

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

Petition by Consumer Action

**COMMENTS OF UNITED STATES POSTAL SERVICE ON CONSUMER  
ACTION PETITION**

**SUMMARY OF COMMENTS**

In the Postal Reorganization Act, the Congress created a Postal Service invested with broad powers to operate in a “businesslike” manner, possessed of operational flexibility and encouraged to seek out “new markets and new ways by which the communication needs of the American people may be served.” Simultaneously, the Congress created the Postal Rate Commission, not as a regulator of the Postal Service with authority to review its business decisions, but to assist in ratemaking and classification matters affecting postal services.

In their Petition, CA and the OCA now invite the Postal Rate Commission to join them in a quixotic tilt at the division of responsibilities laid out in the PRA, and alter it by administrative fiat. Specifically, CA and the OCA advance an interpretation of 39 U.S.C. § 3623 that, in essence, seeks to transfer entrepreneurial control away from the Board of Governors of the Postal Service and to the Commission. The ambition of CA and the OCA in this regard is breathtaking. For not only do petitioners seek to have the Commission undertake a unprecedented review of the Board’s determination that the services listed in the Petition did not require the Postal Service to initiate proceedings

under Chapter 36 of title 39, but they counsel the Commission that, should it find that the services listed are “postal” services, only those “deemed worthy” should be recommended as classifications.

The decision as to what products to offer, and what markets in which to compete, is at the core of management discretion. A Postal Service lacking that discretion would be a shadow of the organization envisioned by the Congress, and bear more than a little resemblance to the Post Office Department beset by the phenomenon of “no control” which the Postal Reorganization Act was designed to remedy.

The Postal Rate Commission should decline the Petition’s invitation to charge boldly back into the discredited past.<sup>1</sup>

## **I. Introduction**

On October 15, 2002, Consumer Action (CA), a consumer advocacy and service organization, submitted to the Commission a document titled "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." (Hereinafter "Petition"). CA attached to the Petition a letter jointly signed by Mr. Ken McElDowney, its Executive Director, and by Ms. Shelly Dreifuss, Director of the Commission's Office of the Consumer Advocate (OCA). (Hereinafter "Letter").

As indicated in the title, the CA Petition asks the Commission to conduct an inquiry into the legal status of fourteen programs that it describes as "unclassified

---

<sup>1</sup> It is of more than passing interest, and not a little irony, that CA and the OCA should embark on this misguided quest at a time when, following a public debate lasting seven

services" offered to the public by the Postal Service.<sup>2</sup> CA characterizes these programs as largely unsuccessful efforts by the Postal Service to create non-traditional retail and commercial products and services as sources of revenue. It contends that the Postal Service inappropriately established the services, after it unilaterally determined that they do not fall within the Commission's jurisdiction because they are "nonpostal." It argues that the Postal Service's failure to seek Commission recommendations of mail classifications and rates for the services was inconsistent with the Postal Reorganization Act ("PRA"). The lengthy CA/OCA Letter elaborates on these contentions.

CA and the OCA specifically request that the Commission establish a proceeding, pursuant to the Commission's authority under 39 U.S.C. § 3623. Section 3623 provides that the Commission, on its own initiative, may submit to the Governors of the Postal Service a recommended decision on changes in the mail classification schedule. CA and the OCA describe their proposal as a multi-stage proceeding leading to (1) a factual investigation of the fourteen services, (2) a declaration by the Commission as to whether any or all fall within the Commission's jurisdiction, (3) a determination by the Commission as to whether any jurisdictional services should be recommended as mail classifications, and (4) recommendations of rates and fees for

---

years, the President has appointed a Commission charged with evaluating, among other things, the Postal Service's need for pricing flexibility.

<sup>2</sup> CA did not participate as an intervenor in the most recent omnibus postal rate proceeding (Docket No. R2001-1). The CA/OCA Petition and Letter, however, embody language and proposals substantially identical to an OCA motion filed in that case. 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

any recommended classifications.<sup>3</sup> If the Commission concludes that any services do not fall within its jurisdiction, CA and the OCA propose that the Commission establish rules dictating accounting procedures and reporting requirements for them.<sup>4</sup>

These comments discuss the representations made in the Petition and Letter. The Postal Service does not believe that the proposed proceeding and rules would be either practical or proper under the PRA. CA and the OCA base their approach on an inappropriate view of the Commission's role that does not conform to the statutory scheme. Furthermore, the Postal Service strongly disagrees with many of the CA's and the OCA's legal arguments, which are grounded in erroneous interpretations of applicable law. In particular, Congress did not intend for section 3623 to authorize the Commission to conduct investigative hearings for the purpose of adjudicating challenges to the Postal Service's legal determinations, or reviewing and second-guessing its management decisions. Finally, CA's and the OCA's proposed rules governing accounting and reporting for nonpostal services are overly broad and unnecessary for proper exercise of the Commission's functions in an omnibus rate case.

---

Nonpostal Services, Docket No. R2001-1 (March 20, 2002)(OCA Motion). The Petition and Letter acknowledge this prior history. Petition at 1, n. 3; Letter at 4, n. 3.

<sup>3</sup> CA and the OCA propose an initial rate and classification proceeding initiated by the Commission under section 3623 and consisting of two Phases. Phase 1 would involve consideration by the Commission of the legal status (postal vs. nonpostal) of each service deemed to be nonpostal by the Postal Service. For those services found to be postal, Phase 2, Part One would also involve review and recommendation of the classification status and rates and fees for each service.

<sup>4</sup> Part Two of Phase 2 of the CA/OCA proposal would appear to be a separate rulemaking proceeding conducted under notice-and-comment procedures pursuant to the Administrative Procedure Act (APA). We discuss this proposal separately below in Part V.

The Postal Service nevertheless acknowledges the interest and concern embodied in the Petition regarding services that are not required to be recommended by the Commission under the PRA. The Petition relies heavily on information in General Accounting Office (GAO) documents, as well as information provided by the Postal Service in recent omnibus postal rate proceedings before the Commission. The timing of the Petition, furthermore, overlaps the Postal Service's own internal consideration of many of the services identified in the Petition.<sup>5</sup>

In light of these circumstances, the Postal Service is filing at a later date a report summarizing the management processes involved in developing, establishing, and operating nonpostal services.<sup>6</sup> The Report also discusses the fourteen services identified in the Petition. In developing this Report, the Postal Service has addressed the status of the listed services in the context of criticisms contained in the Petition and Letter.

## **II. The Petition's Goal of Regulation by the Commission Is Inconsistent with the PRA**

CA's and the OCA's Petition and Letter fundamentally represent expressions of disapproval of Postal Service management practices and policies. They view some of the Postal Service's recent commercial ventures as ill-considered financial failures. Furthermore, they seem concerned that the results of these activities will burden existing and future domestic ratepayers. Their response, however, is itself ill-

---

<sup>5</sup> Letter from Chairman Robert F. Rider, United States Postal Service Board of Governors, to George A. Omas, Chairman, Postal Rate Commission, November 14, 2002.

<sup>6</sup> See United States Postal Service Request to File Report (Jan. 30, 2003)

considered. They envision a system of regulation by the Commission that would distort the respective roles of the Postal Service and the Commission in the statutory scheme.

**A. CA and the OCA Propose a Comprehensive System of Regulation Of Postal Products and Services.**

CA and the OCA focus their criticisms on the Postal Service's relatively recent attempts to offer and operate commercial nonpostal services, especially those related to e-commerce activities. They rely heavily on reports issued by the GAO criticizing the financial performance of such services. GAO also criticizes the Postal Service's management procedures and practices.<sup>7</sup>

CA's and the OCA's philosophical opposition to the Postal Service's recent non-mail commercial ventures is patent and unmistakable. Commercial nonpostal initiatives have existed for many years. The Petition and Letter, however, emphasize activities in recent years that have taken non-traditional approaches to revenue generation.<sup>8</sup> The Letter includes a critical appraisal of the Postal Service's management initiatives in this regard:

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 and are equivalent to such services.<sup>9</sup>

---

<sup>7</sup> OCA Motion at 7-11, 22; Petition at 4; Letter at 9-10, 14-17, 35-36.

<sup>8</sup> The Petition notes: "Many of these services operate at a substantial loss, generating large operating expenses but virtually no revenues." Petition at 3. The Letter states: "The current status of these services...is unconscionable...." Letter at 2.

<sup>9</sup> Letter at 8-9. In the rate case, the OCA also highlighted this trend:

In recent years, the Postal Service has stepped up its efforts to experiment with a variety of services offered on the Internet, others that are hybrids of electronic and traditional mail services, and services ancillary to the provision of traditional postal services.

OCA Motion at 1.

CA and OCA trace the purported failure of the Postal Service's efforts to alleged deficiencies in management procedures and practices. Citing the GAO reports and their own conclusions, they assert a catalog of weaknesses in organizational structure, planning, internal processes, sources of data and information, and execution in operating commercial programs and services.<sup>10</sup> These alleged defects lead CA and the OCA to conclude the following:

The Postal Service exhibits serious fiduciary irresponsibility in offering these services without prior and adequate business plan approval and accurate and ongoing reporting of costs and revenues. This constitutes an abdication of management's public service responsibilities.<sup>11</sup>

For both CA and the OCA, furthermore, the root cause of the Postal Service's alleged failures lies, not only in poor management, but in a legal and business environment in which the Postal Service operates without strict supervision and control by a regulatory overseer. According to their view, this environment results from the Postal Service's erroneous interpretation of its prerogatives under the PRA, under which it presumes to make business decisions regarding nonpostal services without first asking for approval and advice from the Postal Rate Commission, and without subordinating its operations to ongoing review and oversight. In this regard, CA and the OCA conclude their Letter by noting:

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 Congress never intended with the enactment of the PRA.<sup>12</sup>

They also observe:

---

<sup>10</sup> See OCA Motion at 8-11; Letter at 11, 13-15, 17, 35-36, 37.

<sup>11</sup> OCA Motion at 11; Letter at 17.

The need for the Commission to regulate the provision of e-commerce initiatives and like services, subjecting Postal Service records to public scrutiny is compelling.<sup>13</sup>

CA and the OCA explicitly describe their proposed “remedy” for this situation:

“Exercise by the Commission of its statutory oversight responsibility regarding these services.”<sup>14</sup> Execution of this remedy would be accomplished in three steps. First, the Commission would conduct a comprehensive review of nonpostal services in a classification proceeding leading to legal determinations that some, if not all, existing non-traditional services are postal services within the Commission’s jurisdiction under the PRA. Second, the Commission would pass judgment on the wisdom of the existing services by deciding whether they may be included in the classification schedule and by recommending appropriate rates.<sup>15</sup> Third, in the future, the Postal Service would be expected to subject its operations and fees for the services to inquiry and review by the Commission in omnibus and other rate and classification cases.<sup>16</sup>

For those services not subject to the Commission’s adjudication as postal services, CA and the OCA propose that the Commission establish rules that would dictate detailed accounting procedures to track finances and operations of nonpostal services. Further, the Commission would establish data and reporting requirements for such “non-jurisdictional” services to be applied in omnibus rate cases.<sup>17</sup> The

---

<sup>12</sup> Letter at 41.

<sup>13</sup> OCA Motion at 13; Letter at 19.

<sup>14</sup> Letter at 18.

<sup>15</sup> “Services deemed worthy for recommendation as classifications would be declared so in a Phase 2 Commission order.” Letter at 34.

<sup>16</sup> Presumably, in conformity with the proposed review of the Petition’s fourteen identified services, any such services might also be subject to review in proceedings initiated by the Commission under its classification authority in 39 U.S.C. § 3623.

<sup>17</sup> Letter at 34-40.



information provided would be employed by the Commission to evaluate the finances and fees for each nonpostal service. As a standard, the Commission would apply “the incremental cost test” that has been advocated in prior proceedings as a test of cross-subsidy. Accordingly,

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.<sup>18</sup>

The Commission would also authorize itself to reduce the prior years' losses component of the Postal Service's revenue requirement in rate cases to account for any failure of nonpostal services to make money.<sup>19</sup>

So, while nominally rates and fees for nonpostal services would not be prescribed and recommended by the Commission, CA and the OCA would have the Commission in each rate case exercise a kind of regulatory supervision by requiring detailed cost, volume, and revenue data for each service, and by subjecting each service to the incremental cost test. CA's and the OCA's view of the statute, furthermore, also implies that failure to meet the standard could subject the rates and

---

<sup>18</sup> Letter at 38. We note that the reference to “group” of nonpostal services implies application by the Commission of some classification analysis to nonpostal services.

<sup>19</sup> CA and the OCA propose the following rule:

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.

Letter at 39-40.

fees of nonpostal services to challenge as not conforming to the “policies” in the PRA, in complaints brought under 39 U.S.C. § 3662.<sup>20</sup>

Finally, the approach that CA and the OCA outline strongly implies a fourth step in this system of regulation. Since programs determined by the Postal Service to be nonpostal services might be subject to challenge and review at any time, either under section 3662 or section 3623, prudent procedures required to protect postal investments and induce cooperation of business partners might dictate that the Postal Service incorporate into its planning and internal review procedures for new products a proceeding to request the Commission to determine whether a new product is postal, prior to its development or introduction.

**B. The CA/OCA Proposal Conflicts with the Statutory Scheme.**

Even a passing familiarity with the interpretation of the PRA by courts over the past thirty years would suggest that the system and approach described by CA and the OCA overstep the limits of the Commission’s authority, both with respect to the Commission’s specific functions and its overall role in the statutory scheme. CA and the OCA portray a sweeping need for comprehensive regulatory oversight of Postal Service activities. They regard the Commission as the Postal Service’s “regulator,” and they perceive the Postal Service’s practice of exercising its statutory prerogatives to

---

<sup>20</sup> In this regard, we note the argument developed in the Letter that, notwithstanding status of a service as “nonpostal” within the meaning of 39 U.S.C. § 404(a)(6), CA and the OCA interpret the Act to require a Commission recommended decision for any rate or fee charged for a service offered to the public. Letter at 22-24. The Commission’s view of its responsibilities under section 3662 similarly suggests that it might also view the rates of nonpostal services to be subject to challenge in section 3662 proceedings. See Order No. 1239 at 12-14.

establish new, nonpostal services as a serious “gap in the system of regulation” established by the PRA.<sup>21</sup>

The Commission’s role, however, is limited. The PRA created a unique ratemaking scheme in which the Postal Service, its Governors, and the Commission play complementary roles in establishing and changing classifications, rates, and fees for domestic postal services. The scheme consists of an elaborate system of checks and balances among the functions of each government entity. The courts, furthermore, have over the years made very clear that the relationship between the Postal Service and the Commission cannot be characterized as conventional government regulation of economic activity. Only the Postal Service has management authority. The Commission plays an important role in ratemaking and classification, but it cannot usurp management prerogatives.

In a case cited by CA and the OCA, as well as the Commission, to support an expansive view of Commission classification authority, Judge Becker contrasted the Commission’s functions in the postal system with other systems of regulation. He noted:

The responsibilities of the Postal Rate Commission are strictly confined to relatively passive review of rate, classification, and major service changes, unadorned by the overlay of broad FCC-esque responsibility for industry guidance and of wide discretion in choosing the appropriate manner and means of pursuing its statutory mandate.<sup>22</sup>

The Court of Appeals for the District of Columbia Circuit echoed this observation in *Governors of the United States Postal Service v. Postal Rate Commission*, 654 F2d 108 (D.C. Cir. 1981)(*Governors*). The court stated:

---

<sup>21</sup> Letter at 41.

Congress did not intend that the Postal Rate Commission regulate the Postal Service; one partner does not regulate another, and authority to assist in ratemaking and classification does not include authority to interfere in management. It follows that a management decision by the Postal Service may not be overruled or modified by the Rate Commission.<sup>23</sup>

As the Commission should understand quite well, these often-repeated statements are not just trite observations. They provide an important legal context to evaluate CA's and the OCA's rhetoric. But, they also guide the interpretation of the Commission's authority. In *Governors*, the Court of Appeals reviewed the Commission's attempt to qualify its recommendation of the E-COM service by making it temporary and experimental, rather than permanent, as the Board of Governors had proposed. The court found that experimental status was inextricably tied to the management function. It agreed with the Governors that whether the service was permanent could affect the Postal Service's ability to manage and operate E-COM by influencing, among other things, investment decisions, business promotion, and customer base. The court correctly concluded that this element of the service was a function of the Postal Service's management prerogatives, not the Commission's choice in performing its limited regulatory function in ratemaking. *Id.*

In this regard, we note that proponents of the Commission's authority to determine the legal status of nonpostal services tend to characterize the issue as one related to the Commission's "jurisdiction" in proceedings conducted under 39 U.S.C. §

---

<sup>22</sup> *United Parcel Service v. United States Postal Service*, 435 FSupp at 873.

<sup>23</sup> *Id.* at 115. The Court of Appeals for the Second Circuit cited with approval the D.C. Circuit's analysis in *Newsweek, Inc. v. United States Postal Service*, 663 F2d 1186, 1204 (2d Cir. 1981), *aff'd on other grounds sub nom. National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810 (1983). There, the Court

3624. Under this view, the Commission may, in effect, usurp the Postal Service's management prerogative to determine the character of a service, subject to challenge in court, by exercising its authority to decide whether a particular procedure can be invoked. The critical issue, however, is not procedural jurisdiction, but rather the authority to make a determination of legal status. The Postal Service believes that the PRA reserves that determination for the Postal Service in exercising its management function of developing and promoting new services. One lesson of the court's decision in *Governors* is that the CA/OCA rhetoric regarding the Commission's regulatory role cannot sustain a contrary interpretation. As the court stated:

Given these limited statutory responsibilities, the Postal Rate Commission may not rely on the general authority of other regulatory agencies as a legal basis for recommending an experimental service. It must be able to point to a specific grant of authority.

Similarly, proponents of Commission authority to determine the legal status of new, nonpostal products and services must be able to point to a specific grant of that authority in the PRA.

### **III. CA and the OCA Rely on Faulty Interpretations of the PRA.**

The CA/OCA proposal is based in part on their claim of a need to initiate a Commission classification proceeding in which the Commission can investigate and adjudicate the legal status of nonpostal services. Under this approach, once the Commission declares unregulated nonpostal services to be subject to Commission review, it can impose the discipline of rate and classification regulation to correct alleged Postal Service mismanagement and faulty practices and policies.

---

stated: "We agree that Congress intended the Board to have 'exclusive authority to manage the Postal Service....' *Id.*

CA and the OCA also argue, however, that the distinction between postal and nonpostal status is essentially immaterial, since Congress never intended to allow the Postal Service to establish and set rates and fees for any services offered to the public, without prior Commission review. This argument has two prongs. On one hand, CA and the OCA contend that Congress never intended to authorize the Postal Service to establish commercial, nonpostal services that would fall outside of the ratemaking mechanism of Chapter 36 of the PRA.<sup>24</sup> On the other hand, they argue that, even if commercial non-mail services are authorized, the Postal Service may not set any rates unilaterally; it must always seek a recommended decision from the Commission.<sup>25</sup> Both of these arguments, however, disregard the plain language of the PRA and the statutory scheme.

**A. The PRA Authorizes the Establishment of Commercial, Nonpostal Services.**

The PRA specifically empowers the Postal Service to establish “nonpostal” services in 39 U.S.C. § 404(a)(6). CA and the OCA argue that Congress intended the reference to nonpostal services in subsection (a)(6) only to authorize non-commercial services provided to other government agencies. They argue that this interpretation accords with the legislative history of the PRA, which demonstrates that the term “nonpostal” was commonly understood by Congress to refer only to specific types of cooperation between the Post Office Department and other government entities.

The biggest problem with this analysis is that it ignores the rest of the statute, as well as the Commission’s own interpretations. Subsection (a)(6) specifically empowers

---

<sup>24</sup> Letter at 24-28.

<sup>25</sup> Letter at 22-24.

the Postal Service “to provide, establish, change, or abolish special nonpostal or similar services.”<sup>26</sup> Congress, however, also explicitly authorized the provision of services involving other government agencies in a separate provision, 39 U.S.C. § 411.<sup>27</sup> If the CA/OCA construction were correct, the reference to nonpostal services in section 404 would be mere surplusage. At the very least, one would expect section 411 to use the term that CA and the OCA argue Congress intended to associate with provision of governmental services. It does not. Rather, section 404(a)(6) must logically be interpreted to refer at least to services other than those encompassed by section 411. Congress, moreover, did not explicitly exclude any type of service, such as commercial services, from the reference in section 404(a)(6). Other than the reference to “public services” and the sale of Treasury Department documentary stamps as an example of a “nonpostal service” as that term was used in prior legislation, CA and the OCA can point to no legislative history demonstrating that Congress intended to exclude from the Postal Service’s powers the creation of commercial, nonpostal services.

---

<sup>26</sup> As the Commission noted in its Docket No. R74-1 Opinion, The omission of a comma between “special” and “nonpostal” appears to be inadvertent. The bill passed by both the House and the Senate contained a provision identical to § 404(6) except that a comma was included between “special” and “nonpostal..” [H.R. 17070, 91<sup>st</sup> Cong., 2d Sess. (1970), § 402.6 and S. 3842, 91<sup>st</sup> Cong., 2d Sess. (1970), § 504(e).] PRC Op. R74-1, Vol 2, Appendix F, at 4, n. 1.

<sup>27</sup> Section 411 provides:

Executive agencies within the meaning of section 105 of title 5 and the Government Printing Office are authorized to furnish property, both real and personal, and personal and nonpersonal services to the Postal Service, and the Postal Service is authorized to furnish property and services to them. The furnishing of property and services under this section shall be under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.

Furthermore, if CA and the OCA were correct, we might expect that the Commission, in analyzing the scope of its authority to review rates for postal services under 39 U.S.C. § 3622, might have adopted their interpretation. It has not. In fact, in its Docket No. R76-1 Opinion, the Commission followed an analysis that separated postal and other services into three categories: (1) services constituting the actual carriage of mail matter, which clearly fall under section 3622; (2) “services rendered to the public and services performed by the Postal Service for other agencies of the United States,” which are excluded from section 3622; and (3) services that are “ancillary to the collection, transmission, or delivery of mail,” which also fall under section 3622.<sup>28</sup> The Commission then went on to describe several commercial activities performed or offered by the Postal Service to the public for compensation that were not “postal” within the meaning of sections 3621 and 3622. These included photocopy service and sale of postal related products, such as packaging materials. *Id.* at 20-21. On several other occasions, the Commission has addressed the scope of its jurisdiction over postal services. The Commission has never expressed nor adopted CA’s and the OCA’s construction.<sup>29</sup>

In any event, the Postal Service does not rely exclusively on section 404(a)(6) to authorize the establishment of nonpostal services. The boundaries of the Postal Service’s authority to offer services also come from its statutory mission and functions. In general, the Postal Service has a duty to provide mail services throughout the United States for written and printed matter, parcels, and like materials, and to provide

---

<sup>28</sup> PRC Op. R76-1, Vol. 2, Appendix F, at 2-3.

<sup>29</sup> Compare PRC Op. R74-1, vol. 2, Appendix F; Order No. 1075 (Docket No. C95-1); Order No. 1145 (Docket No. C96-1); Order No. 1239 (Docket No. C99-1).



incidental services appropriate to its functions and in the public interest. Under these provisions, the Postal Service has very broad authority to develop mail and related services that contribute to a coherent, effective postal system.

**B. The PRA Requires that Only Rates and Fees for Postal Services Be Recommended by the Commission.**

CA and the OCA also argue that the PRA creates a scheme in which any rate charged for a service or product offered to the public must first be reviewed and recommended by the Commission under sections 3621 and 3622.<sup>30</sup> They argue that this conclusion follows from Congress's strict limitation of its delegation of ratemaking power to two specific references in the PRA: the establishment of international postal rates under 39 U.S.C. § 407, and the establishment of domestic postal rates under sections 3621 and 3622.

CA and the OCA argue that this construction is supported by dictum in *Air Courier Conference of America v. United States Postal Service*, 959 F2d 1213 (3d Cir. 1992). In *Air Courier Conference*, the Third Circuit Court of Appeals was asked to review a district court decision holding that the PRA does not require Commission review prior to changing international postal rates. The court of appeals affirmed the lower court's analysis that specific authorization of changes in international rates under section 407 satisfied the "[e]xcept as otherwise provided" qualification in section 3621. CA and the OCA argue that, since the authorization of nonpostal services in section 404(a)(6) does not include an explicit grant of ratemaking power, the Postal Service may not establish or change rates for any other service, except by proceeding under Chapter 36.

Again, CA and the OCA disregard the clear statutory language. First, they ignore at least one other specific delegation of authority in the PRA to establish and offer services. In 39 U.S.C. § 404(a)(5), the Postal Service is empowered to offer philatelic services. No explicit reference is made to the establishment of fees. In accordance with judicial determinations, however, the Commission has acknowledged that “the Postal Service has authority to exercise broad and unilateral discretion over philatelic operations.”<sup>31</sup> The Commission itself, furthermore, concluded in Docket No. C95-1 that Commission jurisdiction under section 3662 does not extend to shipping and handling charges for philatelic products because they were not “fees for postal services” within the meaning of subchapter II of Chapter 36.<sup>32</sup>

Furthermore, in analyzing the dicta in *Air Courier* Conference, CA and the OCA ignore a critical distinction in the statutory language when comparing nonpostal rates and fees and international mail rates. Both section 3621 and section 3622 limit Commission jurisdiction to rates for “postal services.” That qualification restricts the scope of the ratemaking scheme in relation to nonpostal services. It would not have applied to rates for international mail, which by any conventional definition are postal services. In this respect, it can be seen that Congress included the “except as otherwise provided” exclusion to distinguish international postal services from domestic postal services. The exception is not needed for nonpostal services, which are distinguished by the use of the term “postal services” in subchapter II.

---

<sup>30</sup> Letter at 22-24.

<sup>31</sup> Order No. 1145 (Docket No. C96-1), citing *Morris et al. v. Runyon*, 870 F.Supp 362, 368-69 (D.D.C. 1994), *appeal dismissed*, No. 94-5344 (D.C. Cir. 1994).

<sup>32</sup> Order No. 1175 (Docket No. C95-1), at 5.

The fact that section 404(a)(6) does not refer explicitly to setting rates for nonpostal services is consistent with this analysis. First, the authority to set prices for nonpostal services may be inferred from the authority to create them. Section 401(10) grants the Postal Service "all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers", including those under section 404(a)(6). Second, nothing in subchapter II explicitly refers to rates or fees for nonpostal services. Third, as noted above, the Commission itself has acknowledged that rates and fees for nonpostal services need not be set or changed through subchapter II procedures.<sup>33</sup>

This analysis, furthermore, cannot be limited to section 404(a)(6). The authority to offer nonpostal services is just one of several specific powers of the Postal Service, the exercise of which can result in a rate or fee being charged. For example, many of the initiatives challenged in the petition implicate the Postal Service's authority regarding contracts or property interests under section 401(3) and (5). That the mechanism for the establishment of charges of all kinds is not expressly spelled out is further evidence that the Commission's authority is limited to domestic postal services. The contrary view, implicit in the CA/OCA argument, goes too far. Under the CA/OCA interpretation, the Postal Service would first have to initiate a Commission proceeding before leasing real property, licensing intellectual property, or negotiating a strategic alliance. Any legal conclusion to this effect would be expressly contrary to the plain provisions of the PRA.

---

<sup>33</sup> The Commission has stated: "It is only with respect to 'postal' special services that §3622 requires a recommended decision; the fees, if any, for services falling outside

Finally, petitioners' attempt to impose an extremely constrained view of the broad statutory language flies in the face of the general format and purpose of the PRA as a whole. The introductory chapters of the PRA take the form of broad, highly generalized statements of policies to be served, functions to be performed, and powers to be employed, largely entrusted to the discretion of postal management. The legislative history emphasizes over and over that Congress intended "sweeping reforms" that would "put complete responsibility in a single place" and empower management to conduct the Postal Service "in a businesslike way".<sup>34</sup> The PRA's framers wanted a "modern, dynamic, and viable postal institution" "directed toward the expansion of present postal service and the development of new services responsive to the evolving needs of the United States", an institution "forever searching for new markets and new ways by which the communications needs of the American people may be served."<sup>35</sup> The broad language of section 404(a)(6) and the overall structure of chapter 4 are fully consistent with the larger goals animating the PRA and its history. The strained reading proposed in the petition is fundamentally at odds with the language and direction of postal reorganization.

#### **IV. The Commission Should Decline to Initiate the Proposed Proceeding.**

The Commission has on three previous occasions considered the legal status of nonpostal services in complaints filed pursuant to 39 U.S.C. § 3662. Rather than file a complaint or series of complaints, however, CA and the OCA propose that the

---

that category are presumably to be set unilaterally by the Postal Service. PRC Op. R76-1, Vol. 2, App. F, at 1. (footnote omitted).

<sup>34</sup> *Postal Reorganization and Salary Adjustment Act of 1970*, H. Rep. No. 1104, 91<sup>st</sup> Cong., 2d Sess. 4, 5, 11 (1970).

<sup>35</sup> *Id.* at 2, 9, 20.

Commission exercise its purported authority under 39 U.S.C. § 3623(b) to initiate a broad, open-ended proceeding giving parties opportunities to conduct general discovery against the Postal Service on the topic of nonpostal services.<sup>36</sup> They envision a procedurally complicated inquiry leading to the conversion of “unclassified” commercial services into postal services incorporated into the DMCS.

The Postal Service, however, believes that the CA/OCA proposal would exceed the limits of the Commission's statutory authority under section 3623. CA and the OCA invoke section 3623 for powers it simply does not provide. On the contrary, the courts have been explicit that the Commission's classification authority is strictly limited. It may only be exercised if it does not infringe upon management prerogatives.

**A. Section 3623 Does Not Authorize A Broad Investigative Inquiry into the Legal Status of Nonpostal Services.**

CA and the OCA base their interpretation of section 3623 on the Commission's decision in Docket No. C99-1 denying the Postal Service's motion to dismiss for lack of jurisdiction. The Commission justified the decision in part on its conclusion that, in reviewing the status of a service as postal or nonpostal, “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.”<sup>37</sup> Since section 3623 provides the source of the Commission's

---

<sup>36</sup> The Petition does not limit the inquiry to the fourteen services it identifies. It states: “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 may come to the attention of the Commission.*” Petition at 5 (emphasis added).

<sup>37</sup> Order No. 1239 (Docket No. C99-1) at 12. To support this conclusion, the Commission cited the Third Circuit Court of Appeals decision in *United Parcel Service v.*

classification authority, CA and the OCA conclude that it also would provide authority for the Commission to adjudicate the status of the fourteen identified services, as well as any others that might come to light.<sup>38</sup>

CA and the OCA appear to presume that the Commission's authority under section 3623 authorizes it, in effect, to inquire into postal operations and decisions unrelated to mail for the purpose of deciding whether new classifications should be established. Under this view, virtually any activities might be reviewed, even those determined by postal management not to require or involve mail classification. The proceedings would provide the participating intervenors and the Commission with opportunities to second-guess management decisions. By declaring them unlawful or by incorporating them as qualified classifications, the Commission might nullify or modify them.

Section 3623, however, was never intended by Congress to create such broad oversight responsibility. In particular, Congress never intended it to authorize the Commission to initiate the type of investigative hearings that are contemplated by the petition. The wording of the statute is narrow. Section 3623(a) directs the Postal

---

*U.S. Postal Service*, 604 F.2d 1370, 1381 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). That decision, however, involved a challenge to the establishment of rates for a temporary program that was undisputed as a mail service. Neither the citation, nor the holding of the case in general, supports the Commission's broad expansion of its *classification* authority, which is not mentioned by the court at all. The case, furthermore, did not involve either a proceeding under section 3662, or a proceeding initiated under section 3623. The complaint proceeding in which Order No. 1239 was issued never advanced beyond the discovery stage, and was ultimately dismissed as moot. Order Accepting Certification and Dismissing Complaint as Moot, Order No. 1352, Docket No. C99-1 (Nov. 6, 2002).

<sup>38</sup> Letter at 21.

Service to initiate a proceeding to establish an initial "mail classification schedule."<sup>39</sup>

Section 3623(b) then states:

Following the establishment of the mail classification schedule requested under subsection (a) of this section, the Postal Service may from time to time request that the Commission submit, or the Commission may submit to the Governors on their own initiative, a recommended decision on changes in the mail classification schedule.

By reserving for the Postal Service the authority to initiate the first DMCS, and by restricting the focus of subsequent proceedings to "changes in the mail classification schedule," this language limits the scope of the Commission's authority to consideration of specific proposals to reclassify existing mail services.

Admittedly, Congress intended the statute to be flexible enough to accommodate the Postal Service's authority under the PRA to take action requiring changes in mail classification. Among other things, the PRA directs the Postal Service to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." 39 U.S.C. § 403(a). This power could, and does, lead to the establishment of new mail services that must be incorporated into the DMCS. Those changes, however, result from exercise of the Postal Service's power and authority. There is absolutely nothing in the statute or its legislative history that links the Commission's authority under section 3623 to these or any other management prerogatives. To the contrary, the history of the PRA as well as the statutory scheme show that management authority was reserved for the Postal Service, not the Commission. In this context, the argument that the Commission has the authority to inquire about operations and

---

<sup>39</sup> The Domestic Mail Classification Schedule (DMCS) was established when the Governors approved the Commission's Recommended Decision in Docket No. MC73-1.

practices that, in its judgment, should be incorporated in the classification schedule must fail.

Section 3623 simply does not authorize Commission inquiries that could lead the Commission to usurp or interfere with management prerogatives to develop and provide new services. Nor does the PRA in section 3623 establish an adjudicative function for the Commission to determine the status of new or existing services deemed to be nonpostal by the Postal Service. In fact, nothing in the PRA supports the use of inquiries under section 3623 to give the Commission a role in management decisions, nor to provide an opportunity for the Commission to review them.

CA and the OCA cite the Second Circuit Court of Appeals decision in *Newsweek v. United States Postal Service*<sup>40</sup> to support the proposition that section 3623 does give the Commission's broad classification authority. Letter at 20, n. 53. The issue before the court in that case, however, involved the Commission's construction of the existing DMCS, not determination of a matter reserved by the PRA for the Postal Service.<sup>41</sup> Furthermore, in referring to the Commission's authority to initiate classification recommendations, the court itself states: "Still, this discretion is limited by section 3623's requirement that the PRC base its recommendations on six enumerated

---

Decision of the Governors of the United States Postal Service on Establishing a Mail Classification Schedule, Docket No. MC73-1 (June 2, 1976).

<sup>40</sup> *Newsweek v. United States Postal Service*, 663 F.2d 1186.

<sup>41</sup> Council of Public Utility Mailers (CPUM) had challenged the Commission's determination in the omnibus rate case (Docket No. R80-1) that presorted First-Class Mail had the status of a rate category, rather than a subclass, as CPUM contended. *Id.* at 1209-11.



factors."<sup>42</sup> Each of these factors refers explicitly or by inference to classifications of mail, not unspecified nonpostal services.

CA and the OCA can point to nothing in the statute or legislative history that supports a different conclusion. In fact, we are not aware of any legislative history of section 3623 that would support the argument that it provides broad authority for the Commission to investigate and second-guess Postal Service determinations that services are nonpostal.<sup>43</sup>

Longstanding Commission practice reinforces this interpretation. The Commission has only rarely invoked its authority to initiate cases. Among the many classification proceedings since postal reorganization, we have been able to identify only eleven instances in which the Commission has initiated proceedings pursuant to section 3623.<sup>44</sup> Each of the dockets initiated by the Commission, furthermore, involved

---

<sup>42</sup> *Id.* at 1209 (footnote omitted). The enumerated factors consist of the criteria listed in section 3623(c).

<sup>43</sup> Legislative history supports the contrary view. The House Conference Report described the evolution of the Act in this respect:

The House bill provided for the Postal Service to propose to the Postal Rate Commission changes in rates and classifications of mail. The Senate amendment provided (1) for the Board of Governors to request the Postal Rate Commission to recommend changes in rates and classifications of mail; and (2) *after the initial change in classifications of mail, also for the Postal Rate Commission to recommend changes on its own initiative.* The conference substitute adopts the Senate provision.

H.R. Conf. Rep. No. 91-1363, 91<sup>st</sup> Cong., 2d Sess. 86 (1970)(emphasis added).

<sup>44</sup> Docket No. MC77-1(See PRC Op. MC77-1, (Feb. 23, 1979)); Docket No. MC79-1 (See Order Instituting Proceedings, Order No. 222, Docket No. MC79-1 (Nov. 30, 1978; PRC Op. MC79-1 (July 19, 1979)); Docket No. MC79-3 (PRC Op. MC79-3 (May 16, 1980)); Docket No. MC80-1 (Order Instituting Docket, Order No. 339, Docket No. MC80-1 (May 27, 1980)); Docket No. MC81-1 (Order Instituting Proceeding and Designating Officer of the Commission, Order No. 366, Docket No. MC81-1 (Jan. 8, 1981)); Docket No. MC81-2 (Order Instituting Proceeding; Designating Postal Service as a Party; and Requesting Proposals, Order No. 367, Docket No. MC81-2 (Feb. 3, 1981); PRC Op. MC81-2/R81-1 (June 15, 1982)); Docket No. MC86-3 (Commission

consideration of reclassification proposals pertaining to existing mail services. In only two instances did the Commission invoke section 3623 in response to petitions from mailers.<sup>45</sup> None of the Commission-initiated proceedings was for the purpose of reviewing a Postal Service decision not to seek a Commission recommended decision for a new service. Nor did these instances involve a broad-based fishing expedition into the Postal Service's practices and policies, as suggested by the petition.

**B. Section 3623 Does not Authorize the Commission to Adjudicate the Legal Status of Nonpostal Services.**

As noted above, the Commission has considered complaints challenging the nonpostal status of services on three previous occasions.<sup>46</sup> In each instance, the

---

Order Instituting Mail Classification Case Paralleling Docket No. N86-1, Changes in Collect on Delivery Service, Order No. 700, Docket No. N86-1/MC86-3 (July 9, 1986); PRC Adv. Op. N86-1/ PRC Op. MC86-3 (Feb. 6, 1987)); Docket No. MC87-2 (Order Denying Motion to Dismiss and Establishing Proceeding, Order No. 724, Docket No. MC87-2/C86-2 (Dec. 2, 1986)); Docket No. MC89-1 (Commission Order and Notice Initiating Proceedings and Setting Dates for Filing Initial Testimony, Order No. 852, Docket Nos. C89-3/MC89-1/C89-4 (Oct. 30, 1989)); Docket No. MC92-1 (Notice and Order Provisionally Establishing Proceeding for Consideration of Modifying Format Requirement for Second Class and Requesting Comments, Order No. 934, Docket No. MC92-1 (Sept. 21, 1992)); Docket No. MC97-3 (Notice and Order Initiating Proceedings to Consider Changes in Domestic Mail Classification Provisions Governing Bound Printed Matter and Directing Parties to Initiate Informal Procedures, Order No. 1180, Docket No. MC97-3 (June 5, 1997)). The Commission's practice in the early years following establishment of the DMCS represents its contemporaneous interpretation of the scope of its authority under the Act.

<sup>45</sup> Docket No. MC81-1 (Petition of Prof. Monmonier); Docket No. MC89-1 (Petition of Advo., Inc.).

<sup>46</sup> In Docket No. C95-1, the Commission considered a complaint that the Postal Service had unilaterally adjusted shipping and handling fees for philatelic products. In Docket No. C96-1, the Commission considered a complaint that a Postal Service packaging service was a postal service that required prior Commission recommendation. In Docket No. C99-1, United Parcel Service challenged PostECS, an international electronic document transfer service.

Commission concluded that it had jurisdiction to consider the complaints.<sup>47</sup>

Nevertheless, CA and the OCA propose that the Commission review the status of nonpostal services, not in a complaint proceeding, but in a classification proceeding initiated by the Commission pursuant to section 3623.<sup>48</sup>

As we have explained above, the Commission's reliance on its classification authority does not support review of nonpostal status, either in a complaint proceeding or in a proceeding initiated under section 3623. CA and the OCA, however, also support review under section 3623 on the basis of an argument commonly made to support jurisdiction in a complaint. They argue that Commission authority to investigate and declare the status of nonpostal services under section 3623 is supported by the

---

<sup>47</sup> In their Decision in Docket No. C96-1, the Governors explicitly declined to concede that the Commission had jurisdiction to declare the status of a service in a section 3662 complaint proceeding. Governors Decision, Docket No. C96-1, at 4, n.1. In its order dismissing the complaint in Docket No. C95-1, the Commission concluded that the complaint did not fall within its jurisdiction under section 3662, because the shipping and handling charges for philatelic products were not "fees for postal services." The Commission reached this conclusion by finding that the charges were not closely related to the delivery of mail. Order No. 1075, at 5.

<sup>48</sup> CA's and the OCA's decision to propose a classification proceeding, rather than file a complaint or series of complaints under section 3662, was likely influenced principally by the narrower focus that complaints must take. Commission rules governing complaints under section 3662 require specific factual and legal allegations and establish procedures under which the Commission may exercise its discretion in deciding whether to hold hearings. Moreover, the initial burdens of going forward and of proof lie with the complainants. By contrast, the Commission does not have rules specifically governing proceedings it initiates under section 3623, or describing the circumstances or standards under which the Commission might act on a "petition" to initiate a section 3623 proceeding. Complaint proceedings, furthermore, are based on specific rates or services, rather than open-ended fishing expeditions. CA and the OCA may prefer a classification proceeding because they believe it affords them and the Commission more flexibility for the Commission to exercise its "regulatory" authority.

"well-established" principle that agencies have jurisdiction to determine their own jurisdiction.<sup>49</sup>

This principle, however, does not control interpretation of the Commission's authority under section 3623. First, the doctrine is not without qualification. There is a "well-established" exception that it does not control when there is a patent lack of jurisdiction.<sup>50</sup> In this case, we believe it is clear from the statute that the Commission has not been granted the authority to supplant management's determination of nonpostal status. Second, the principle is typically invoked in proceedings involving a court challenge to an agency subpoena issued to clarify a factual element of the agency's jurisdiction. In that situation, courts have held that the agency can conduct proceedings, at least to the extent necessary to determine whether the factual predicates for jurisdiction are present.<sup>51</sup> Under the CA/OCA proposal, however, postal status would not be an issue of fact, but rather a legal determination by the Commission. Third, the principle frequently supports the requirement that administrative remedies be exhausted before resort to judicial review.<sup>52</sup> Congress, however, did not create a mechanism for administrative review of postal versus nonpostal status. That is essentially the point of the Postal Service's opposition. Review should be in court, if at all. Finally, the main problem with applying the "bootstrap" jurisdiction argument to Commission review under section 3623 is that it

---

<sup>49</sup> Letter at 20. See, e.g., *CAB v. Deutsche Lufthansaaktiengesellschaft*, 591 F2d 951, 952 (D.C. Cir. 1979).

<sup>50</sup> *Id.*

<sup>51</sup> See *Government of the Territory of Guam v. Sea-Land Service, Inc.*, 958 F2d 1150, 1155 (D.C. Cir. 1992).

<sup>52</sup> Compare *West v. Bergland*, 611 F2d 710, 715 (8<sup>th</sup> Cir. 1979); *Marshall v. Burlington Northern, Inc.*, 595 F2d 511, 513 (9<sup>th</sup> Cir. 1979).

completely swallows the issue of Commission authority. Assuming jurisdiction to determine whether a service is nonpostal for purposes of requiring review under section 3622 would have the effect of deciding the issue of authority by default. The Commission is simply not authorized by section 3623 to make that inquiry.

CA and the OCA also argue that under the doctrine of *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984), the Commission's interpretation of its authority under section 3623 should be given deference.<sup>53</sup> CA and the OCA, however, misplace their reliance on *Chevron*. First, the *Chevron* doctrine is applied by courts reviewing agency interpretations of their enabling statutes. Under *Chevron*, courts will defer to an agency's interpretation, if Congress's intent in the statute is not clear on its face, and if the agency's interpretation is reasonable. *Id.* at 842-43. Here, Congressional intent is clear, and the OCA's construction is clearly inconsistent with the statutory scheme. The PRA does not specifically grant the Commission authority to subvert management's determination of nonpostal status by conducting a proceeding under section 3623 to allow the Commission to make that determination. If CA's and the OCA's argument is that the Commission's interpretation of its authority under section 3623 is weightier than the Postal Service's interpretation, that view is unsupported. Even in the *Chevron* context, courts sometimes observe an exception to deference where the agency is interpreting the limits of its own "jurisdiction."<sup>54</sup> Moreover, where the PRA is concerned, it is by no means clear that the Commission, as opposed to the Postal Service, is entitled to deference. In *United Parcel Service v. United States Postal*

---

<sup>53</sup> Letter at 20, n. 54. *Chevron* deference is a judicial doctrine in reviewing agency conduct. CA and the OCA appear to be arguing that the Commission should defer to itself.

*Service*, 604 F2d at 1380, the court deferred to the Commission in deciding that an experimental rate needed to be reviewed and recommended by the Commission. In *Air Courier Conference*, 959 F2d at 1224-25, however, the court deferred to the Postal Service.<sup>55</sup>

We must emphasize that we are not contending that the Postal Service's and the Board's determination of status is immune from review in court. We simply assert that second-guessing management's judgment, or purporting to adjudicate status, are not appropriate roles for the Commission under the statutory scheme.

**C. The Commission's Exercise of Authority under Section 3623 Cannot Interfere with Management.**

The court's decision in *Governors v. Postal Rate Commission*, 654 F2d 108, amplifies the conclusion that the Commission's classification authority does not authorize the CA/OCA proposal. As noted above, that case involved a Postal Service request for the Commission to recommend that a new service -- E-COM -- be incorporated in the classification schedule. In recommending the service, however, the Commission attempted to impose a condition that changed its character significantly. The court held that the Commission's qualification interfered with the Postal Service's exercise of its managerial functions, and that it therefore exceeded the Commission's authority. The court also cautioned the Commission that, if it acts in a way that infringes

---

<sup>54</sup> See *Midland Coal Co. v. Director, OWCP*, 149 F3d 558, 561-62 (7<sup>th</sup> Cir. 1998).

<sup>55</sup> See generally, *Dimension Financial Corp. v. Board of Governors of the Federal Reserve System*, 744 F2d 1402, 1410 (10<sup>th</sup> Cir. 1984), *aff'd*, 474 US 361 (1984)(when granting deference to agency's interpretation of jurisdiction, consideration should be given to contrary views by other agencies).

on management prerogatives, it may only rely on a *specific* grant of authority. *Id.* at 117.

The court's decision in *Governors* is especially pertinent in the present context. In *Governors*, there was no question that the E-COM proceeding was authorized. The court nevertheless affirmed strict limitations on the Commission's authority to make substantive recommendations that interfered with management choices. If placing unwanted conditions on a management program exceeded the Commission's classification authority, then initiating an unauthorized proceeding for the purpose of potentially nullifying management's decision to offer a nonpostal commercial service does as well.

In this regard, we note that CA's and the OCA's proposal seems to contemplate a more intrusive role for the Commission in the conversion of nonpostal services to mail classifications than is permitted under the PRA. They propose that, after the Commission adjudicates the status of a service, the Commission will review "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." <sup>56</sup> The Postal Service would be permitted "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." *Id.* (emphasis added). This stage would conclude with a Commission judgment as to whether the service should be maintained as a mail

---

<sup>56</sup> Letter at 33.

classification: "Services *deemed worthy* for recommendation as classifications would be declared so in a Phase 2 Commission order." *Id.* at 34 (emphasis added).

In line with their view that the Commission should be allowed to regulate the Postal Service's conduct under the PRA, CA and the OCA in their proposal have fashioned a role for the Commission that oversteps the bounds of its authority. CA and the OCA would give the Commission, in effect, a veto over the continued operation of the service reviewed. Opponents of any commercial service might thereby achieve that result, if in a section 3623 proceeding they convince the Commission to declare the service postal and to decline to recommend it as a classification, or to recommend it only in modified or qualified form.

This is precisely the type of interference with management judgment that the court in *Governors* proscribed. CA and the OCA might argue that this view unreasonably constrains the Commission's exercise of its independent judgment in applying the classification criteria in section 3623. Nevertheless, the court was faced with that argument in *Governors* as well. While the Commission must exercise its authority to evaluate changes in the categorization of existing mail services, it may not intrude on management's decision on whether to offer a new service.

**D. CA and the OCA Propose A Convolted, Unworkable Proceeding that Would Exceed the Commission's Authority under the PRA.**

CA and the OCA propose that the Commission initiate a rate and classification proceeding under section 3623 consisting of two Phases. Phase 1 and Phase 2, Part One, would encompass consideration of the legal status (postal vs. nonpostal), classification status, and rates and fees for each service previously deemed to be nonpostal by the Postal Service, and found to be a postal service by the Commission in



Phase 1. Part Two of Phase 2 would appear to be a separate rulemaking proceeding conducted under notice-and-comment procedures pursuant to the Administrative Procedure Act (APA).<sup>57</sup>

The proceeding would apparently be established as one docket leading to one recommended decision. The Commission would initiate the docket under section 3623, and thus would also initiate determination of postal vs. nonpostal status. CA and the OCA state that the classification phase could be initiated by either the Commission or the Postal Service. Letter at 33. Consideration of rates for services that the Commission determined should be classified would also take place in Phase 2, Part One. CA and the OCA, however, state that "[I]t is expected that the Postal Service would bring a request to the Commission for a rate recommendation." *Id.* at 34.

As a practical matter, what CA and the OCA likely mean is that the consideration of classification and rates would be telescoped into one set of discovery and hearings based on a comprehensive Postal Service request.<sup>58</sup> If the Postal Service were not inclined to seek both classification and rates for a service determined to be postal by the Commission, it would simply inform the Commission that it did not intend to proceed. In this circumstance, the Commission's determination of legal status (postal vs. nonpostal) would have had the effect of terminating the service. Alternatively, the Postal Service

---

<sup>57</sup> We address this part of the proposal in the next section.

<sup>58</sup> Procedurally, it would appear that, in theory, the proposed proceeding could be developed in two or three stages. The proposal contemplates that consideration of each major issue (legal status, classification status, and rates or fees) would involve discovery against the Postal Service, testimony, and hearings. If consideration of classification were a separate stage initiated by the Commission, there might be two sets of hearings for classification issues and rates, since consideration of rates would be initiated by a separate request from the Postal Service.

might decide to ignore the Commission's legal conclusions and take its chances in court.

CA and the OCA thus have proposed to combine several functions into one proceeding under section 3623. In the first instance, the proceeding would provide an alternative to the complaint mechanism to require the Postal Service to justify its decision not to seek a recommended decision for an array of products and services. Second, as described by CA and the OCA, the proceeding would enable the Commission to pass judgment on the "merits" of particular products from a classification perspective. Failure by the Commission to recommend that a service be classified would amount to a veto of management's decision to offer it. Finally, the proceeding would permit the Commission to evaluate the fees for the questioned products, and to adjust them if they are not found consistent with ratemaking principles applied to other domestic postal products and services.

While CA and the OCA lay out this plan as a logical progression, in practice it simply cannot work. If the Postal Service has already determined that a particular service is nonpostal, and therefore not within the Commission's jurisdiction, the odds are high that the Postal Service's reaction to the Commission's adjudication of the service's status would be to disregard it and continue to operate the service. In this regard, CA and the OCA appear to presume that the Postal Service would either be bound legally by the Commission's determination or would be influenced by it to concede and seek a classification and rates for the service in question.

The Postal Service would not conclude that the Commission's determination is binding, however, because it does not believe that the PRA gives the Commission that

authority. The possibility that the Commission's conclusion would persuade the Postal Service, moreover, implies that the Commission's function in making the determination is advisory. Again, the Postal Service does not agree that the PRA creates that role for the Commission in the statutory scheme with regard to postal vs. nonpostal status.

Assuming the PRA were to authorize the Commission to adjudicate the question of status -- and it does not -- the only proper exercise of that authority would be the issuance of a recommended decision on that issue. In Docket No. C96-1, the Commission expressly declined to issue a recommended decision on the question of status alone.<sup>59</sup> It reasoned that such a recommendation "would be a hollow vessel lacking any recommendation of substance upon which the Governors could act under § 3625."<sup>60</sup> The Commission, however, cited nothing explicit in the PRA to support that construction. The Governors, furthermore, repudiated that approach in their own decision.<sup>61</sup> Rather, they construed the Commission's "declaratory order" as, in effect, a recommended decision, and rejected it. *Id.*

We presume that the Governors would have the same reaction, if the Commission were to adopt the structure of the CA/OCA proposed proceeding, and were to issue a declaration of postal status as only the first stage of a multi-stage section 3623 proceeding. Furthermore, while the Governors in practice act independently on Commission recommendations, the fact that they comprise the predominant

---

<sup>59</sup> The Commission could have been influenced by the OCA's argument that it should avoid issuing a recommended decision, because it would give the Governors an opportunity to reject it. See Initial Brief of the Office of the Consumer Advocate to the Postal Rate Commission, Docket No. C96-1, at 15-16 (Nov. 22, 1996).

<sup>60</sup> Order No. 1145, at 24.

membership of the Board of Governors suggests that their reaction to a Commission recommendation repudiating the Postal Service's determination of status might be to reject it.

With that result as a probable outcome, the CA/OCA plan for its proposed proceeding would disintegrate. The Commission's action would be reduced to a device to permit the Commission to provide an advisory opinion on a legal question that the PRA empowers the Postal Service to decide. As noted above, the PRA does not create that role for the Commission. Alternatively, the proceeding would be the vehicle for the Commission to express an opinion that could be used in court by a complainant seeking to enjoin operation of a Postal Service commercial product. Again, the Commission lacks authority to function in that capacity under section 3623 and the statutory scheme.

Even if the Postal Service were to agree to the Commission's conclusion as to status, the court's decision in *Dow Jones v. Postal Rate Commission*, , 656 F.2d 786 (DC Cir. 1981), strongly suggests that the entire proceeding would be in jeopardy. In that proceeding, Dow Jones and others challenged the Governors' approval of a Commission recommendation to create a rate discount and surcharge in connection with the classification of so-called "Red-Tag" expedited service for second-class mail. The Commission initiated Docket No. MC79-3 to consider issues of possible discrimination embodied in the second-class rate structure. These issues had been noted by the Court of Appeals for the DC Circuit itself in two prior decisions. After holding a full hearing, during which intervenors proposed classification and rate

---

<sup>61</sup> Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on the Complaint of the Coalition Against Unfair Competition, Docket No. C96-1, at 4-5 (April 17, 1997).

changes, the Commission recommended creation of a rate structure that resulted in charging a lower rate for publications not receiving expedited service, and a higher rate for publications who benefited from Red Tag. The issue on appeal was whether the Commission had the authority under section 3623 to initiate a proceeding that resulted in recommending a rate change. Petitioners for review argued that only the Postal Service, and not the Commission, may initiate a rate case.

The court agreed with the petitioners. It recognized that the structure of the PRA created a clear dichotomy between the Postal Service's exclusive authority to initiate rate cases under section 3622 and the shared authority to initiate changes in the mail classification schedule under section 3623. The court's decision, furthermore, was prescriptive:

When confronted by clear statutory language and congressional intent, it is not for this court to construe 39 U.S.C. § 3623(b) to permit that which it obviously prohibits.

*Id.* at 790. Furthermore, the court held that the Governors' Decision arising out of Docket No. MC79-3 was "*void in its entirety*." *Id.* at 788, 791 (emphasis added). The court did not try to invalidate the decision only with respect to the rate changes recommended. Rather, it declared the entire proceeding to be illegal, since the Commission lacked the statutory authority to initiate it.

It could be argued that a Postal Service request for a recommended decision at the later stages of the proceeding could "cure" the defect. It is not, however, a foregone conclusion that no party would be aggrieved in that situation. Many of the services being questioned in the Petition and Letter operate through partnerships and alliances with private parties who might be disadvantaged by the Commission's and the Postal

Service's decision to seek declarations of classification status and new rates, as a result of the Commission's legal determination. Postal Service customers for the services might also object. In that context, going forward with the proceeding as described in the CA/OCA proposal would conflict with the court's clear determination in *Dow Jones* that a Commission-initiated rate proceeding is void *in its entirety*.

Furthermore, the situation created by the structure of the CA/OCA proposal again emphasizes the intrusive nature of such a proceeding. Any Postal Service reversal of its own determination of nonpostal status would have to be regarded as the result of the coercive effects of the Commission's action. The clear lesson in the *Governors* case, furthermore, is that, under the statutory scheme, the Commission cannot act under section 3623 to cause that result.

**V. The Proposed Rules Governing Accounting and Reporting for Nonpostal Services are Unnecessary and Unauthorized.**

For those services determined by the Commission to be nonpostal, CA and the OCA propose that the Commission create rules strictly governing accounting practices and reporting requirements.<sup>62</sup> They propose several specific amendments to Commission Rule 54 (39 C.F.R. § 3001.54), which establishes requirements for information and data production in rate cases initiated by the Postal Service. From the commentary by CA and the OCA, the proposed rules appear to have two purposes: (1) to induce the Postal Service to account for the finances of nonpostal services in a way that conforms to CA's and the OCA's judgment; and (2) to provide the Commission with information that would enable it to critique the specific rates and fees established by the

---

<sup>62</sup> Letter at 34-40.

Postal Service for each nonpostal service. Both objectives are unnecessary and lie outside the Commission's authority.

For the most part, the CA's and OCA's proposed amendments are direct outgrowths of discovery disputes in prior omnibus rate proceedings, particularly Docket No. R2001-1. As noted above, the CA Petition arose out of an OCA motion asking for the same relief at the end of that proceeding. The timing in the rate case of the OCA's motion, furthermore, was somewhat unusual. The Postal Service and nearly all of the intervenors in the case (including the OCA) had successfully negotiated an unprecedented settlement agreement. Only two days after the OCA's motion, the Commission issued its opinion accepting the settlement as the basis for its recommendations.<sup>63</sup> The Postal Service did not have an opportunity to respond to the motion, and, as noted in the Petition, the Commission denied it, without specific reference, in the Recommended Decision.

The OCA's rate case motion followed protracted discovery by the OCA against the Postal Service designed to elicit detailed information concerning specific nonpostal services.<sup>64</sup> As it had in response to similar inquiries in the previous rate case (Docket No. R2000-1), the Postal Service provided descriptions of the services, as well as operating expenses and revenues, and statements of income/loss for each service

---

<sup>63</sup> Opinion and Recommended Decision Approving Stipulation and Agreement (March 22, 2002). (PRC Op. R2001-1).

<sup>64</sup> The OCA sought detailed descriptions, as well as operations and financial data, concerning several of the services identified in the Petition and Letter. The Motion included: Post ECS, Electronic Postmark, FirstClass Phone Cards, Retail Merchandise, Post Office Online, Liberty Cash, Dinero Seguro, REMITCO, Sure Money, eBillPay, USPS Send Money, USPS [Pay@Delivery](#), Netpost™ CardStore, and NetPost™ Certified Mail. See OCA Interrogatories OCA/USPS 239-46, 248-53.

through the most recent postal quarter.<sup>65</sup> The Postal Service, however, did not provide other information, such as investment and start-up costs for each service that did not directly affect the allocation of costs and revenues between postal services and nonpostal services in the aggregate for the test year.<sup>66</sup> The Postal Service objected to answering questions calling for conclusions about the legal status of nonpostal services, and argumentative questions asking why the Postal Service had failed to ask the Commission for recommended decisions on the services deemed not to be within the Commission's jurisdiction. Among other reasons, the Postal Service based its objections on lack of relevance of the requested information to material issues in the rate case.

With respect to the relevance of the OCA's interrogatories, the Postal Service noted that the services and products identified by the OCA did not fall under the Commission's authority to recommend classifications, rates, or fees. Accordingly, detailed inquiries about these services, and questions regarding their legal status simply did not fall within the scope of proper discovery in the rate case. *Id.* at 5-6.

---

<sup>65</sup> See Response of United States Postal Service to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-239-240, Docket No. R2001-1 (Dec. 17, 2001); Response of United States Postal Service to Interrogatories of Office of the Consumer Advocate (OCA/USPS-241-42, 244, 248-53), Docket No. R2001-1 (Dec. 12, 2001). See also, Response of the United States Postal Service to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-122-128), Docket No. R2000-1 (April 27, 2000); Response of United States Postal Service to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-139-148), Docket No. R2000-1 (May 18, 2000); Response of the United States Postal Service to Interrogatories of the Office of the Consumer Advocate Redirected from Witness Tayman (OCA/USPS-T9-30-38 and OCA/USPS-T9-39-41), Docket No. R2000-1 (April 3, 2000); Library Reference I-248 (Materials Provided in Response to OCA/USPS-T9-36), Docket No. R2000-1.

<sup>66</sup> 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, Docket No. R2001-1



The OCA persisted, and filed a motion to compel production of answers to its interrogatories.<sup>67</sup> Declaring that the Postal Service had concluded that it was the final arbiter of nonpostal status, the OCA repudiated that position. Rather, it asserted:

The determination of the postal/nonpostal character of a challenged service is essentially an exercise by the Commission of its mail classification authority. Furthermore, once the Commission has adjudged that a service is postal in character, it is authorized to adduce evidence from the Postal Service that will permit the further determination that the rate is/is not compensatory.

*Id.* at 6, 9. As authority, the OCA cited a Commission order denying a Postal Service motion to dismiss Docket No. C99-1.<sup>68</sup> In that order, the Commission found a source for its jurisdiction to consider complaints challenging the status of nonpostal services in its need to interpret the scope of section 3662. As noted above, the Commission further declared that determination of the legal status of a service in a complaint proceeding was essentially an exercise of “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.”<sup>69</sup>

The OCA thus reasoned that the Commission’s assumption of authority to address mail classification issues in a complaint proceeding supported its authority to rule on the legal status of nonpostal services in a rate case. OCA Motion to Compel at

---

<sup>67</sup> Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-231-233, 243, 245-47, and 239-42, 244, 248-53, Docket No. R2001-1 (Dec. 17, 2001) (OCA Motion to Compel).

<sup>68</sup> Order Denying Motion of United States Postal Service to Dismiss Complaint and Notice of Formal Proceedings, Order No. 1239, Docket No. C99-1 (May 3, 1999). Docket No. C99-1 was initiated by United Parcel Service to challenge the status of the Postal Service’s PostECS service.

<sup>69</sup> *Id.* at 12. As noted above, to support this conclusion, the Commission cited the Third Circuit Court of Appeals decision in *United Parcel Service v. U.S. Postal Service*, 604

9. It apparently further concluded that the pendency of an omnibus rate case initiated by a Postal Service request for recommendations on general rate increases made anything fair game. Accordingly, the OCA argued that the Commission's authority to recommend rates for services that it determined were postal flowed from its "duty to recommend a full set of postal rates that also meet the criteria of section 3622." *Id.* The OCA cited the Commission's opinion in Docket No. R76-1, in which it exercised jurisdiction to recommend fees for special services, as support for the proposed exercise of this adjudicative and ratemaking function with regard to nonpostal services in an omnibus rate case.<sup>70</sup> *Id.* at 10.

The Postal Service opposed the OCA's motion to compel.<sup>71</sup> It reiterated its position that the OCA's interrogatories were not relevant to material issues in the rate case. *Id.* at 10. It affirmed, furthermore, its view that the Postal Service, not the Commission, was arbiter of the legal status of nonpostal services.<sup>72</sup> *Id.* at 10-11.

---

F.2d 1370, 1381 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). That decision, however, does not support the principle expressed by the Commission.

<sup>70</sup> The OCA noted that the Commission's action in Docket No. R76-1 followed the District Court's decision in *Associated Third Class Mail Users v. United States Postal Service*, 405 F.Supp. 1109 (D.D. C. 1975), *affirmed*. In *ATCMU*, the District Court considered a mailer association's challenge to the Postal Service's position that special services did not have to be recommended by the Commission.

<sup>71</sup> Opposition of the United States Postal Service to Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-231-233, 243, 245-47, and 239-42, 244, 248-53, Docket No. R2001-1 (Dec. 26, 2001).

<sup>72</sup> While the Postal Service acknowledged the Commission's authority to initiate proceedings to consider changes in the classification schedule, *id.*, it did not intend to imply that such proceedings were appropriate forums for the Commission to adjudicate the legal status of nonpostal services. See OCA Motion at 3. Rather, it was responding to the OCA's apparent argument that section 3623 authorized the Commission to assume that function in rate cases. The Postal Service simply contrasted the pending situation, an omnibus rate case, with a proceeding initiated by the Commission, and it noted that, even in a case initiated under section 3623, the Postal Service's Governors had final authority to reject the Commission's recommendations. *Id.* In fact, the Postal

Although the Presiding Officer conceded that the Postal Service initially determines the legal status of a new service, he sided with the OCA on whether some of the interrogatories were relevant.<sup>73</sup> He directed the Postal Service to answer parts of the inquiries asking for detailed financial and other information pertaining to the questioned services.<sup>74</sup> He also apparently endorsed, at least in part, the OCA's position regarding the Commission's authority to rule on legal status. He stated : "Under the PRA, the Commission has the *primary* responsibility for interpreting the status of services proposed or offered by the Postal Service."<sup>75</sup>

The Presiding Officer's reasoning, however, differed somewhat from the argument that CA and OCA now develop in the Petition and Letter. He referred to the Commission's classification authority, yet he emphasized the Commission's ratemaking responsibilities under the PRA in an omnibus rate case to justify relevance of the inquiries. POR No. 2001-1/42 at 8-9. Furthermore, he did not state or imply that section 3623 would justify a proceeding initiated by the Commission for the purpose of investigating and adjudicating the legal status of nonpostal services.

---

Service also affirmed its position in Docket No. C99-1 that the Commission lacked jurisdiction to adjudicate the legal status of nonpostal services in complaints brought under 39 U.S.C. § 3662. *Id.* at 11, n. 5.

<sup>73</sup> Presiding Officer's Ruling Concerning the OCA's Motion to Compel Responses to OCA/USPS-231 *Et Seq.*, POR No. R2001-1/42, Docket No. R2001-1, at 7, 8-11 (Jan. 29, 2002),

<sup>74</sup> He explicitly declined to direct the Postal Service to answer questions asking for legal justification for nonpostal status or asking the Postal Service to explain why it had not sought a recommended decision from the Commission. *Id.* at 10, n. 20.

<sup>75</sup> *Id.* at 8 (emphasis added). Like the Commission's Order No. 1239 in Docket No. C99-1, the Presiding Officer cited *United Parcel Service v. United States Postal Service*, 604 F2d 1381, for this broad interpretation of Commission authority. Again, neither the cite nor the case in general supports this conclusion.

The Postal Service fundamentally disagrees with POR No. 42. Its interpretation of Commission authority regarding nonpostal services is inconsistent with the correct and intended interpretation of the statutory scheme. Accordingly, the ruling's conclusions regarding the relevance of the OCA's inquiries in the rate case were wrong. The Presiding Officer, however, suspended the effect of the ruling, in light of the progress toward settlement at that stage of the case. POR No. 2001-1/42, at 13. That circumstance, combined with the Postal Service's confidence at the time in the probable success of the settlement efforts, persuaded the Postal Service not to seek certification or reconsideration. Furthermore, because the case was settled, the Governors did not have occasion to comment on the conclusions embodied in the ruling or the OCA's position.<sup>76</sup> When, at the end of the proceedings, the OCA filed its motion asking for the same relief that it now requests in CA's Petition, the Commission denied the motion without comment.

We will not attempt to address the specific amendments that CA and the OCA propose. Notwithstanding the curious structure of their proposal, which appears to incorporate a rulemaking within a proceeding initiated under section 3623 to consider the questioned services, we presume that, if the Commission were to decide to consider changing rule 54, it would proceed by issuing a notice of proposed rulemaking in accordance with normal notice-and-comment rulemaking procedures. If that happens, the Postal Service will submit comments on the proposed amendments.

---

<sup>76</sup> In this regard, we note that in an earlier case the Governors questioned the Commission's decision to require production of detailed information pertaining to international mail services, which, like nonpostal services, fall outside the Commission's ratemaking authority. Decision of the Governors of the United States Postal Service on

For now, we will comment generally that, as we argued during Docket No. R2001-1, the detailed information sought pertaining to specific nonpostal services is largely irrelevant and unnecessary for exercise of the Commission's functions in an omnibus rate case. Conditioning a Commission recommendation of rates and fees on provision of such information, either as a procedural matter or a matter of substance, would be unauthorized and could lead to a denial of due process. Furthermore, proposed amendment (vi)<sup>77</sup> would require the Postal Service to identify a specific component of prior years losses associated with losses from nonpostal services. The amendment states: "Any losses generated by non-jurisdictional services may not be made part of the costs to be recovered by jurisdictional rates and fees." The Postal Service believes that this requirement would be entirely unauthorized.

## **VI. Conclusion**

For the foregoing reasons, the Postal Service respectfully requests that the Commission decline to adopt the proposals contained in the CA/OCA Petition and Letter. Section 3623 does not authorize a broad, investigative inquiry leading to a Commission declaration of the legal status of nonpostal services under Chapter 36 of the PRA. CA and the OCA have proposed a complicated, unworkable mechanism that would interfere with the Postal Service's management prerogatives to develop and offer new services, and that would exceed the Commission's lawful authority. Furthermore the proposed amendments to Commission Rule 54 are not required by the Commission's functions and responsibilities in rate cases. They would only complicate

---

the Recommended Decision of the Postal Rate Commission on Postal Rate and Fee Changes, Docket No. R94-1, at 15-16 (Dec. 12, 1994).

<sup>77</sup> Letter at 40.

such proceedings, and would infringe upon the Postal Service's authority under the PRA.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

---

Daniel J. Foucheaux, Jr.  
Chief Counsel, Ratemaking

475 L'Enfant Plaza West, S.W.  
Washington, D.C. 20260-1137  
(202) 268-2999 Fax -5402  
January 30, 2003