

ORDER NO. 1388

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:                   George Omas, Chairman;  
  Tony Hammond, Vice Chairman;  
  Dana B. Covington, Sr.; and Ruth Y. Goldway

Consumer Action Petition for Review  
of Unclassified Services

ORDER DENYING, IN PART, AND  
GRANTING, IN PART, PETITION

(January 16, 2004)

The Commission has before it a petition filed by Consumer Action (CA) requesting the Commission to initiate two proceedings to consider the jurisdictional status of 14 services provided to the public by the Postal Service without prior Commission approval.<sup>1</sup>

The petition and Joint Letter raise important issues with significant implications for mailers, the Postal Service, and, more generally, the public. The Commission appreciates the diverse comments filed on these issues. They have proved very useful in identifying the broad ramifications of issues before the Commission.

After careful consideration of the issues, the Commission declines to initiate the requested classification proceeding. In lieu of that, the Commission, in a companion Order, (Order No. 1389) will commence a rulemaking proceeding for purposes of

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<sup>1</sup> Petition of Consumer Action Requesting that the Commission Institute Proceedings to (1) Review the Jurisdictional Status of 14 Specified Services and (2) Establish Rules to Require a Full Accounting of the Costs and Revenues of Non-Jurisdictional Domestic Services, October 15, 2002 (Petition). In support of its petition, CA incorporates by reference a letter signed by its executive director and the Office of the Consumer Advocate (OCA) that provides the legal basis for the petition and the substantive and procedural relief requested (Joint Letter).

defining the term “postal service.” In addition, the Commission finds merit to the request that it initiate a rulemaking proceeding to establish reporting requirements for the Postal Service’s non-jurisdictional activities. To that end, the Commission intends, in the near future, to issue a notice of proposed rulemaking proposing to establish such reporting requirements.

#### 1. The Petition

CA, a non-profit membership-based organization, founded in San Francisco in 1971, requests the Commission to initiate proceedings to consider the jurisdictional status of 14 services provided to the public without prior Commission approval. First, CA requests the Commission to commence a classification proceeding to review the jurisdictional status of the 14 services it has identified.<sup>2</sup> Second, it requests that the Commission initiate, as part of the same proceeding, a rulemaking to promulgate accounting rules applicable to non-jurisdictional services.<sup>3</sup>

CA and OCA suggest a phased proceeding for the Commission to consider the jurisdictional status of the challenged services. Phase 1 would have the Postal Service explain why it considers the services are not within the Commission’s jurisdiction. This would be followed by discovery, hearings, and legal argument, culminating with a Commission order concerning the jurisdictional status of each service.<sup>4</sup>

Phase 2, which also has two parts, would first review proposed additions to the Domestic Mail Classification Schedule (DMCS) for services found to be jurisdictional. As CA and OCA envision it, this phase of the proceeding, which could be initiated by either the Postal Service or the Commission, would entail discovery against the Postal Service, hearings, and include “legal argument on the question whether the ‘postal’ services in dispute were worthy of recommendation as new classifications.”<sup>5</sup> CA and

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<sup>2</sup> See Petition at 5; see also Joint Letter at 4 and 41. CA and OCA also reserve the right to supplement the list should other unreviewed services come to light. Joint Letter at 5, n.4.

<sup>3</sup> Petition at 5; see also Joint Letter at 4 and 41.

<sup>4</sup> Joint Letter at 33.

<sup>5</sup> *Id.* at 34.

OCA suggest that Phase 2 would also entail hearings, pursuant to section 3622, to establish rates and fees for services found to be worthy.<sup>6</sup> A recommended decision would ensue.

The second part of Phase 2 would entail instituting a rulemaking to establish accounting and reporting requirements for services found to be non-jurisdictional. CA and OCA include suggested amendments to the Commission's Rules.

The 14 services identified by CA and OCA are:

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

CA and OCA oppose the continued offering of these services to the public "absent the discipline that comes with classification and rate review."<sup>7</sup> They are critical of the Postal Service's unregulated retail ventures, contending that they have incurred substantial losses that are being imposed on mail users. Citing GAO reports and Postal Service responses to discovery in Docket No. R2001-1, they attempt to estimate the extent of the operating losses.<sup>8</sup> In addition, CA and OCA contend that the costs reported by the Postal Service for these "nonpostal" services may be substantially understated as they fail to reflect total investment cost and various ongoing costs, e.g.,

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.* at 2.

<sup>8</sup> Estimated at \$80 million for "e-commerce initiatives," and \$45 million for various "nonpostal" services. *Id.* at 9-13.

advertising and support staff. Finally, based largely on GAO findings, CA and OCA criticize the financial information reported by the Postal Service as incomplete, inaccurate, and inconsistent.<sup>9</sup> They state that management has abdicated its public service responsibilities. While noting that GAO has recommended an independent audit function for the Commission to address the Postal Service's deficient accounting and reporting practices, CA and OCA conclude that the Commission has the authority under the current statute to review the services, exercise its rate and classification jurisdiction, and regulate the accounting and reporting requirements of non-jurisdictional services.<sup>10</sup>

## 2. Procedural History

In Order No.1353, the Commission noticed CA's petition and provided interested persons an opportunity to comment on how the Commission should proceed. The Order noted that while the Commission was considering the petition, the Chairman received a letter from the Chairman of the Board of Governors indicating that the Postal Service was conducting an internal review of its "non-postal service offerings." Then-Chairman Rider expressed the hope that, prior to addressing the request for a formal proceeding, the Commission would afford the Postal Service an opportunity to comment on the issues, and further, that it first be able to complete its internal review.

Six parties submitted comments, which are briefly summarized below.

Association for Postal Commerce (PostCom) — PostCom takes no position on the Commission's jurisdiction over the 14 services identified in the petition, but urges the Commission to initiate a rulemaking to examine establishing accounting conventions applicable to Postal Service offerings that are not subject to regulated rates.<sup>11</sup>

Computer & Communications Industry Association (CCIA) — CCIA endorses the petition and urges the Commission to initiate the proceeding requested.<sup>12</sup>

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<sup>9</sup> *Id.* at 14-17.

<sup>10</sup> *Id.* at 17.

<sup>11</sup> Comments of PostCom, January 30, 2003, at 1-2.

<sup>12</sup> Comments of the Computer & Communications Industry Association on the Motion of the Office of the Consumer Advocate to Request that the Commission Institute a Proceeding to Consider the Postal/Nonpostal Character of Specified Services and the Establishment of Rules to Require a Full Accounting of the Costs and Revenues of Nonpostal Services, January 28, 2003, at 1 and 9.

Council for Citizens Against Government Waste (CCAGW) — CCAGW endorses the petition and urges the Commission to initiate the proceeding requested.<sup>13</sup>

Pitney Bowes, Inc. — Pitney Bowes, while expressing some general concerns, noted that at the time its comments were filed no person had an opportunity to review the results of the Postal Service's internal evaluation. Thus, Pitney Bowes requests that the Commission provide interested persons an opportunity to comment on "the appropriate scope and manner of proceeding" after having time to consider the results of the Postal Service's internal review.<sup>14</sup>

Washington Legal Foundation (WLF) — WLF supports the petition and urges the Commission to act favorably on it.<sup>15</sup> Among other things, WLF also requests that interested persons be afforded an opportunity to comment on the results of the Postal Service's internal review. *Id.* at 5.

Postal Service — The Postal Service opposes the petition and requests that the Commission decline to adopt the proposals contained in the petition and accompanying Joint Letter.<sup>16</sup> Concurrently with the filing of its Comments, the Postal Service requested leave to file a report summarizing the internal review referenced by Chairman Rider. United States Postal Service Request for Leave to File Report, January 30, 2003. At that time, the Postal Service anticipated filing the report in early February.

On March 10, 2003, the Postal Service submitted a report that generally describes the results of its internal review.<sup>17</sup> The report briefly summarizes the business review process, including the procedures used to monitor the various services offered by the Postal Service. In addition, the report discusses each of the services identified in

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<sup>13</sup> Comments of the Council for Citizens Against Government Waste on the Motion of the Office of the Consumer Advocate to Request that the Commission Institute a Proceeding to Consider the Postal/Nonpostal Character of Specified Services and the Establishment of Rules to Require a Full Accounting of the Costs and Revenues of Nonpostal Services, January 30, 2003, at 1.

<sup>14</sup> Comments of Pitney Bowes, Inc., January 30, 2003, at 2.

<sup>15</sup> WLF letter addressed to the Commission's Secretary, Steven W. Williams, January 30, 2003, at 1.

<sup>16</sup> Comments of United States Postal Service on Consumer Action Petition, January 30, 2003, at 45 (Postal Service Comments); *see also id.* at 20 *et seq.*

<sup>17</sup> *See* Notice of United States Postal Service of Filing Report, March 10, 2003. Attached to the Notice is the "Report on Nonpostal Initiatives" (Postal Service Report).

the petition, grouping them “based on the type of service offered to the public.”<sup>18</sup> To that end, the Postal Service divides the services into three groups: (a) services intended to enhance access to, or the utility of, postal services, such as Returns@Ease and Liberty Cash; (b) programs that leverage postal assets, such as Unisite Antenna program, retail merchandise, and NetPost CardStore; and (c) “non-traditional electronic services,” such as Online Payment services.<sup>19</sup>

The Postal Service briefly outlines the standards by which it determines whether to request a recommended decision from the Commission, indicating that determination rests on whether a change is needed in postage rates, fees for postal services, or mail classification. For this exercise, it defines the term “postal services” as “involving some aspect of the acceptance, carriage, delivery, or other processing of mail.”<sup>20</sup> The Postal Service indicates that no filing is made if the proposed service does not involve mail, is international rather than domestic, or “does not require the Postal Service to charge the public any new rates or fees, or revise any existing mail classification.”<sup>21</sup> In reviewing the 14 services identified in the petition, the Postal Service concludes that none involves charges imposed on the public. Further, it expresses its opinion that all-electronic services are not postal services.

On November 14, 2003, the Postal Service submitted an update to its Report on Nonpostal initiatives.<sup>22</sup> The Postal Service briefly describes each of the 14 services as follows:<sup>23</sup>

Mall Package Shipment Program — a collection experiment, entailing a limited pilot test of a variation of free centralized collection service in shopping malls. In its initial Report, the Postal Service stated that the program was discontinued. The Postal Service Update indicates that it has terminated this collection service.

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<sup>18</sup> Postal Service Report at 4.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Update to Report on Nonpostal Initiatives, November 14, 2003 (Update).

<sup>23</sup> See Report at 5-10.

Returns@Ease — described as the umbrella name for a developmental effort to provide Internet access to Merchandise Return Service, whereby a mailer can print a Merchandise Return label from the merchant's website. No fee is charged for the label, but the Merchandise Return Service fee would apply if mailed.

LibertyCash — a Postal Service stored-value card that can be used to pay for all postal products and services. In its Update, the Postal Service indicates that this service has been terminated.

Unisite Antenna Program — In 1996, the Postal Service and UniSite Alpha Inc. formed a limited partnership to market and manage antenna sites on real estate owned or leased by the Postal Service. In 1999, the Postal Service assigned its interests in the limited partnership to UniSite and executed a site management agreement. UniSite's successor, American Tower, owns the contractual rights to operate the remaining term of the existing antenna leases.

Retail Merchandise — consists of items, such as stationary and packaging supplies, and merchandise, such as licensed postal theme toys and clothing, sold by the Postal Service.

NetPost CardStore — described as a private sector service offered by TouchPoint with Postal Service branding pursuant to a February 2002 contract that enables consumers to create personalized greeting cards that are printed and mailed the next business day. Those desiring to use the service must first register with NetPost before proceeding to CardStore's website. The Postal Service indicates that it does not charge a fee to the public for connection to CardStore, but that CardStore compensates it for a link on the Postal Service's website as does TouchPoint for access to the website.

NetPost Certified Mail — described as a private sector service offered through USCertified Mail through a link on the Postal Service's website pursuant to a February 2002 contract allowing users to create a document and transmit it electronically to the Postal Service (at usps.com) along with a mailing list. The Postal Service states that the certified mail system verifies the mailing addresses, adds the appropriate barcode, prints and folds the letter, and completes the certification forms electronically. Users are not charged for access to the link; however the Postal Service is compensated by USCertified Mail for the link to its website.

USPS FirstClass Phone Card — a prepaid phone card sold at post office retail counters. It is the Commission’s understanding that the telephone service is provided by AT&T, with whom the Postal Service shares the revenue generated.

Sure Money — described as the umbrella title for the Postal Service’s international funds transfer service; it currently operates only from select Postal Service facilities to Mexico through BBVA Bancomer, with whom the Postal Service has contractual agreement.

USPS eBillPay — an online payment service, begun in April 2000, allowing users to receive, view, and pay bills electronically via the Postal Service website. At the time it filed its Report, the Postal Service indicated that it had revamped its agreement with CheckFree Corp. whereby CheckFree assumed marketing and operational responsibility for USPS eBillPay, with the Postal Service retaining branding and governance responsibilities. In its Update, the Postal Service states that it has decided not to renew its contract with CheckFree upon its expiration in April 2004.

USPS Send Money — described as a service feature of USPS eBillPay enabling customers to send or receive money electronically between bank accounts. Both sender and receiver must be enrolled to exchange funds. In its Update, the Postal Service indicates that it will no longer offer this service after April 2004.

USPS Pay@Delivery — described as a service feature of USPS eBillPay enabling Postal Service customers to combine USPS Send Money with Delivery Confirmation for purchases online. Under this service, CheckFree will hold the buyer’s payment until the Postal Service has confirmed delivery of the product by scanning the Delivery Confirmation barcode. In its Update, the Postal Service indicates that since this is a service feature under its agreement with CheckFree, it will no longer offer this service after April 2004.

USPS Electronic Postmark — In its Report, the Postal Service described EPM as “currently under development as an outsourced all electronic service giving customers a way to time-stamp electronic files securely.”<sup>24</sup> Further, the Postal Service indicated that in July 2002, it executed an agreement with Authentidate, under which the Postal Service will receive a portion of the fee charged by Authentidate “once the new service is launched.”<sup>25</sup> Although not

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<sup>24</sup> Report at 9.

<sup>25</sup> *Id.* at 10.



mentioned in the Update, apparently the Postal Service is now offering EPM service, as confirmed by reference to its website.<sup>26</sup>

In Order No. 1364, the Commission provided interested persons with an opportunity to address the Postal Service's "Report on Nonpostal Initiatives" and the initial comments submitted by any party. Four parties submitted comments, briefly summarized as follows:

Pitney Bowes — Pitney Bowes asserts that the Postal Service should focus on its core business, *i.e.*, accepting, collecting, processing, transporting, and delivering physical mail. It states that the Postal Service should not enter markets that can be served by the private sector. It asserts that the Postal Service should be permitted to pursue pricing strategies such as volume discounts, NSAs, and dynamic pricing, which it describes as pricing by season, month, week, or time of day. In addition, Pitney Bowes argues that there is a need for regulatory oversight, and that "the Commission can and should play a useful role to ensure a level playing field for all participants in the postal sector."<sup>27</sup> It suggests that this proceeding is appropriate for resolving whether that oversight is available under the current statute. It also urges the Commission to initiate hearings to consider establishing cost accounting and reporting standards for "unclassified" services and guidelines concerning introducing and providing such services.<sup>28</sup>

PostCom — Reiterating its initial comments, PostCom urges the Commission to "study how the Postal Service accounts for the cost of and revenues from unregulated services with an eye to determining whether suitable accounting and reporting conventions should be applied."<sup>29</sup>

Walz Postal Solutions, Inc. (Walz) — Walz's comments are largely a variation of its complaint regarding NetPost Certified service, issues addressed in Docket No. C2003-2. Among other things, Walz argues that the Postal Service actively markets the service belying the notion that it is a private sector service; further, it disputes the suggestion that the Commission approved "batch delivery confirmation." In addition, it claims that the economic model for NetPost Certified is flawed. Walz concludes by asking the Commission to evaluate, among other things, "the merits of [nonpostal] service businesses and whether there should be [Commission] oversight of lack of

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<sup>26</sup> See U.S. Postal Service Electronic Postmark page <<http://www.usps.com/electronicpostmark>>.

<sup>27</sup> Comments of Pitney Bowes, Inc., April 18, 2003, at 5.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> Further Comments of PostCom, April 18, 2003, at 2.

accountability, [and] NetPost Certified as a nonpostal service business in particular.”<sup>30</sup>

*CA/OCA* — These comments challenge the Postal Service’s legal conclusions regarding both its authority to provide nonpostal services and the Commission’s authority to act under section 3623.<sup>31</sup>

### 3. Issues

#### A. Classification Proceeding

*CA and OCA Position.* CA and OCA urge the Commission to initiate a classification proceeding to determine its jurisdiction over services offered by the Postal Service to the public without prior Commission approval. In support, they rely principally on the Commission’s “broad authority to initiate classification proceedings” under section 3623 of the Act and the Commission’s finding in Order No. 1239, concerning a complaint filed by United Parcel Service, that “it may consider the jurisdictional nature of so-called ‘nonpostal’ services.”<sup>32</sup> They conclude that if the Commission has the authority to consider jurisdictional issues in a complaint proceeding then it must have “similar power when it undertakes its own investigation into a classification matter . . . .”<sup>33</sup>

*Postal Service Response.* The Postal Service opposes the suggestion that the Commission initiate a classification proceeding asserting that section 3623 does not authorize the Commission to investigate or adjudicate the legal status of nonpostal services.<sup>34</sup> It challenges the Commission’s finding in Order No. 1239 as unsupported, arguing that the Commission’s reliance on its classification authority does not support review of nonpostal status either in a complaint proceeding or one initiated under

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<sup>30</sup> Comments of Walz Postal Solutions, Inc., April 28, 2003, at 5.

<sup>31</sup> Consumer Action/Office of the Consumer Advocate Reply to Postal Service Comments and Report on Nonpostal Initiatives, April 18, 2003 (Joint Reply).

<sup>32</sup> Joint Letter at 20.

<sup>33</sup> *Ibid.*

<sup>34</sup> See Postal Service Comments at 20-30.

section 3623.<sup>35</sup> The Postal Service concludes that “nothing in the [Act] supports the use of inquiries under section 3623 to give the Commission a role in management decisions, nor provide an opportunity for the Commission to review them.”<sup>36</sup>

The Postal Service argues that the Commission’s authority under section 3623 is limited to considering specific proposals to reclassify existing mail services.<sup>37</sup> Under the Act, the Postal Service notes, management authority is reserved to it. The Postal Service asserts that any inquiry or adjudication by the Commission would be tantamount to second-guessing Postal Service determinations that the services were nonpostal and thus usurp management prerogatives to develop and provide new services.<sup>38</sup> The Postal Service contends that the Act has no mechanism for administrative review of postal versus nonpostal status. According to the Postal Service, the only review available is through the courts.<sup>39</sup>

*Analysis.* The Postal Service’s argument that any review by the Commission would impinge on management’s prerogatives is similar to that it advanced in Docket No. C99-1, involving UPS’s complaint concerning Post ECS service. In that proceeding, the Postal Service characterized the Commission’s review of the postal or nonpostal nature of services challenged in complaint proceedings as an exercise of “authority to declare independent actions of the Postal Service to be either lawful or unlawful,” authority, it argued (as it does here) that Congress did not intend to grant the Commission. In Order No. 1239, the Commission found that:

this characterization misconstrues the Commission’s function in considering a complaint of this type. In determining whether a previously unreviewed service challenged by the complaint of an interested party is appropriate for consideration under the regulatory procedures specified in subchapter II [of the Postal Reorganization Act], the Commission is engaged essentially in exercising its mail classification authority, under

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<sup>35</sup> *Id.* at 21, n.37.

<sup>36</sup> *Id.* at 24.

<sup>37</sup> *Id.* at 23.

<sup>38</sup> *Id.* at 24.

<sup>39</sup> *Id.* at 28.

which it is assigned primary responsibility for interpreting the status of services either proposed or offered by the Postal Service.<sup>40</sup>

As in Docket No. C99-1, the Postal Service never comes to grips with the possibility that the service offerings (or some of them) are postal services and the jurisdictional implications of that. Instead, the Postal Service's arguments are premised on the implicit presupposition that the services are nonpostal and thus exclusively subject to management's prerogative. These arguments assume too much.

Plainly and unambiguously, section 3623 vests the Commission with mail classification authority. Contrary to the Postal Service's contentions, the exercise of that authority does not usurp management prerogatives to develop and provide new services. The Postal Service remains free to do so consistent with the requirements of the Act. To the extent it proposes to provide a postal service, the Act directs it to submit a request for a recommended decision on changes in the mail classification schedule. While the regulatory scheme necessarily permits management to characterize potential products initially as postal or nonpostal, that initial determination does not preclude Commission review, on complaint or otherwise, for purposes of exercising its statutory jurisdiction. Such review does not impinge on management's prerogatives in a manner not contemplated by the Act. "The very existence and function of the Postal Rate Commission bespeaks a limitation on postal management's freedom."<sup>41</sup>

It is clear that the Postal Service may charge no rate or fee for a postal service or change any mail classification without a prior recommended decision from the Commission. "[T]he Act is completely unequivocal in requiring *all* changes in *any* rates and *any* mail classification to be processed through and by the Commission." *United Parcel Service v. U.S. Postal Service*, 604 F.2d 1370, 1375 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (emphasis in original). Based on the facts before it, the

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<sup>40</sup> PRC Order No. 1239, May 3, 1999, at 12, citing *United Parcel Service v. U.S. Postal Service*, 604 F.2d 1370, 1381 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

<sup>41</sup> *United Parcel Service v. U.S. Postal Service*, 455 F.Supp. 857, 869 (E.D. PA 1978), *aff'd*, 604 F.2d 1370, (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

Commission may, in its discretion, initiate a proceeding to determine the jurisdictional status of unreviewed services provided by the Postal Service. This is neither the equivalent of asserting jurisdiction nor does it mean that the Commission has prejudged the status of any service. Rather, it serves as a means to develop the facts to which the law may then be applied.

Moreover, the Postal Service's bald assertion that there is no mechanism for the administrative review of postal versus nonpostal status is erroneous. Not only is this assertion at odds with a reasonable construction of the Act, but even assuming *arguendo* that it were correct, the result creates a gap that courts have found that administrative agencies are empowered to fill.

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly, or explicitly, by Congress. *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own

construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.<sup>42</sup>

Furthermore, while the Postal Service may be correct that judicial review is available, nothing in the Act limits an affected party to that forum. Indeed, the principle that parties must exhaust their administrative remedies suggests that the Commission first be afforded the opportunity to consider its jurisdiction.<sup>43</sup> In any event, the Act does not preclude concurrent jurisdiction by the Commission and courts. By its terms, section 409(a) provides that the jurisdiction of the district courts is not exclusive.<sup>44</sup>

Notwithstanding the foregoing, the Commission declines to initiate a classification proceeding, finding the requested relief problematic for several reasons. First, the procedures suggested by CA and OCA do not lend themselves to the efficient resolution of issues presented by the Petitioner. These primary problems relate to concerns whether a sufficient, cohesive record could be developed in reasonable fashion to support a recommended decision. Attempting to litigate the status of so many different services in a single classification proceeding, particularly when encumbered with the likelihood of protracted disputes involving both procedural and substantive matters, is an inefficient method for addressing jurisdictional issues. That a preferable alternative exists reinforces this conclusion.

Second, the suggested procedures do not appear to represent the most efficacious use of the Commission's and potential parties' resources. Under the statute, only the Postal Service is authorized to initiate rate requests. As a consequence, the Commission could not, in a Commission-initiated classification proceeding, recommend

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<sup>42</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984) (footnotes and internal quotation marks omitted).

<sup>43</sup> See *General Atomics v. U.S. Nuclear Regulatory Commission*, 75 F.3d 536, 541 (9th Cir. 1996) "Judicial review of an agency's jurisdiction should rarely be exercised before a final decision from the agency. 'It is well established in administrative law that before a federal court considers the question of an agency's jurisdiction, sound judicial policy dictates that there be an exhaustion of administrative remedies.'" Citing *Marshall v. Burlington Northern, Inc.* 595 F.2d 511, 513 (9th Cir. 1979).

<sup>44</sup> "Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." 39 U.S.C. § 409(a).

rates for any service found to be jurisdictional.<sup>45</sup> Thus, at most, any Commission determination of jurisdiction would result in a shell classification. Assuming that the Governors did not reject that recommendation, an unlikely supposition according to the Postal Service,<sup>46</sup> the earliest opportunity for the Commission to recommend rates for any such service would be in the next omnibus rate case. Furthermore, there is some question as to whether rejection or inaction by the Governors would afford an aggrieved party an opportunity to appeal.<sup>47</sup>

Lastly, the Postal Service's recent indication that it is terminating its involvement with several of the subject programs also has a bearing on the Commission's consideration of the issues. There is less of a need to attempt to develop a record regarding services that may arguably be considered postal if the Postal Service's involvement has terminated (or will shortly).

Accordingly, for these reasons, the Commission declines to grant CA's and OCA's request that it initiate a classification proceeding. In lieu of that and to provide guidance in the future, the Commission is instituting, in a companion order, a rulemaking proceeding to define the term "postal service."

## B. Authority to Offer Nonpostal Services

*CA and OCA Position.* CA and OCA argue that the Postal Service does not have authority to offer the challenged services to the public without first coming to the Commission for a recommended decision. In support of this position, they advance a two-pronged argument. First, they contend that the Postal Service has no authority to set fees for services it provides to the public, arguing that the authority to set or change rates is set forth only in section 407 (international mail) and sections 3621 and 3622. Since section 404(a)(6) does not include the power to set rates or fees, CA and OCA

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<sup>45</sup> See *National Association of Greeting Card Pub. v. U.S. Postal Service*, 569 F.2d 570, 598 (D.C. Cir. 1976) ("Under the Act only the Board has the authority and the power to make requests for recommended decisions on changes in postal rates and fees . . .")

<sup>46</sup> See Postal Service Comments at 35-36.

<sup>47</sup> See 39 U.S.C. § 3628.

conclude that the Postal Service's offering of services to the public, without a recommended decision by the Commission, "constitutes *ultra vires* acts never authorized by Congress."<sup>48</sup>

Second, citing former Title 39 and the legislative history of the Postal Reorganization Act, they argue that the phrase "nonpostal services" included in section 404(a)(6) is intended to mean only services provided by the Postal Service to other federal agencies. Historical examples of nonpostal services provided include: health services for the Federal Communications Commission, sale of migratory bird stamps, building services for other federal agencies, and transportation of military mail.<sup>49</sup> Current examples included in the Postal Service's system of accounts are food coupons, passport applications, and migratory bird stamps.<sup>50</sup> CA and OCA contend that no rates or fees are associated with these nonpostal services. Instead, the Postal Service is reimbursed for providing these nonpostal (public) services based on arms-length transactions with the relevant agency.

Distinguishing between nonpostal services provided by the Postal Service to other federal agencies and services it offers to the public, they conclude: "If a product or service is being sold by the Postal Service to the public, then there is no question that the Commission has the authority (and duty) to review its provision under the classification and ratemaking provisions of the [Act]."<sup>51</sup>

*Postal Service Response.* The Postal Service's position is that the proposal, which it characterizes as a comprehensive system of regulation of postal services and products, conflicts with the statutory scheme.<sup>52</sup> The Postal Service notes that CA and OCA interpret the Act to require a Commission recommended decision for any rate or fee charged for a service offered to the public.<sup>53</sup> The Postal Service dismisses the

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<sup>48</sup> Joint Letter at 23.

<sup>49</sup> *Id.* at 26.

<sup>50</sup> *Id.* at 27.

<sup>51</sup> *Id.* at 28.

<sup>52</sup> Postal Service Comments at 6-13.

<sup>53</sup> *Id.* at 10, n.20.



notion that the Commission has authority to determine the legal status of nonpostal services. Otherwise, the Postal Service contends, the Commission:<sup>54</sup>

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.

The Postal Service argues that section 404(a)(6) specifically authorizes it to provide commercial "nonpostal" services. It criticizes the CA and OCA arguments as contrary to the Act and Commission precedent.<sup>55</sup> It cites section 411 as authority to provide services to other governmental agencies, asserting that section 404(a)(6) must logically be interpreted to mean services other than those encompassed in section 411.<sup>56</sup> It notes that on occasion the Commission has reviewed the scope of its authority to review rates for postal services, the principal example being Docket No. R76-1 involving jurisdiction over special services. The Postal Service observes that the Commission has never adopted the position advanced by CA and OCA. In addition, the Postal Service states that it relies on more than section 404(a)(6) to provide nonpostal services, claiming that its authority also comes from its statutory mission and functions. To that end, it cites a duty to provide mail services throughout the country and "incidental services appropriate to its functions and the public interest."<sup>57</sup>

Lastly, the Postal Service responds to the contention that any rate charged for a service offered to the public must first be reviewed and recommended by the Commission. It argues that under the Act only rates and fees for postal services require

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<sup>54</sup> *Id.* at 13.

<sup>55</sup> *Id.* at 14.

<sup>56</sup> *Id.* at 15. In reply, CA and OCA argue that sections 411 and 404(a)(6) refer to different services. Section 411 concerns bilateral exchanges of services between the Postal Service and other federal agencies, whereas section 404(a)(6) refers to services provided to the public by the Postal Service on behalf of other federal agencies. Joint Reply at 2-4.

<sup>57</sup> Postal Service Comments at 16-17.

a recommended decision from the Commission, noting, among other things, that sections 3621 and 3622 limit Commission jurisdiction to rates for “postal services.” The Postal Service also criticizes the CA and OCA argument regarding the lack of explicit rate authority in section 404(a)(6). The Postal Service notes that section 404(a)(5), which authorizes it to provide philatelic services, contains no reference to establishing fees. It points out that the Commission has acknowledged the Postal Service’s “authority to exercise broad and unilateral discretion over philatelic operations.”<sup>58</sup>

*Analysis.* CA’s and OCA’s argument that the Postal Service has no authority to offer the 14 services identified in the Petition without requesting a recommended decision from the Commission is flawed. First, section 404(a)(6) specifically authorizes the Postal Service to provide nonpostal services. Second, the Commission’s rate authority is limited to “postal” rates and fees, and its classification authority extends only to “changes in the mail classification schedule.” Consequently, regardless whether they are correct that the Postal Service may only provide “nonpostal” services for other government agencies, the issue of the lawfulness of any “nonpostal” service would be a matter for the courts, not the Commission.

Furthermore, CA and OCA overreach by contending that the Commission has authority to review the justification for providing any service or product sold to the public by the Postal Service irrespective of its putative postal nature. In Docket No. R76-1, the Commission disclaimed jurisdiction over incidental services, such as copying, provided by the Postal Service to the public.<sup>59</sup> Moreover, as the Commission concluded in Order No. 1239: “[t]he lawfulness of the independent actions by which the Postal Service implemented a service is simply not an issue before the Commission[.]”<sup>60</sup> To reiterate, the Commission’s jurisdiction extends only to postal rates and mail classification changes. Thus, only if the service is deemed postal would the Commission’s

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<sup>58</sup> *Id.* at 18.

<sup>59</sup> PRC Op. R76-1, Vol. 2, App. F at 19-20.

<sup>60</sup> PRC Order No. 1239, May 3, 1999, at 13.

jurisdiction be implicated. This leads to the question of which agency is empowered to determine the meaning of the term “postal service.”

While the courts have not addressed this issue, the most reasonable construction is the Commission may initially determine the scope of its jurisdiction. This conclusion is buttressed by a number of considerations. It is well established that an agency may in the first instance determine its own jurisdiction. “The need to protect the primary authority of an agency to determine its own jurisdiction ‘is obviously greatest when the precise issue brought before a court is the process of litigation through procedures originating in the (agency). While the (agency’s) decision is not the last word, it must assuredly be the first.’”<sup>61</sup>

The Commission’s consistent, long-held position is that it has authority to determine whether a particular service is within its jurisdiction. For example, in Docket No. R76-1, the Commission reviewed the status of various “special services,” ultimately classifying them as postal (and subject to its jurisdiction) or nonpostal.<sup>62</sup> In its opinion approving a stipulation regarding Mailgram service, the Commission expressly rejected “the notion that the parties to a proceeding may, among themselves, stipulate as to the jurisdictional limits of the Commission.”<sup>63</sup> In Docket No. MC78-3, Electronic Mail Classification Proposal, the Commission evaluated its jurisdiction compared to that of the Federal Communications Commission.<sup>64</sup>

More recently, in Docket No. C95-1, the Commission disclaimed jurisdiction over philatelic fees, declining to hear a complaint challenging proposed increases in the shipping and handling charges for orders placed with the Postal Service Philatelic

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<sup>61</sup> *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 621, 647 (1972), quoting *Marine Engineers Beneficial Assn. v. Interlake S.S. Co.*, 370 U.S. 173, 185 (1962).

<sup>62</sup> PRC Op. R-76-1, Vol. 2, App. F.

<sup>63</sup> PRC Op. MC76-1-4, June 17, 1977, at 4 (footnote omitted). Under the terms of the settlement, the parties stipulated that Mailgram was not a postal service, but rather a communications service subject to regulation by the Federal Communications Commission. The Commission specifically held that its conclusion that Mailgram service was not appropriate for inclusion in the DMCS was without precedential effect. *Id.* at 6.

<sup>64</sup> PRC Op. MC78-3, December 17, 1979, at 36 *et seq.*

Fulfillment Service catalog sales program.<sup>65</sup> In Docket C96-1, the Commission found the Postal Service's Pack and Send Packaging service to be postal in character.<sup>66</sup> Lastly, as previously discussed, in Docket No. C99-1, the Commission held that, on complaint, it had authority to review the status of Post ECS service.<sup>67</sup>

The general principle is clear that an agency's interpretation of its jurisdiction is entitled to deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984); *Transmission Access Policy Study Group v. Federal Energy Regulatory Commission*, 225 F.3d 667, 694 (D.C. Cir. 2000) ("It is the law of this circuit that the deferential standard of [*Chevron*] applies to an agency's interpretation of its own statutory jurisdiction."); see also *Oklahoma Natural Gas Company v. Federal Energy Regulatory Commission*, 28 F.3d 1281, 1283 (D.C. Cir. 1994).

Moreover, in matters involving rates and mail classifications, it is settled that the Commission's interpretation is entitled to deference. In *United Parcel Service*, the court rejected the Postal Service's argument that its interpretation of the Act deserved deference. "[I]t was recognized there [in *NAGCP v. USPS*, 569 F.2d 570 (DC Cir. 1976)] as we do here, that the agency entitled to deference in the interpretation of 39 U.S.C. §§ 3622-24 is the Rate Commission - not the Postal Service - as it is the Rate Commission which is charged with making recommended decisions on changes in rates and mail classification."<sup>68</sup> The Postal Service's contention that there is ambiguity on the point is not persuasive.<sup>69</sup> The case cited by the Postal Service, *Air Courier Conference of America/International Committee v. U.S. Postal Service*, 959 F.2d 1213 (3<sup>rd</sup> Cir. 1992), concerned the Postal Service's unilateral authority to set rates for international mail service. While the court found the Postal Service's interpretation of section 407(a) consonant with the Act's text, there was no dispute between the Commission and the

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<sup>65</sup> PRC Order No. 1075, September 11, 1995, at 5.

<sup>66</sup> PRC Order No. 1145, December 16, 1996, at 19.

<sup>67</sup> PRC Order No. 1239, May 3, 1999, at 12-13.

<sup>68</sup> *United Parcel Service v. U.S. Postal Service*, 604 F.2d 1370, 1381 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

<sup>69</sup> Postal Service Comments at 29-30.

Postal Service, as the Commission agreed with the Service's interpretation.<sup>70</sup> The court contrasted this situation with that presented in *United Parcel Service, supra*. "There we refused to defer to the Postal Service because its interpretation was inconsistent with the Act."<sup>71</sup> Notably, that case involved the Commission's authority over rate and mail classification changes, matters, at least in the first instance, singularly within the Commission's jurisdiction.

In conclusion, the Postal Service's initial characterization of a service is neither dispositive of the issue nor determinative of the Commission's jurisdiction. Precedent and a fair reading of the Act confirm the Commission's authority to determine the scope of its own jurisdiction.

#### 4. Companion Rulemakings

The Commission's Rules are replete with reference to the terms "postal service" and "postal services." For example, Rule 51 provides that the rules in Subpart B govern requests under section 3622 of the Act for a recommended decision on changes in rates and fees for postal service. Pursuant to Rule 54(b)(1) every formal request must include rate and fee schedules for all proposed postal services. Similarly, Rule 54(h)(1) requires each formal request to separate the Postal Service's actual and estimated costs for certain fiscal years between postal services and nonpostal services. *See also, e.g.,* Rule 54(l)(1) regarding billing determinants, Rule 64(b)(1) regarding changes in the mail classification schedule, Rules 71-74 regarding changes in the nature of postal services, Rule 82 concerning complaints, and Rules 181 and 182 concerning the use of multi-year test periods in connection with a new postal service. Heretofore, that the term "postal service" is not expressly defined in the rules has not caused undue concern or controversy. Of late, however, that would no longer appear to be so, as evidenced not only by the services addressed in this proceeding, but also by other recent dockets before the Commission, discussed more fully in Order No. 1389 issued coincidentally

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<sup>70</sup> *Air Courier Conference* at 1224-25.

<sup>71</sup> *Ibid.* citing *United Parcel Service, supra*, 604 F.2d at 1380.

herewith. As a result, the Commission has concluded that clarification of its rules is warranted. Consequently, the Commission proposes to amend its rules by including a definition of the term “postal service.” See Order No. 1389. As more fully discussed in that order, codification of the term in the Commission’s Rules is appropriate and timely. It addresses what appears to be becoming an increasingly controversial matter, while providing guidance to the Postal Service and the public concerning services that fall within the purview of sections 3622 and 3623 of the Act.

The second specific request in the CA petition, that the Commission initiate a rulemaking to establish reporting requirements concerning the Postal Service’s non-jurisdictional activities, is granted. Two commenters, Pitney Bowes and PostCom, specifically endorse this proposal, while the remaining commenters, other than the Postal Service, support the petition in its entirety. While noting that neither financial transparency nor accountability is served if the underlying data are not made public, PostCom observes that “[p]roperly tailored accounting and reporting practices are entirely consistent” with the Postal Service’s professed objectives, e.g., trying new things, spreading risks, and stimulating innovation.<sup>72</sup> While stating its belief that the Postal Service should not enter markets served by the private sector, Pitney Bowes argues that the Commission is “uniquely situated” to provide “regulatory oversight of non-core [nonpostal] services.”<sup>73</sup> It concludes: “The Commission has a direct interest and a responsibility to insure that revenues derived from the rate paying public’s consumption of classified services are not being used to subsidize unclassified services.”<sup>74</sup>

The need to revise the Commission’s Rules, which have long required the Postal Service to separate costs between postal and nonpostal services, has become more acute as the Postal Service has expanded its “nonpostal” operations. The General Accounting Office reports discussed in the petition underscore the need for the Postal

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<sup>72</sup> Further Comments of PostCom, April 18, 2003, at 2.

<sup>73</sup> Comments of Pitney Bowes, Inc., April 18, 2003, at 6.

<sup>74</sup> *Ibid.*

Service to provide accurate and timely financial information concerning its various “initiatives.” Similarly, in its Report, the President’s Commission on the United States Postal Service emphasizes the need for greater financial transparency concerning the Postal Service’s operations.

The need for an accurate accounting of the Postal Service’s “postal” and “nonpostal” activities traces to the statute. First, the Postal Service operates under a breakeven requirement, *i.e.*, revenues from postal rates and fees must equal as nearly practicable the Postal Service’s total estimated costs. 39 U.S.C. § 3621. Second, section 3622(b)(3) requires that each class or type of mail bear the direct and indirect postal costs attributable to it plus a reasonably assignable portion of the Postal Service’s other costs.<sup>75</sup>

To recommend rates that satisfy the Act, the Commission must have accurate cost and revenue information regarding both jurisdictional (domestic postal) services and non-jurisdictional (nonpostal) services. Without such information, the Commission cannot reasonably determine the net revenue to be generated by jurisdictional services to enable the Postal Service to achieve a financial breakeven result. Nor, without reliable estimates of the Postal Service’s non-jurisdictional revenues and expenses, can the Commission ensure, under section 3622(b)(3), that costs properly attributable to non-jurisdictional services are not reflected in rates for jurisdictional services. Such data are undeniably relevant for the Commission to recommend rates for jurisdictional services that are fair and equitable and free from cross-subsidies. Indeed, the Postal Service has acknowledged that non-jurisdictional costs and revenues (concerning international mail services) are prerequisites to determine revenues from jurisdictional services.<sup>76</sup> Accordingly, as noted above, it is the Commission’s intent to issue, in the near future, a proposed rulemaking to establish reporting requirements regarding the Postal Service’s non-jurisdictional activities.

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<sup>75</sup> In addition, section 403(c) prohibits both undue discrimination among users and any undue preference for any user.

<sup>76</sup> PRC Op. R94-1, November 30, 1994, para. 1085.

It is ordered:

For the foregoing reasons, the petition filed by Consumer Action October 15, 2002, requesting, *inter alia*, that the Commission initiate a classification proceeding is denied, in part, and granted, in part.

By the Commission  
(SEAL)

Steven W. Williams  
Secretary