power to establish rates and fees for the challenged services is utterly without foundation. Therefore, the Postal Service’s retailing of these services to the public unilaterally, without a recommended decision by the Commission, constitutes *ultra vires* acts never authorized by Congress.

B. The Third Circuit Court of Appeals, in *Air Courier* issued, in dictum, a critical interpretation of the PRA.

The subject of the *Air Courier* case was the Postal Service’s authority to set rates unilaterally for international mail services. For insight into congressional intentions with respect to the delegation of international ratesetting authority, the Third Circuit found it necessary to construe the meaning and scope of the statutes that confer domestic ratesetting authority.⁵⁹ In evaluating whether Congress had granted unilateral authority to the Postal Service to set international mail rates, the Court first observed that the authority to establish rates and fees is “in accordance with the provisions of this chapter” [*i.e.*, Chapter 36].⁶⁰ The Court further noted that Chapter 36 has no express

⁵⁹ *Id.* at 1215-16.

⁶⁰ *Id.* at 1218, quoting §3621 .

exception for international rates.⁶¹ However, an express exception (for international mail) is provided for in Chapter 4 of the PRA. In *Air Courier*, the Postal Service argued successfully that the “Except as otherwise provided” clause of §3621, read together with §407 (which expressly gives the Postal Service the power to set international mail rates, with the consent of the President), demonstrates that Congress created an exception (or had “otherwise provided”) for the establishment of international mail rates.

Section 404(a)(6), providing for Postal Service authority to establish and change services, however, is wholly inapposite to §407. It was critical to the Court’s decision in *Air Courier* that when Congress intended to give the Postal Service the power to establish *rates* for a service, it did so explicitly, as in §407. The Court underscored that the Postal Service, for domestic services, must *request* from the PRC a change in rates.⁶² Thus, the Court in *Air Courier* makes the crucial distinction between establishing a service – as in §404(a)(6) – and establishing *rates* for a service – only possible under Chapter 36 (or §407 in Chapter 4).

VII. THE LEGISLATIVE HISTORY OF THE PRA REINFORCES THE VIEW THAT CONGRESS NEVER INTENDED TO DELEGATE UNILATERAL RATESETTING AUTHORITY TO THE POSTAL SERVICE FOR SERVICES RETAILED TO THE PUBLIC.

The meaning of the phrase “nonpostal services” was well understood by Congress, the Postal Service, and mailers at the time the PRA was being drafted. The postal statutes that were in place at the time of the drafting of the PRA included 39

⁶¹ *Id.*

⁶² *Id.* at 1220-21.

U.S.C. §§2302-03.⁶³ Section 2302 provided that there were elements of postal service that had a public service character and that the costs incurred in providing such services would be borne by the Federal Government, not postal ratepayers. Section 2303 identified such “public services.” Generally, in §2303, Congress identifies the elements of “public services” or the “public services” themselves that serve a worthy social purpose distinct from a postal purpose, thereby justifying funding by taxpayers, not ratepayers. Most of them consisted of the revenue deficiencies generated by certain nonprofit mailings, books and films, rural postal services, special services, and, in subsection (c)(3): *“the loss incurred in performing nonpostal services, such as the sale of documentary stamps for the Department of the Treasury.”*⁶⁴ The example given, documentary stamps for the Department of the Treasury, is a service provided by the Postal Service to another federal agency, not the retailing of a service to the public, as is the case for services such as e-Bill Pay and Netpost Card Store. Conspicuously absent is any reference to services of a commercial nature sold by the Postal Service to the public.

This understanding of the phrase “nonpostal services” is manifest throughout the legislative history of the drafting of the PRA. “Nonpostal services” had a precise meaning that was well known both to Congress and the Postal Service at the time the PRA was being drafted.

⁶³ §§2302 and 2303 are reproduced in their entirety in an Attachment to this letter.

⁶⁴ Emphasis added.

“Nonpostal services” were defined as: “[p]ublic service costs associated with non-reimbursed services for other government agencies.”⁶⁵ 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.⁶⁶ Non-mail, commercial services offered to the general public (such as those challenged in this letter) were never included in the legislative history discussing the phrase “nonpostal” services during the crucial period of statutory debate and development.

If Congress had intended to delegate to the Postal Service the power to engage in virtually any kind of enterprise that it liked, and set fees at any level that the Postal Service chose, from zero to exorbitant, it is certain that there would have been extended discussion in the legislative history indicating such an intent. One wonders whether the Postal Service sees any limitation on its ability to sell services and products

⁶⁵ “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. In the Kappel Commission’s consideration of which “public service costs’ would be paid by the taxpayers,” (*Kappel Commission Report* at 136), the Kappel Commission advised establishing a principle that “the Post Office should be reimbursed for non-postal services performed for other Government agencies.” *Id.* at 138.

⁶⁶ 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.

to the public under §404(a)(6)⁶⁷ – could the Postal Service sell used cars if it chose? Open up a chain of fast food restaurants? Operate a bowling alley?

In addition to viewing itself as having unlimited power to engage in any type of commercial enterprise, the Postal Service believes that there are no restrictions on its power to set rates for such products and services at any level it chooses, even if this means using monopoly revenues to drive competition out of the market. It is almost a certainty that Congress never intended to give the Postal Service unbridled power to misuse its monopoly privilege to eliminate competition in any commercial arena it chooses. If this were Congress' intention, where in the legislative history are these intentions stated? The answer, of course, is that Congress never articulated such an intention and has not granted to the Postal Service the powers that it has unlawfully arrogated to itself. Rather, in employing the same phrase –“nonpostal services” in §404(a)(6) of the Postal Reorganization Act as had been used in the antecedent §2303(c)(3) – Congress intended that phrase to mean only services provided by the Postal Service to other federal agencies.

The current chart of accounts, for example, lists revenues generated from providing “Public Service Products” such as Food Coupons (Account 42321) and reimbursements from the Department of Interior for expenses incurred in the sale of migratory bird stamps (Account 42341). Likewise, reimbursements from offering “Public Services,” such as Passport Applications, are reported in Account 43420. None of

⁶⁷ During the course of GAO's investigation of the Postal Service's e-commerce activities, the Postal Service stated its views on the breadth of its powers under the PRA. The Postal Service is of the opinion that any of §§401(3), 401(10), or 404(a)(6) “are broad enough to empower the USPS to provide whatever service or conduct whatever activity (not prohibited elsewhere) that appropriately serves the purposes set forth in law for USPS.” Report GAO/GGD-00-188 at 65-66. The Postal Service apparently believes it is the sole judge of the propriety of its actions and whether they serve the purposes set forth in the PRA.

these reimbursements by other federal agencies are akin to the sale of commercial products and services to the public. Reimbursements from other federal agencies are arms-length transactions. The Postal Service can be expected to document all of the expenses it incurs to provide these services, while the federal agencies served can be expected to verify the expense claims.

Public tariffs, on the other hand, provide no such opportunities to the purchasers of products and services. Customers of the Postal Service have only one choice to make: buy the product or not. Congress established an outside, expert body – the Postal Rate Commission – to protect customers' interests.

Rates for products and services such as these may be established only under §§3621 and 3622. If a product or service is being sold by the Postal Service to the public, then there is no question that the Commission has the authority (and duty) to review its provision under the classification and ratemaking provisions of the PRA.

VIII. THE COURT HAS CLEARLY ESTABLISHED THAT SO-CALLED "NONPOSTAL" SERVICES THAT ARE THE FUNCTIONAL EQUIVALENT OF MAIL OR ANCILLARY TO MAIL SERVICE ARE "POSTAL SERVICES" WITHIN THE MEANING OF THE ACT.

In *Associated Third Class Mail Users v U. S. Postal Service* (hereinafter "ATCMU"),⁶⁸ ATCMU challenged a Postal Service announcement that it would increase the charges for eleven special services without first coming to the Commission with a request for a change in fees. Judge Sirica held that all of the challenged special services were subject to the regulatory authority of the Commission under §3622.

⁶⁸ 405 F. Supp. 1109 (D.D.C. 1975).

Under Judge Sirica's formulation, "services . . . very closely related to the delivery of mail" are deemed 'postal services' in ordinary parlance."⁶⁹ The opinion concluded:

Congress intended, by its creation of the Rate Commission, that changes in fees such as these, which would likely have a substantial impact on sizeable and diverse groups in society, be tested by the full procedures provided in a Postal Rate Commission proceeding to determine the need for the increase and the practicability of less onerous alternatives. (405 F. Supp 1116)⁷⁰

The court found in *ATCMU* that the services in that proceeding were the "special" and "other similar services" referred to in §404(a)(6) of the Act and, at the same time, "postal services."⁷¹ The court further determined that although §404(a)(6) allowed the Postal Service to change the fees for the services involved, any increases in fees were still subject to review by the Commission.⁷²

[I]t may be conceded that the power to "change" these services includes the power to increase the fees for them. But this does not get the Postal Service very far. For any increases in these fees may still be subject to review by the Postal Rate Commission under Sec. 3622.

Significantly, the court also pointed out that the nonpostal reference applied to situations relating to governmental activities and, "Clearly, however, it [the nonpostal

⁶⁹ *Id.* at 1115. The judge noted that money orders might not be "closely related to the delivery of mail" because they "can be used equally as well without being delivered by mail." Nevertheless, he concluded that because "the vast majority of money orders sold at post offices are actually sent by mail" they may also be considered "postal services" in ordinary parlance.

⁷⁰ It should be remembered that many of the services once claimed in *ATCMU* to be beyond Commission jurisdiction, but which today are unquestionably considered postal services, were seemingly as far from the traditional definition of mail but ancillary to the mail service as are the "nonpostal" services cited in this letter. For instance, at issue in *ATCMU* were insurance, a signed receipt for mail, COD mail, and mail list corrections, each only ancillary to the actual movement of mail and yet now universally recognized as postal services.

⁷¹ The Postal Service has the power "to provide, establish, change, or abolish special [,] nonpostal or similar services." (The court's note 2 stated that it is generally agreed the absence of a comma between "special" and "nonpostal" was inadvertent.)

⁷² 405 F. Supp. at 1117.

reference] does not refer to any of the services at issue here.”⁷³ (405 F. Supp. at 1117.)

The services at issue in that case, as many here, involved matters wholly ancillary to the movement of mail. As applied by the Commission, this has come to mean that services “which can fairly be said to be ancillary to the collection, transmission, or delivery of mail are postal services.”⁷⁴

Many of the services that we contend should be reviewed by the Commission as postal services are ancillary to the collection, delivery, and transmission of mail. They directly 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.⁷⁵ USPS eBillPay™ payments are sometimes entered as First-Class Mail.⁷⁶ USPS Pay@Delivery™ is a payment service offered in connection with Priority Mail and Delivery Confirmation.⁷⁷ NetPost™ Certified Mail appears to be a variant of Certified Mail, but with a “referral fee” added by the Postal Service.⁷⁸ The Mail Package Shipment Program is, in fact, the Postal Service’s traditional pick-up service, with the significant distinction that no fee is charged.

The Commission’s Order establishing the PosteCS complaint docket (Order No. 1239)⁷⁹ indicated that it would entertain arguments that even an all-electronic service

⁷³ *Id.* at 1117 and note 3.

⁷⁴ PRC Op. R76-1, App. F at 3.

⁷⁵ Tr. 10C/3518-19 (Partial response to interrogatory OCA/USPS-250).

⁷⁶ *Id.* at 3510-11 (Partial response to interrogatory OCA/USPS-241).

⁷⁷ *Id.* at 3515-16 (Partial response to interrogatory OCA/USPS-248).

⁷⁸ *Id.* at 3521-23 (Partial response to interrogatory OCA/USPS-252).

⁷⁹ Issued May 3, 1999, Docket No. C99-1 at 19.

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.⁸⁰

USPS SendMoney functions as a substitute for First-Class bill payments.⁸¹ Sure Money involves 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.

Of further significance, these services are often offered for sale in competition with other similar or equivalent services sold by private enterprises. The PRA at §3622(b)(4) directs that Commission rate recommendations shall consider the effect of rate increases upon private enterprises engaged in the delivery of mail matter other than letters. Congress' explicit concern about the impact of postal service rates upon private enterprises suggests that it is important to consider whether the service impacts private enterprises. If it does, this suggests it is the type of service Congress wanted the Commission to regulate. By contrast, nonpostal services, as Congress understood them, involve only non-reimbursed services for other government agencies and do not

⁸⁰ *Id.* (Emphasis in original.)

⁸¹ Tr. 10C/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.

compete with private enterprises. In summary, the only rational construction of the PRA is that, while 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, it does have jurisdiction over the services cited in this letter. The fundamental character of jurisdictional services is their nexus with the movement of mail: they are provided in connection with, or ancillary to, the movement of mail or are the functional equivalent of mail. The other significant criterion for jurisdiction is that they are sold to the public for a fee (or will be at a future time) – a feature true of all of the services challenged in this letter.

It is reasonable to conclude that the services challenged here are subject to Commission regulation as postal services under chapter 36. All of the above discussion provides ample grounds for the Commission to commence a classification proceeding to investigate thoroughly the characteristics and terms of each challenged service. In this way, the “postal” status and the impact upon other postal services may be determined for each listed service, taking into consideration, *inter alia*, the effect upon private enterprises engaged in the delivery of mail matter other than letters.

IX. A TWO-STAGE PROCEDURAL PROCESS IS APPROPRIATE, CONSISTING OF REVIEW BY THE COMMISSION OF ITS JURISDICTION OVER THE CHALLENGED SERVICES, FOLLOWED BY A RULEMAKING TO INSTITUTE DETAILED ACCOUNTING RULES FOR ANY SERVICES DETERMINED TO BE SUBJECT TO A UNILATERAL POWER OF THE POSTAL SERVICE TO SET RATES.

The entire process for disposing of all issues raised by CA and OCA in this letter is best handled in two stages. First, the Commission should determine whether the challenged services are subject to its regulatory authority under §§3622 and 3623 of

Title 39. Following this determination, further proceedings are two-pronged. If the Postal Service wishes to continue to offer retail or commercial services found to be subject to the Commission's jurisdiction in a lawful manner, it will prepare classification and rate proposals for submission to the Commission. After review, the Commission may then make recommendations to the Governors of the Postal Service.

Phase 1. The first phase would consist of a demonstration by the Postal Service as to why these services are not subject to Commission jurisdiction.⁸² This would be followed by discovery on the Postal Service's demonstration (and on germane issues omitted from the demonstration), hearings, presentation of evidence and counter-evidence, and legal argument on the question whether the challenged services are subject to §3622 of Title 39. Phase 1 would culminate with a Commission order declaring the jurisdictional status of each challenged service.

Phase 2 (Two Parts). Part One consists of reviewing the pros and cons of recommending as new classifications of mail under the Domestic Mail Classification Schedule (DMCS) those services identified as jurisdictional at the end of Phase 1. Part One of Phase 2 may be initiated either by the Postal Service or the Commission. It is assumed 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

⁸² It is our view that procedural efficiency is accomplished by having the Postal Service provide an organized, coherent explanation of why each of the challenged services should not be subject to Commission jurisdiction. Of course, the Commission may follow the earlier examples of complaint cases by having CA, OCA, and other participants first try to elicit the salient facts and explanations through discovery. The more sensible course, we believe, is to submit discovery on the facts presented by the *Postal Service* in its first-stage explanation.

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 worthy for recommendation as classifications would be declared so in a Phase 2 Commission order.

Part One of Phase 2 would also involve §3622 hearings on the record to establish compensatory rates for identified "postal" services. It is expected that the Postal Service would bring a request to the Commission for a rate recommendation.

Part Two of Phase 2 consists of establishing and prosecuting a rulemaking to establish rules of reporting and accounting for the costs and revenues of any services that may continue without Commission approval under §§3622 and 3623. The CA/OCA proposal for such rules is discussed in the next section.

X. A RULEMAKING SHOULD INSTITUTE DETAILED ACCOUNTING AND REPORTING REQUIREMENTS FOR SERVICES NOT JURISDICTIONAL UNDER §§3622 AND 3623.

If the Commission determines any of the challenged services to be outside its rate-setting authority, procedures should be implemented at the conclusion of Phase 1 for the purpose of developing rules for detailed accounting and reporting for such non-jurisdictional services. Such a rulemaking is critical to identifying all of the investment and operating costs caused by these services.

In a ruling in Docket No. R2001-1 – POR R2001-1/42 -- the Presiding Officer observed that, while:⁸³

⁸³ "Presiding Officer's Ruling Concerning the OCA's Motion to Compel Responses to OCA/USPS-231 *et Seq.*," January 29, 2002 at 9.

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.

Commission review of revenues and costs of non-jurisdictional services to ensure that there is no cross-subsidization is a policy of long standing. In Order No. 1034,⁸⁴ the Commission explained that it has a duty to examine cost, revenue, and volume information for non-jurisdictional services⁸⁵ because they have "an undeniable impact on the domestic mail revenue requirement."⁸⁶

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.⁸⁷ Major expenses such as advertising and program staff costs have been left out of the financial statements.⁸⁸ In some cases, the omitted expenses "made up a significant portion of total expenses."⁸⁹ There is a distinct possibility that any non-jurisdictional e-commerce revenues and costs are not being separated from domestic jurisdictional service costs

⁸⁴ "Order Denying Motion for Reconsideration," Docket No. R94-1, October 24, 1994 at 4.

⁸⁵ The subject of Order No. 1034 was International Mail.

⁸⁶ 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," August 13, 1987 at 2, first established the propriety of requiring provision of this information.

⁸⁷ Report GAO-02-79 at 11.

⁸⁸ *Id.* at 14.

⁸⁹ *Id.*

and revenues in submissions by the Postal Service to the Commission.⁹⁰ GAO is concerned that Postal Service e-commerce initiatives in the aggregate are being cross-subsidized by jurisdictional services.⁹¹ The Postal Service has difficulty in distinguishing between jurisdictional and non-jurisdictional services; thus its financial reporting is not complete, accurate or consistent.⁹²

The types of information that the Commission believes to be essential to accurate forecasts of jurisdictional domestic mail are delineated primarily in Order No. 1025,⁹³ and Presiding Officer's Ruling No. R87-1/78.⁹⁴ 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.

In a rate proceeding affecting jurisdictional postal services under §§3621, the Commission is obligated to set rates and fees that will generate sufficient revenues to permit the Postal Service to achieve a "break even" financial result. This is not possible

⁹⁰ *Id.*

⁹¹ *Id.* at 15.

⁹² *Id.* at 16.

⁹³ "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, August 17, 1994.

⁹⁴ Fully cited in n. 86 above.

in the absence of reliable estimates of revenue and expense for non-jurisdictional services; the Commission cannot determine how much net revenue must be raised by jurisdictional mail services to allow the Postal Service to break even. Consequently, the Commission should require the Postal Service to provide an accurate accounting of the revenue generated by each non-jurisdictional service. A concomitant requirement should be an accurate accounting of the volume (or number of transactions) for each non-jurisdictional service.

With respect to costs, in the context of international postal services, the Commission has stated that “the mandate of §3622(b)(3) that each mail service bear its own direct and indirect cost requires that the Commission ensure that no cost properly attributable to international mail is inadvertently assigned to domestic mail.”⁹⁵ This same obligation is required of the Commission with respect to domestic non-jurisdictional services. Such non-jurisdictional services incur costs that are not caused by domestic mail services. These include, in the case of non-jurisdictional e-commerce initiatives, costs of processing electronic financial payments. They might also include costs incurred exclusively to manage non-jurisdictional services. At the present time, costs for certain non-jurisdictional services are not complete, accurate or consistently reported.⁹⁶ For example, it appears highly unlikely that all of the costs caused by the sale of retail merchandise by a postal window clerk have been allocated to the non-jurisdictional service. At a minimum, costs exclusive to non-jurisdictional services must

⁹⁵ PRC Order No. 1025 at 9.

⁹⁶ Report GAO-02-79 at 6-7.

be reliably identified so as to permit verification of the proper allocation between jurisdictional and non-jurisdictional services.

It is essential that the Postal Service collect and report cost data permitting application of the incremental cost test for non-jurisdictional services.⁹⁷ The incremental cost test must be performed to determine whether non-jurisdictional services generate sufficient revenues to be free of cross-subsidy. Even the Postal Service agrees, in principle, that "eCommerce products and services in the aggregate are to cover the incremental costs and thus not be cross-subsidized."⁹⁸ However, permitting the Postal Service to satisfy the incremental cost test in the aggregate for non-jurisdictional services rather than individually may permit cross-subsidy among some non-jurisdictional services.⁹⁹ Consequently, the Commission should require sufficient cost data and documentation to permit application of the incremental cost test for non-jurisdictional services in the aggregate, for each individual non-jurisdictional service, and for each group of such services.

Since many so-called nonpostal services have generated significant losses over the last several years, there is a distinct possibility that in an omnibus rate proceeding, the prior year losses that the Postal Service requests be included as part of the institutional costs in the rates for jurisdictional ratepayers improperly include losses

⁹⁷ The Postal Service defines the following criteria for the incremental cost test: "The revenues collected from any service (or group of services) must be at least as large as the additional (or *incremental*) cost of adding that service (or group of services) to the enterprise's other offerings." Direct testimony of John C. Panzar on Behalf of the US Postal Service in Docket No. R97-1, USPS-T-11 at 8. (Emphasis in original). See also Report GAO/GCD-00-188 at 57.

⁹⁸ Report GAO/GCD-00-188 at 57.

⁹⁹ *Id.* at 76, citing letter of Edward J. Gleiman, Chairman, Postal Rate Commission, to Bernard L. Ungar, Director, Government Business Operations Issues, General Government Division, US General Accounting Office, August 25, 2000.

associated with non-jurisdictional services. Therefore, the Postal Service must be required to submit evidence in an omnibus case that permits the separation of past jurisdictional losses from past non-jurisdictional losses.

Following is a preliminary proposal for an amendment to Commission Rule 54(h)(1)¹⁰⁰ that specifies the contents of formal requests in §3622 proceedings. The language is intended to ensure that the Commission will obtain from the very inception of rate proceedings all of the developmental, investment, and operating costs relating to all services offered by the Postal Service. The proposed language would follow the last sentence of current Rule 54(h)(1):

(i) The following must be provided for domestic services offered to the public outside of a Commission recommendation under 39 U.S.C. §§3622 and 3623: a complete listing of all such services that the Postal Service offers to the public for a fee or intends to offer for a fee. For each such non-jurisdictional service, the Postal Service shall provide a full description of the elements of the service.¹⁰¹

(ii) For each such non-jurisdictional service, the Postal Service shall describe and provide in full detail all of the costs incurred in providing the service, including all related investment costs and whether these costs are incurred solely for the non-jurisdictional service or in common with other services (whether jurisdictional or non-jurisdictional).

(iii) For each such non-jurisdictional service, the Postal Service shall provide the operating costs of the non-jurisdictional service and a description of the operations producing the operating costs. For each such non-jurisdictional service, the Postal Service shall state which operating costs are incurred separately from other services and which are incurred jointly. The Postal Service shall explain fully how jointly incurred costs are allocated among the services (both jurisdictional and non-jurisdictional) involved.

(iv) For each such non-jurisdictional service the Postal Service shall provide the development, start-up, and all other investment costs for the service beginning with the time that the Board of Governors first approved (whether formally or tacitly) the provision of the service to the public or a segment of the public

¹⁰⁰ 39 C.F.R. §3001.54(h)(1).

¹⁰¹ This new language would make Rule 54(b)(4) redundant; thus, (b)(4) should be deleted if (h)(1)(i) is adopted.

(including on a pilot or test basis). Development and start-up costs shall include all of the costs to develop the non-jurisdictional service and shall be reported on a fiscal year basis. The Postal Service shall state how development and start-up costs are being recovered from fees charged for the non-jurisdictional service. If development and start-up costs are not able to be recovered fully from the non-jurisdictional service, then the Postal Service shall state how the costs will be recovered from other services (whether jurisdictional or non-jurisdictional).

(v) The Postal Service shall report any other costs caused by provision of the non-jurisdictional service. Each cost-causing activity or material underlying such costs shall be described. The portion of such cost involved solely in the provision of the non-jurisdictional 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 jurisdictional or non-jurisdictional) that cause them.

(vi) Amounts proposed by the Postal Service for the recovery of prior year losses shall separate those losses produced by jurisdictional services and those generated by non-jurisdictional services. Any losses generated by non-jurisdictional services may not be made part of the costs to be recovered by jurisdictional rates and fees.

(vii) 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),¹⁰² is also submitted as a preliminary proposal. We propose that the following subsection "(v)" be added just after subsection "(iv) Statement of Income and Expense by cost segment:"

For each non-jurisdictional 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

The Postal Service's decision not to request, initially, Commission classification and rate review of its new services has created a gap in the system of regulation that

¹⁰² 39 C.F.R. §3001.54(k)(1).

Congress never intended with the enactment of the PRA. By its failure to establish and enforce procedures for approving and monitoring the performance of new services, Postal Service management has abdicated its role in protecting the public interest in the provision of such services. Further failures to develop adequate accounting and reporting procedures for non-jurisdictional services risk unlawful cross-subsidy by jurisdictional services. The need for the Commission to exercise regulatory oversight is compelling. CA and OCA ask the Commission to institute a classification and rulemaking proceeding to end the unauthorized provision of retail services and promulgate accounting rules that will ensure that jurisdictional ratepayers do not have included in their rates the expenses and losses of non-jurisdictional services.

Very truly yours,

Ken McEldowney
Executive Director,
Consumer Action

Shelley S. Dreifuss
Director,
Office of the Consumer Advocate

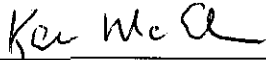
Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Request for Commission Review
of Unclassified Services

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Docket No. _____

SIGNATURE PAGE FOR CONSUMER ACTION



October 15, 2002

Ken McElDowney, Executive Director
Consumer Action
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Date

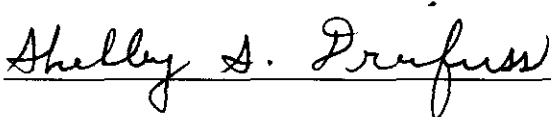
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Docket No. _____

SIGNATURE PAGE FOR
OFFICE OF THE CONSUMER ADVOCATE



October 15, 2002

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FORMER TITLE 39

§ 2301

CHAPTER 27—POSTAL POLICY AND FISCAL REPORTS

POSTAL POLICY

Sec.

- 2301. Findings of Congress.
- 2302. Declaration of policy.
- 2303. Identification of public services and costs thereof.
- 2304. Reviews, studies, surveys, and reports of Postmaster General.
- 2305. Effect on fourth class mail rates.
- 2306. Costs for establishing postal rates.

REPORTS

- 2331. Cost Ascertainment.
- 2332. Postal Modernization Fund.¹

¹Section was repealed but analysis was not amended to reflect the repeal.

POSTAL POLICY

§ 2301. Findings of the Congress

The Congress hereby finds that—

(1) the postal establishment was created to unite more closely the American people, to promote the general welfare, and to advance the national economy;

(2) the postal establishment has been extended and enlarged through the years into a nationwide network of services and facilities for the communication of intelligence, the dissemination of information, the advancement of education and culture, and the distribution of articles of commerce and industry. Furthermore, the Congress has encouraged the use of these broadening services and facilities through reasonable and, in many cases, special postal rates;

(3) the development and expansion of these several elements of postal service, under authorization by the Congress, have been the impelling force in the origin and growth of many and varied business, commercial, and industrial enterprises which contribute materially to the national economy and the public welfare and which depend upon the continuance of these elements of postal service;

(4) historically and as a matter of public policy there have evolved, in the operations of the postal establishment authorized by the Congress, certain recognized and accepted relationships among the several classes of mail. It is clear, from the continued expansion of the postal service and from the continued encouragement by the Congress of the most widespread use thereof, that the postal establishment performs many functions

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and offers its facilities to many users on a basis which can only be justified as being in the interest of the national welfare;

(5) while the postal establishment, as all other Government agencies, should be operated in an efficient manner, it clearly is not a business enterprise conducted for profit or for raising general funds, and it would be an unfair burden upon any particular user or class of users of the mails to compel them to bear the expenses incurred by reason of special rate considerations granted or facilities provided to other users of the mails, or to underwrite those expenses incurred by the postal establishment for services of a nonpostal nature; and

(6) the public interest and the increasing complexity of the social and economic fabric of the Nation require an immediate, clear, and affirmative declaration of congressional policy with respect to the activities of the postal establishment including those of a public service nature as the basis for the creation and maintenance of a sound and equitable postal-rate structure which will assure efficient service, produce adequate postal revenues, and stand the test of time.

Pub.L. 86-682, Sept. 2, 1960, 74 Stat. 598.

§ 2302. Declaration of policy

(a) The Congress hereby emphasizes, reaffirms, and restates its function under the Constitution of the United States of forming postal policy.

(b) It is hereby declared to be the policy of the Congress, as set forth in sections 2301-2305 of this title—

(1) that the post office is a public service;

(2) to provide a more stable basis for the postal-rate structure through the establishment of general principles, standards, and related requirements with respect to the determination and allocation of postal revenues and expenses; and

(3) in accordance with these general principles, standards, and related requirements, to provide a means by which the postal-rate structure may be fixed and adjusted by action of the Congress, from time to time, as the public interest may require, in the light of periodic reviews of the postal-rate structure, periodic studies and surveys of expenses and revenues, and periodic reports, required to be made by the Postmaster General as provided by section 2304 of this title.

(c) The general principles, standards, and related requirements referred to in subsection (b) of this section are as follows:

(1) In the determination and adjustment of the postal-rate structure, due consideration should be given to—

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(A) the preservation of the inherent advantages of the postal service in the promotion of social, cultural, intellectual, and commercial intercourse among the people of the United States;

(B) the development and maintenance of a postal service adapted to the present needs, and adaptable to the future needs, of the people of the United States;

(C) the promotion of adequate, economical, and efficient postal service at reasonable and equitable rates and fees;

(D) the effect of postal services and the impact of postal rates and fees on users of the mails;

(E) the requirements of the postal establishment with respect to the manner and form of preparation and presentation of mailings by the users of the various classes of mail service;

(F) the value of mail;

(G) the value of time of delivery of mail; and

(H) the quality and character of the service rendered in terms of priority, secrecy, security, speed of transmission, use of facilities and manpower, and other pertinent service factors.

(2) The acceptance, transportation, and delivery of first class mail constitutes a preferred service of the postal establishment and, therefore, the postage for first class mail should be sufficient to cover (A) the entire amount of the expenses allocated to first class mail in accordance with sections 2301-2305 of this title and (B) an additional amount representing the fair value of all extraordinary and preferential services, facilities, and factors relating thereto.

(3) Those services, elements of service, and facilities rendered and provided by the postal establishment in accordance with law, including services having public service aspects, which, in whole or in part, are held, and considered by the Congress from time to time to be public services for the purposes of sections 2301-2305 of this title shall be administered on the following basis:

(A) the sum of such public service items as determined by the Congress should be assumed directly by the Federal Government and paid directly out of the general fund of the Treasury and should not constitute direct charges in the form of rates and fees upon any user or class of users of such public services, or of the mails generally; and

(B) nothing contained in any provision of section 2301-2305 of this title should be construed as indicating any intention on the part of the Congress (i) that such public

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services, or any of them, should be limited or restricted or (ii) to derogate in any way from the need and desirability thereof in the public interest.

(4) Postal rates and fees shall be adjusted from time to time as may be required to produce the amount of revenue approximately equal to the total cost of operating the postal establishment less the amount determined under section 2303 of this title to be attributable to the performance of public services.

Pub.L. 86-682, Sept. 2, 1960, 74 Stat. 599; Pub.L. 87-793, § 201(a), Oct. 11, 1962, 76 Stat. 836.

§ 2303. Identification of public services and costs thereof

(a) The following shall be considered to be public services for the purposes of sections 2301-2305 of this title—

(1) the total loss resulting from the transmission of matter in the mails free of postage or at reduced rates of postage as provided by statute, including the following:

(A) Repealed. Pub.L. 90-206, Title I, § 120(a), (1), Dec. 16, 1967, 81 Stat. 624;

(B) penalty mailings of the Pan American Union and the Pan American Sanitary Bureau as provided by section 4152(a) of this title;

(C) second class mailings at postage rates as provided by section 4358 of this title;

(D) free postage on reading matter and other articles for the blind and other handicapped persons as provided by sections 4653 and 4654 of this title;

(E) free mailing privileges for members of the diplomatic corps of the countries of the Postal Union of the Americas and Spain as provided by section 4168 of this title;

(F) free mailing privileges granted to individuals by the Act of May 7, 1945 (59 Stat. 707) and other provisions of law;

(G) reduced third-class postage rates to certain organizations as provided by section 4452 of this title;

(H) section 302 of The Federal Voting Assistance Act of 1955 (5 U.S.C. 2192), granting free postage, including free airmail postage, to post cards, ballots, voting instructions, and envelopes transmitted in the mails under authority of that Act; and

(I) reduced postage rates on books, films, and similar material as provided by section 4554 of this title.

(2) 10 per centum of the gross cost of the operation of third-class post offices and the star route system, and 20 per centum of the gross cost of the operation of fourth-class post offices and rural routes.

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(3) the loss incurred in performing nonpostal services, such as the sale of documentary stamps for the Department of the Treasury;

(4) the loss incurred in performing special services such as cash on delivery, insured mail, special delivery, and money orders; and

(5) the additional cost of transporting United States mail by foreign air carriers at a Universal Postal Union rate in excess of the rate prescribed for United States carriers.

The terms "total loss" and "loss" as used in this section mean the amounts by which the total allocated costs incurred by the postal establishment in the performance of the public services enumerated in this subsection exceed the total revenues received by the postal establishment for the performance of such public services.

(b) The Postmaster General shall report to the Congress, on or before February 1 of each year beginning with the year 1963, the estimated amount of the losses or costs (or percentage of costs) specified in subsection (a) incurred by the postal establishment in the then current fiscal year in the performance of the public services enumerated in such subsection. The aggregate amount of the losses or costs (or percentage of costs) specified in subsection (a), incurred by the postal establishment in any fiscal year in the performance of such public services, shall be excluded from the total cost of operating the postal establishment for purposes of adjustment of postal rates and fees, including any adjustment pursuant to the provisions of section 207(b) of the Act of February 28, 1925, relating to reformation of classification (39 U.S.C., 1958 ed. 247).

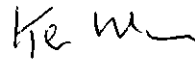
Pub.L. 86-682, Sept. 2, 1960, 74 Stat. 600; Pub.L. 87-646, § 2A, Sept. 7, 1962, 76 Stat. 442; Pub.L. 87-793, § 201(b), (c), Oct. 11, 1962, 76 Stat. 836; Pub.L. 90-206, Title I, § 120(a), Dec. 16, 1967, 81 Stat. 624.

CERTIFICATE OF SERVICE

I hereby certify that I have this date filed and served the foregoing document in accordance with Rules 9–12 of the rules of practice. An original and 24 copies have

been filed with the Secretary of the Commission and six copies have been delivered to the
the

agent of ~~/~~ Chief Counsel of the Postal Service.



Ken McEldowney

Washington, D.C. 20005

October 15 __, 2002