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January 30, 2003

Steven W. Williams  
Secretary  
Postal Rate Commission  
1333 H Street, N.W.  
Suite 300  
Washington, D.C. 20268-0001

**Re: Comments in Support of the Consumer Action Petition for Review of  
Unclassified Services; Order No. 1353**

Dear Mr. Williams:

The Washington Legal Foundation (WLF), in conjunction with WLF's Economic Freedom Law Clinic at George Mason University School of Law (Clinic), hereby submits these comments in support of the petition and accompanying letter filed with the Postal Rate Commission (Commission) on October 15, 2002, by Consumer Action (CA), a nonprofit consumer organization, and the Office of Consumer Advocate (OCA), an office within the Postal Rate Commission. The CA/OCA petition requests that the Commission institute proceedings to (1) review the jurisdictional status of fourteen specified services offered by the Postal Service, and (2) establish rules to require a full accounting of the costs and revenues of non-jurisdictional domestic services. WLF and the Clinic strongly support the petition, and urge the Commission to act favorably on it as a matter of law and sound public policy.

### **Interests of WLF and the Clinic**

WLF is a non-profit, public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting the principles of free enterprise, individual rights, and a limited and accountable government. WLF has appeared before numerous federal courts and administrative agencies, opposing attempts by regulatory agencies to exceed the authority granted to them by Congress. *See, e.g., FDA v. Brown & Williamson Tobacco, Corp.*, 529 U.S. 120 (2000) (FDA lacked statutory authority to regulate tobacco products as a drug or device under the Food, Drug, and Cosmetic Act); *Comments of WLF and WLF Economic Freedom Law Clinic in Response to Proposed Ergonomics Program Standard of the Occupational Safety and Health Administration* (March 2, 2000).

In addition, WLF's Legal Studies Division produces and disseminates through the U.S. mails numerous legal and public policy publications on a variety of constitutional, statutory, and regulatory issues. Accordingly, a large portion of WLF's budget is allocated for postage, particularly for its first-class postage mailings. Thus, WLF has an additional institutional interest in the instant proceeding because, as the petition explains, WLF and millions of other postal patrons are subsidizing the Postal Services' revenue losing commercial activities that are at issue here. WLF further objects to these commercial activities because they unfairly compete with those services and products offered by the private sector.

WLF's Clinic at George Mason University School of Law actively participates in public interest litigation and regulatory issues in conjunction with WLF. Over the last three years, the

Clinic has submitted comments on proposed regulations by government agencies.

Accordingly, both WLF and the Clinic (hereinafter collectively referred to as "WLF") have an interest in the petition and its disposition.

### **Introduction and Summary**

The petition has identified at least the following fourteen non-traditional retail and commercial services and products that are now being offered by the Postal Service that have not been (but should be) subject to review by the Commission: Liberty Cash, Sure Money, Online Payment Services – eBillPay; Pay @ Delivery and USPS Send money, ePayments (unless this is the same as eBillPay), NetPost CardStore, NetPost Certified Mail, Electronic Postmark, Unisite Antenna Program, Returns @ ease, Mall Package Shipment Program, First Class Phone Cards, and Retail Merchandise. CA/OCA Petition at 5.<sup>1</sup>

The CA/OCA petition requests that the Commission institute a proceeding to determine “(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) to

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<sup>1</sup> In addition, WLF has learned that the Postal Service also offers passport photographs in some of its branches. Peter Rowe, "What Will the Postal Service Think of Next?," *SignOnSanDiego.Com* (Dec. 15, 2002). The article describes how the Postal Service unfairly competes with a vision-impaired passport photographer. Jack Estes, executive director of the Main Street Coalition for Postal Fairness in Washington, D.C., rightfully complains that the Postal Service is "getting into areas that are not related to the delivery of mail." *Id.* When questioned by the reporter as to why the Postal Service is getting into this and other businesses identified by CA and OCA, a Postal Service spokesman stated, "It is a congressional mandate that we offer this." *Id.* As discussed in the petition and these comments, the opposite is true: the Postal Service lacks congressional authority to operate these services, particularly without Commission review.

establish "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." CA/OCA Petition at 1.

As documented in the petition, not only has the Postal Service embarked on these non-traditional activities without first obtaining Commission approval, but also has been operating many of these services at substantial losses, thereby forcing consumers who use first-class postage to subsidize these forays by the Postal Service into commercial activities. Such publicly-subsidized commercial activities unfairly compete with those same products and services offered by the private sector. *See* CA/OCA Petition at 11-12. For example, the Online Payment Services 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. *Id.* Even worse, there are no record-keeping and accounting procedures or rules in place that would ensure that the Postal Service disclose to the Commission and the public the costs -- both fixed and operating -- and the revenues that are associated with the selling and marketing of these services and merchandise.

The Order issued in this matter states that the Commission is soliciting comments "concerning how the Commission should proceed with the petition. . . ." 67 Fed. Reg. 71993 (Dec. 3, 2002). It thus appears that the Commission's notice seeks only procedural comments from the public, namely, *how* the Commission should proceed in this matter, rather than substantive comments on the merits of the petition itself. In any event, WLF hereby offers comments on the procedural aspects of this issue as well as comments on the merits of the

substantive issues.

### ***WLF'S PROCEDURAL COMMENTS***

In the first place, WLF requests that as a procedural matter, the Commission should re-open the record and give the public an opportunity to file supplemental comments based on the forthcoming submission by the Postal Service responding to the petition. Indeed, in the *Federal Register* notice of this proceeding, the Commission noted that the Postal Service was conducting an internal review of the matters raised in the petition, and that it was anticipated that the review "will be completed by early January 2003." 67 Fed. Reg. 71993 (Dec. 3, 2002). The Commission further noted that deferring action on the petition "will not prejudice the petitioner [CA]," and that [m]oreover, the scope of the issues raised may be significantly clarified by the results of the Postal Service's review, which, it is indicated, will 'bear substantially on the representations in the petition.'" *Id.*

If, indeed, the Postal Service's review and submission will "bear substantially on the representations in the petition," it only seems fair that the petitioner and interested members of the public be given an opportunity to respond to any submission, lest any of the Postal Service's assertions otherwise go unchallenged. In addition, the Commission will be better informed of the matter as it decides whether and how to institute formal proceedings.

Regardless of any submission by the Postal Service, WLF wholeheartedly agrees with CA and OCA that a formal proceeding should be instituted in two phases. The first should be proceedings with public hearings where the Postal Service would have to demonstrate why the services and products are not subject to Commission jurisdiction. The second phase would

entail two steps: first, to determine the proper rates to be set for the services, and the second, the establishment of reporting and accounting rules on those services determined to be not subject to prior Commission approval. *See* CA/OCA Petition at 33-34.

### ***WLF'S SUBSTANTIVE COMMENTS***

#### **I. OFFERING DOMESTIC SERVICES WITHOUT A PRIOR REQUEST BY THE POSTAL SERVICE COMMISSION FOR A RECOMMENDED DECISION CONSTITUTES *ULTRA VIRES* AGENCY ACTIVITY.**

##### **A. Statutory Language and Framework**

Under Section 404(a)(6) of the Postal Reorganization Act (PRA), Congress has made an express but limited delegation of powers to the Postal Service. Activities that fall outside the scope of those powers delegated by Congress are *ultra vires* and invalid. *See generally* *FDA v. Brown & Williamson Tobacco, Corp.*, 529 U.S. 120 (2000) (FDA lacked authority to regulate tobacco products as a drug or device under the Food, Drug, and Cosmetic Act); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607 (1980) (OSHA's adoption of a costly and burdensome regulation was outside the scope of its delegated authority, and therefore invalid).

The petition cogently argues that a proper construction of the PRA demonstrates that the Postal Service does not have statutory authority to offer e-commerce and other services to the public without prior authorization by the Commission. *See* CA/OCA Petition at 22-23. It is well established that statutory interpretation begins with the language of the statute itself. *See* *Duncan v. Walker*, 533 U.S. 167, 172 (2001). In determining the scope of a statute, courts ordinarily look first the language employed by Congress and if the language is unambiguous,

absent clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive. *See United States v. Turkett*, 452 U.S. 576, 680 (1981). Under § 404(a)(6) of the PRA, the Postal Service is granted certain authority to “provide, establish, change, or abolish special nonpostal or similar services.” As will be discussed below in section B of these comments, the term “nonpostal” means services provided to other federal agencies, not the public. But even assuming that the Postal Service has the power to establish the challenged services, which we seriously doubt, it is clear that *rates and fees* for postal services are necessarily subject to review by the Postal Rate Commission. Indeed, pursuant to §§ 3621 and 3622 of the PRA, “reasonable and equitable rates of postage and fees” for all services sold to the public by the Postal Service are subject to review and a recommended decision by the Postal Rate Commission.

It is also instructive to note that Congress expressly provided for an exception in §407, which provides that the Postal Service “may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries.” Using traditional tools of statutory construction, including the rule of *expressio unius est exclusio alterius*, the Postal Service does not have the power to establish rates and fees for all *domestic* postal services without a recommended decision by the Postal Rate Commission. Accordingly, the Postal Service’s retailing of the 14 challenged services are *ultra vires* acts that are outside of the scope of authority delegated by Congress.

Further support for this *ultra vires* argument can be found in *Air Courier Conference of Am./Int’l Comm. v. U.S. Postal Serv.*, 959 F.2d 1213 (3d Cir. 1992). As the petition notes, *Air*

*Courier* makes a crucial distinction between the authority to establish a service, and the authority to establish *rates and fees* for a service. CA/OCA Petition at 23-24. Because there is no indication in the statute or legislative history (discussed below), that Congress intended to give the Postal Service unilateral authority to establish rates and fees for e-commerce and other commercial ventures, the statute cannot be construed as an implied revocation of the requirement that the Postal Rate Commission recommend approval for such services.

The decision in *United Parcel Serv., Inc. v. United States Postal Serv.*, 604 F.2d 1370, 1375 (3d Cir. 1979) is also instructive. In that case, the court of appeals held that the PRA was unequivocal in requiring that all changes in any rates and any mail classifications be processed through the Commission, and rejected the contention that marketplace experiments are not subject to Rate Commission review pursuant to §§ 3622 and 3623 of the PRA. *Id.* In that case, the court rejected the Postal Service's argument that because §§3622-23 do not by their express terms require a recommended decision for experimental programs, it could test in the marketplace without complying with the statutory provisions requiring submission to the Rate Commission. The Third Circuit properly found this argument "less than compelling," and stated that, "while it is clear that §§3622-23 do not expressly require Rate Commission approval of Postal Service experiments, it is equally clear that these statutes contain no express exception for experiments which involve changes in rates and classifications." *Id.*

That principle of statutory interpretation applies here as well. Thus, the absence of express terminology in the PRA requiring Commission approval of the Postal Service's e-commerce and commercial ventures cannot be construed as an exception to the requirements



under Chapter 36 of the PRA. Otherwise, the Postal Service would be free to engage in any commercial activity that it desires, without any controls or accounting. The Postal Service could sell pizzas, or as the CA/OCA petition suggests, even operate a bowling alley. CA/OCA Petition at 27.

### **B. Legislative History of the PRA**

WLF further agrees with the petition's contention that the legislative history of the PRA reinforces the view that Congress did not intend to delegate unilateral rate setting authority to the Postal Service for e-commerce ventures. The petition notes that the term "nonpostal services" in § 404(a)(6) was well understood to refer only to "public service costs associated with non-reimbursed services for other government agencies" at the time the PRA was being drafted. *See* CA/OCA Petition at 26. Any congressional intent to delegate to the Postal Service the power to engage in commercial enterprise is conspicuously absent from the legislative history of the Act, underscoring the fact that Congress never intended to give the Postal Service unbridled power to misuse its monopoly privilege. *Id.* at 27. Accordingly, in employing the term "nonpostal services" in §404(a)(6) of the PRA, Congress clearly intended that term to mean only services provided by the Postal Service *to other federal agencies*, and not commercial products and services provided to the public. *Id.*

As a general rule, in determining the meaning of a statute, a court looks not only at the statutory language, but also to the design of the statute as a whole and to its object and policy. *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *K Mart Corp. v. Cartier, Inc.*, 486 U.S.

281, 291 (1988). Although an agency's interpretation of a statute under which it operates is entitled to some deference, such deference is constrained by an obligation to honor the clear meaning of the statute, as revealed by its language, purpose and history. *See Int'l Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 (1979). Indeed, where the statutory language, in conjunction with the legislative history, clearly indicates the purpose of Congress, as it does here, that purpose must be upheld. *See Hudson Distrib., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 395 (1964). In the present matter, the legislative history clearly indicates that the purpose of the Postal Rate Commission is to protect consumers' interests. *See S. Rep. 91-92*, 91st Cong. 2d Sess. at 13-14.

Clearly, Congress never anticipated that the Postal Service would attempt to use its monopoly privileges to eliminate competition or unfairly compete in e-commerce and other commercial markets. Further, it is apparent that Congress's purpose in enacting the PRA was to ensure that postal rates and fees for service are reasonable and equitable. Accordingly, the Postal Service's remarkable and novel interpretation of the PRA, namely, that if the statute does not expressly forbid it, the Postal Service is free to engage in any and all commercial activity that it chooses to offer, no matter what the cost, must be rejected. Allowing the Postal Service to exercise unbridled and unreviewable power to set rates and fees for any commercial products and services it chooses is fundamentally at odds with the congressional purpose and design in enacting the PRA.

Accordingly, in light of the legislative history of the PRA, and the public interest policy underlying the role of the Postal Rate Commission, the Commission not only has the authority

to review the Postal Service's e-commerce ventures pursuant to the ratemaking provisions of the PRA, but also must exercise that authority.

## **II. THE GAO HAS DOCUMENTED NUMEROUS PROBLEMS WITH THE POSTAL SERVICE'S COMMERCIAL ACTIVITIES**

As the petition makes clear, the General Accounting Office (GAO) has investigated the Postal Service's new commercial ventures and has itself faced the same problems that others are encountering – the Postal Service remains unaccountable. CA/OCA Petition at 9. The Postal Service has been so secretive about how it has spent its money to launch the fourteen services in question that the “GAO censured the Postal Service for failing to report the total planned costs associated with total planned revenues.” *Id.* The following excerpt from a GAO Report summarizing how well the Postal Service had implemented GAO's suggestions for improving its efforts related to these e-commerce ventures says it all:

Although USPS has several actions under way to respond to the recommendations made in our previous report, it has made only limited progress during the past year in resolving the problems that our recommendations were aimed at correcting. USPS continues to have difficulty defining, identifying, and classifying its Internet-related initiatives, including e-commerce initiatives. Additionally, inconsistency remains in the implementation of its processes and controls for developing, approving, and monitoring the performance of e-commerce initiatives. Also, financial information related to its e-commerce and Internet-related activities is not complete, accurate, and consistent. In our opinion, a major factor contributing to USPS' limited progress in this area has been its management approach. Overall, the management of USPS' ecommerce program has been fragmented, and implementation of ecommerce initiatives has been inconsistent across the various business units involved in these activities.

Report GAO-02-79 at 2.

In addition to this GAO Report, another one recently issued also documents serious problems with the Postal Service and recommends that the Service improve transparency and

timeliness of financial and performance information. *See generally* GAO-03-118, "Major Management Challenges and Program Risks: U.S. Postal Service" (January 2003).

## **CONCLUSION**

The President has recently established a White House Commission to review the operation of the Postal Service, further underscoring the importance of the issues presented in the petition. The Postal Service has strayed far afield from its original mission and limited congressional authority to deliver the mail, and is instead using its monopoly powers to venture into questionable commercial activities. These commercial activities not only unfairly compete with private enterprise, but force postal customers who pay for first-class mail to subsidize those commercial ventures. The Commission should not allow these activities to continue without strict regulation, oversight, and accountability

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