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

Proposed Amendment to The Commission's Rules	))	Docket No. RM2004-1

OFFICE OF THE CONSUMER ADVOCATE AND CONSUMER ACTION COMMENTS ON PROPOSED AMENDMENT TO THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE (March 15, 2004)

The Office of the Consumer Advocate ("OCA") and Consumer Action ("CA") hereby respond to the Commission's Proposed Rulemaking ("Notice") inviting comments on or before March 15, 2004, on the Commission's proposal to revise the Commission's Rules of Practice and Procedure in 39 C.F.R. §3001.5 ("Rule 5").[1] CA is an independent non-profit membership organization founded in San Francisco in 1971. It serves consumers nationwide by advancing consumer rights.[2]

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[1] "Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure," Order No. 1389, January 16, 2004. Following an OCA motion filed on February 27, 2004, "Office of the Consumer Advocate Motion to Reschedule Deadline for Filing Comments in RM2004-1," the Commission graciously extended the deadline for filing Comments to March 15, 2004, in Order No. 1393, "Order Granting Motion for Extension of Comment Deadlines," issued February 27, 2004.

[2] CA refers consumers to complaint-handling agencies through a free hotline, publishing educational materials in English, Spanish and a variety of major Asian languages including Russian, and advocating for consumers in the media and before legislators. The organization also assists consumers by comparing prices on credit cards, bank accounts, and long distance services. CA previously filed before the Commission on October 15, 2002 a petition requesting the institution of Commission proceedings to review the jurisdictional status of fourteen specified services and to establish rules accounting for costs and revenues of non-jurisdictional domestic services. See "Order Denying, in Part, and Granting, in Part, Petition," *Petition to Review Unclassified Services*, Order No. 1388, January 16, 2004.

The proposed revisions are intended for the first time to add a definition of "postal service" to the Commission's rules (§3001.5(r)). The Commission explains that the need for the rule is to aid the Postal Service and mailers in resolving recent issues regarding the jurisdictional need for Commission review of certain postal services.

OCA and CA respectfully offer the following comments upon the proposal. OCA and CA fully support the need for a definition of "postal service" for inclusion in the rules.[3] As the Commission has noted, several recent cases have turned upon the definition of postal services, including those related to philatelic services, postal packaging services, and electronic mail. It is hoped that the rule will provide significant future assistance in resolving the issues that were brought before the Commission in the Consumer Action Petition for review of unclassified services of the Postal Service.[4] Although the Commission order denied the Petitioner's request for a hearing at this time to determine the jurisdictional status of those unclassified services,[5] the Commission deferred the final determination as to whether those services require classification and rate review. Instead the Commission stated that a preferable alternative exists: that of instituting the instant rulemaking to define the term "postal service." Presumably, with a definition in place, the Postal Service will then be able to determine whether appropriate filings are required for any of its currently unclassified services. Also, complaints may lie to enforce the filing of appropriate classifications for these unclassified services.

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[3] Our proposed definition appears in Appendix A of these comments.

[4] "Petition of Consumer Action Requesting that the Commission Institute Proceedings to (1) Review the Jurisdictional Status of Fourteen Specified Services and (2) Establish Rules to Require a Full Accounting of the Costs and Revenues of Non-Jurisdictional Domestic Services," October 15, 2002.

[5] "Order Denying, In Part, and Granting, In Part, Petition," *Consumer Action Petition for Review of Unclassified Services*, Order No. 1388, January 16, 2004.

Some of the controversy over what constitutes a "postal service" is reminiscent of disputes over the proper scope and extent of the Domestic Mail Classification Schedule ("DMCS"). This is hardly surprising; a determination that a service offering is a "postal service" is equivalent to deciding that the service must be included in the DMCS. Those disputes of the 1970s culminated in Docket No. MC76-5. In its opinion in that case, the Commission attempted to distinguish between essential definitional aspects of a service and operational details concerning provision of a service. Specifically, the issue before the Commission was what regulations of the Postal Service should be included in the DMCS. It was the Commission's view that operational details could be left out of the DMCS unless they were necessary to define and distinguish a particular service.[6] The Commission also stated that:

> a DMCS should categorize products and services so that those products and services that are likely to bear different rates are clearly distinguished from one another. . . . Obviously, Postal Service regulations can have an effect . . . on rates. . . . [C]hanges in regulations may create or eliminate differences in cost or value of service that would *justify a separate rate for a previously undefined category of mail,* regardless of the purpose for the change.

OCA and CA commend the Commission for formulating a canny administrative solution to a "vexing" problem that has produced "several contentious PRC proceedings."[7] The Commission's decision to establish a firm, clear position on what services and products constitute Chapter 36 jurisdictional services will undoubtedly be

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6 PRC Op. MC76-5 at 13-15 (Nov. 29, 1978) (emphasis added).

7 "Comments of the Postal Rate Commission Concerning the President's Commission on the Postal Service Submitted to the Committee on Governmental Affairs," November 19, 2003, at 5.

the most administratively efficient path to resolve opposing points of view on this question and forestall fruitless complaint filings.

In addition, to promote the Commission's goal of finally settling conflicting positions on these questions,[8] OCA and CA respectfully ask the Commission to modify and supplement the rule change set forth in Order No. 1389. In OCA's and CA's view, the instant rulemaking constitutes the ideal mechanism for building a complete, comprehensive framework for defining those services and products that come within the Commission's jurisdiction under 39 U.S.C. §§3622 and 3623. A number of recent actions by the Postal Service to "push the envelope" on both traditional and non-traditional commercial activities make it imperative for the Commission to articulate the dividing line between activities that may be initiated without first coming to the Commission with a request for a recommended decision and those that may not. OCA and CA urge the Commission to add descriptive and definitional language to the Commission's rules so as to resolve remaining disagreements and uncertainties. The language of the rules proposed by OCA and CA appears in Appendix A of this pleading.

[8] In Order No. 1389, at 8, the Commission explains that:

> the postal character of new services provided by the Postal Service is unsettled. Because the issue appears to be increasingly controversial, the Commission has determined that it would be administratively most efficacious to clarify it by rule rather than on an ad hoc basis.

I. Postal Reorganization Act Framework for Defining Jurisdictional Services

OCA and CA believe that one of the chief divisions between jurisdictional and non-jurisdictional services is distinguishing Chapter 36 "postal services" from Chapter 4 "nonpostal services." Congress' view of the respective roles of the Postal Service and the Postal Rate Commission are presented in Chapter 4 of the Postal Reorganization Act (PRA), i.e., outlining the "General Authority" of the Postal Service; and Chapter 36, outlining the limitations on the Postal Service's powers to establish "Postal Rates, Classes, and Services." In Chapter 4, Congress conferred on the Postal Service powers to *provide* mail services (§404(a)(1)) and philatelic services (§404(a)(5)); and to provide, establish, change, or abolish special nonpostal or similar services (§404(a)(6)). Also in Chapter 4, Congress delegated to the Postal Service both the power to establish international mail services and to set international rates of postage (with the consent of the President, in §407).

Congress was content in delegating its powers to establish postal and nonpostal services because postal services (those provided by the Postal Service on its behalf and on behalf of its postal customers) would have to go through the testing procedures of the Administrative Procedure Act ("APA"). APA procedures include furnishing evidentiary support for a proposal to change rates or classifications, public input, and a hearing on the record. Congress had the further assurance that a body of experts, i.e., the Postal Rate Commission and its staff, would recommend changes in rates and classifications only if they determined that the evidentiary record satisfied the requirements of §§ 3622 and 3623 of title 39.

Nonpostal services, as Congress well knew, were those furnished on behalf of other governmental agencies. Consequently, Congress delegated more extended powers, with fewer limitations, where nonpostal services (public, governmental services) were involved. One important reason that nonpostal services could escape APA scrutiny is that the Postal Service would not be tempted to compete unfairly or cross-subsidize such services in order to increase its revenues. As governmental services, themselves, they typically would not be offered in competition with private sector entities. The fairly equal balance of power between two governmental agencies and the arm's length nature of a bilateral agreement between them do not pose the risks or temptations of ventures to raise extra revenues by competing with private sector enterprises. In any event, since nonpostal services were well known to Congress as governmental services, all of the services that remain, i.e., those sold to the public on behalf of the Postal Service itself, were equally understood to be postal services within Chapter 36 and subject to the jurisdiction of the Postal Rate Commission.

Apart from the need for the rule to clarify the distinction between nonpostal and postal services, these comments will discuss some areas that we believe must be considered jurisdictional postal services. As such, the Commission should be certain the rules cover situations regarding de facto new services, pilot tests, services provided through a strategic alliance arrangement, and electronic services.

There are recent examples of experimentation by the Postal Service to offer distinct new services, many of them involving traditional mail, that constitute de facto classification changes commenced without the imprimatur of the Commission. Two such

are *Electronic Tracking Confirmation*[9] and the new *Carrier Pickup* service now offered widely throughout the United States that is similar to a classified service, *Pickup on Demand*, but which is offered free of charge. These services are at the edge of another important dividing line, between distinct new services and mere operational details managed by the Postal Service. In the view of OCA and CA, many of these services are clearly de facto mail classifications that are being offered to the public in violation of Chapter 36.

Another area of postal service activities that OCA and CA ask the Commission to address falls between services managed primarily by the Postal Service and those that are sold to the public as U.S. Postal Services, but which are primarily operated by a Postal Service strategic partner. The Commission denominated such arrangements as "strategic alliance[s] or contract[s]" in another rulemaking it recently established, Docket No. RM2004-2.[10] In the view of OCA and CA, services offered to the public through a strategic alliance are postal services, too, because of significant involvement by the Postal Service and the impression deliberately conveyed to customers that they are purchasing U.S. Postal Service services. Netpost CardStore and eBillPay are examples of such services. In cases where traditional mail-type services are involved, it is clear that such strategic partnership arrangements constitute de facto changes in mail fees and mail classifications. Any such services offered without a prior recommended decision by the Commission are in violation of Chapter 36. OCA and CA contend, of

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[9] Identified as Bulk Access, Batch Processed Delivery Confirmation Information for Certified Mail by Walz Postal Solutions in Docket No. C2002-3. The Commission dismissed the Walz Complaint in Order No. 1385, issued October 9, 2003.

[10] "Reporting Requirements for Nonpostal Services," Order No. 1394, issued March 5, 2004.

course, that even commercial services that are not like traditional mail are postal services, nonetheless, and subject to Chapter 36 procedures.

Electronic services constitute a distinct new sphere of commercial activity by the Postal Service. These are unquestionably "postal services" on two grounds: (1) they are not "nonpostal" (i.e., governmental) services, and (2) in any event they substitute for traditional mail services and are an equivalent form of mail. Therefore, they not only fall within the definition of postal services, they are also mail.

In Appendix A, OCA and CA have developed an extended framework for a rule that draws these dividing lines clearly and distinctly.

II. Postal Services vs. Nonpostal Services

A. Nonpostal Services

In our view, the Postal Reorganization Act envisions two broad types of domestic service and sales activities that would be undertaken by the Postal Service.[11] The legislative history, as well as prior title 39, make clear that services for other governmental agencies for which the Postal Service is reimbursed are identified as "nonpostal" in Section 404(a)(6). Thus, nonpostal is a term of art having a limited meaning within the statute.

1. *The rules should define nonpostal services*. In order for the distinction between postal services and nonpostal services to be clear and understandable, the Commission should include a definition of nonpostal services in its rules. The word nonpostal appears in §404(a)(6) of the PRA; and legislative history makes its meaning clear. Although the Commission appears to reach a different conclusion regarding the meaning of nonpostal in two recent orders, OCA and CA respectfully note that the conclusion was not the result of rigorous review and analysis of the legislative history, which, in our view, points to a different conclusion. Regrettably, therefore, OCA and CA must ask the Commission to reconsider its determination that “nonpostal” products and services can be commercial in nature.

Mindful that the correct method for ascertaining Congressional intent is, first, to research thoroughly the legislative history of the PRA, OCA/CA specifically examined every page of legislative history (comprising thousands of pages) to ascertain Congress’ understanding of the term “nonpostal.” Little was written about the term “nonpostal,” but

several crucial pieces of evidence were located. First, and most important of these, is that Congress used the term nonpostal in postal statutes that were immediately antecedent to the PRA. Former §2303 of title 39 gave an example of a "nonpostal service[]" – these were services "such as the sale of documentary stamps for the Department of the Treasury." This understanding, i.e., that "nonpostal services" were those provided by the Postal Service on behalf of other governmental entities, was manifest throughout the remaining search through the legislative history.

Members of the Kappel Commission understood "non-postal services" to be those "performed for other Government agencies."[12] Likewise, Congress' understanding of "nonpostal services" was the same as the Kappel Commission's. "Nonpostal services" were defined as "[p]ublic service costs associated with non-reimbursed services for other government agencies."[13]

In the "Nonpostal Functions" section of *The United States Postal Service* (1973),[14] G. Cullinan states that "because of its ubiquity in American life" the Post Office "was called upon to perform a bewildering number of nonpostal functions *pro bono publico*." These include "a steady accretion of minor federal functions", such as the sale of Liberty bonds and war savings certificates; registration of aliens; sale of U.S. savings bonds; sale of documentary stamps; notary public services; and the acceptance of passport applications.

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11 Leaving aside the international mail and philatelic services covered explicitly in certain sections.

12 *Kappel Commission Report* at 136 and 138.

13 "Background Paper, Public Service Costs," included in *Hearing Report No. 91-19, Subcommittee on Postal Rates, Committee on Post Office and Civil Service*, June 25-December 10, 1969 at 59.

14 At 196-99.

The most significant statement concerning the meaning of the term "nonpostal" is found in *Associated Third Class Mail Users v. United States Postal Service* , 405 F. Supp. 1109, 1117 (D.D.C. 1975, Sirica, J.) ("*ATCMU*"). Judge Sirica stated, in n. 3, that "'nonpostal' [l]ikely . . . encompasses such activities as selling United States savings bonds for the Treasury, maintaining a country-wide information service on civil-service examinations for all government positions, and conducting examinations for the Civil Service Commission."[15]

OCA's and CA's approach to ascertaining Congressional intent is, in fact, the course of action taken by the U.S. Court of Appeals for the Third Circuit in *United Parcel Service, Inc. v. U.S. Postal Service*, 604 F.2d 1370, 1376 (3d Cir. 1979). In searching for Congress' meaning for the term "rate," which was not specifically defined in the Act, the Court looked carefully at "the use of that term prior to 1970." Likewise, the District Court, whose opinion was affirmed by the Third Circuit, explained that its "modus procedendi is to begin with the statutory language and then measure that language against what we know of the congressional intent."[16]

The Commission relies on its previous determinations concerning the postal/nonpostal nature of challenged services. OCA and CA respectfully ask the Commission to reject its earlier decisions that failed to frame the question of Commission jurisdiction under Chapter 36 along the lines dictated by the legislative

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[15] The Commission cites and relies upon the *ATCMU* case in Order No. 1389. OCA and CA respectfully request that the Commission also rely upon footnote 3 of that opinion – that nonpostal services are likely those furnished by the Postal Service on behalf of other governmental agencies.

[16] 455 F. Supp. 857, 879 (E.D. Pa. 1978).

history, Congressional intent, and Judge Sirica's elucidation of the likely meaning of the term "nonpostal." The question to pose in deciding whether the Commission has jurisdiction over a retail product or service is whether the service is provided on behalf of another governmental entity, not whether the service has the characteristics of a traditional physical mail service. OCA and CA submit that the proper question is whether the service is provided to fulfill the mission of another governmental agency or whether its purpose is to fulfill the Postal Service's mission.[17] Those services and products that are retailed to the public to raise revenues to fund the Postal Service's universal service obligation or other duties that the Postal Service is charged with performing are Chapter 36 postal services. In the future, the question should be framed: is the subject service or product provided on behalf of another agency's mission or to fulfill the Postal Service's mission? If the answer is to fulfill another agency's mission, then it is a nonpostal service and not a jurisdictional service. If the answer is to fund the mission of the Postal Service, then the product or service is subject to the Commission's jurisdiction under Chapter 36.

In earlier cases, the Commission was not far off the mark in posing the question: is a challenged service a nonpostal service or a postal service? The chief difficulty was not applying a proper definition of a "nonpostal" service. It was believed formerly that "nonpostal" services might be retail products and services that were not like traditional physical mail; but such a belief is in conflict with the legislative history of the PRA.

[17] In its "Report on Nonpostal Initiatives," filed on March 10, 2003, in Docket No. *2003, at 1, the Postal Service states that this is one of the key distinguishing features of its effort to expand into new, non-traditional areas: "To fulfill its universal service mandate and mission, the Postal Service must find ways to use existing resources to generate new revenue."

Unless the Postal Service can find in the legislative history an explicit Congressional delegation to allow the Postal Service to retail products and services to the public that do not have to comply with the provisions for proper cost attribution, fairness, equity, and competitive balance, OCA and CA believe that *their* view of the proper statutory interpretation must be settled upon as best fulfilling Congressional intent.

A recent Supreme Court decision contains language that superficially appears to apply to the postal/nonpostal debate, but is actually irrelevant. For example, in *United States Postal Service v. Flamingo Industries Ltd*, No. 02-1290, slip op (Feb. 25, 2004), the Court states that "[t]he Postal Service does operate nonpostal lines of business, for which it is free to set prices independent of the [Postal Rate] Commission, and in which it may seek to make profits . . . ." The Court clearly used "nonpostal" in a non-technical sense, being unaware of (1) lower court discussions of the meaning of that word and (2) this rulemaking. Unfortunately, none of the authorities relied on in the opinion supports the statements made. Indeed, one of the authorities cited contains language that flatly contradicts the statement for which it is cited.

The next-to-last paragraph of the Flamingo opinion contains the following language (citations omitted):

> The Postal Service does operate nonpostal lines of business, for which it is free to set prices independent of the [Postal Rate] Commission, and in which it may seek profits to offset losses in the postal business. The great majority of the organization's business, however, consists of postal services. Further, the Postal Service's predecessor, the old Post Office Department, had nonpostal lines of business, such as money orders and postal savings accounts.

The citation for the last sentence is G. Cullinan, *The United States Postal Service*. That book has an explicit discussion of "nonpostal functions" of the Post Office Department.

Id. at 196-99. The description of "nonpostal functions" is identical to that of "nonpostal service" in n. 3 of *ATCMU*. It is also the same definition that OCA and CA are urging the Commission to rely on.

The point that the Supreme Court was making is that neither the old Post Office Department nor the current Postal Service engaged(s) in significant unregulated commerce. The primary role of the Postal Service is governmental, not commercial. Thus, the Postal Service cannot be considered a "person" separate from the government and suable under the antitrust laws. The Court's statement that "[t]he Postal Service does operate nonpostal lines of business" should not be read to mean that the Service is authorized to set its own prices or make a profit on some products or services that it offers to the public. The Court was not informed of the previous history in the courts and before the Commission of the term "nonpostal."

As is evident from the discussion of the *Flamingo* case, the term "nonpostal" is an unusual one that is not well understood by the public or by those who have not combed the legislative history for the term's meaning. Congress' meaning in choosing this term can only be ascertained by careful research into the legislative history of the PRA. The Commission must reflect Congress' intent by fashioning a rule that draws the dividing line between Chapter 36 postal services (that are subject to the Commission's jurisdiction) and nonpostal services that are outside the Commission's jurisdiction in the way Congress intended.

Furthermore, the *general* duties provisions of the PRA, such as §§403 and 404, are subordinate to the *specific* ratemaking and classification provisions of §§3622 and

3623.[18] It is with deep regret that OCA and CA ask the Commission to reconsider its statements in Orders 1388 and 1389 that the term "nonpostal" can include nontraditional retail products and services.

2. *Interrelationships with Docket No. RM2004-2*. Although comments in a more recent rulemaking proceeding, Docket No. RM2004-2,[19] are not due until April 15, 2004, OCA and CA believe that the term "nonpostal" must be defined in the instant proceeding so as to clear up the confusion surrounding the word. As argued at length above, OCA and CA ask the Commission to define the term "nonpostal" in Rule 54. The definition should be limited to services provided by the Postal Service on behalf of other governmental agencies.

OCA and CA further ask that proposed Rule 54(h)(1)(i), from Docket No. RM2004-2 *not* use the term "nonpostal" to identify the services that are subject to the new, detailed accounting and reporting requirements. Instead, OCA and CA respectfully ask the Commission to substitute the following phrase

> domestic products and services offered to the public outside of the definition of a postal service as set forth in Rule 3001.5(r). Products and services that fall outside the definition of a postal service are those that are provided to the public without first being recommended by the Commission under 39 U.S.C. §§3622 and 3623. A service subject to this rule consists of a product or service for which a charge is levied and, provision of a product or a service at no charge.

In the view of OCA and CA, using the term "nonpostal" in proposed Rule 54(h)(1)(i), in Docket No. RM2004-2, creates considerable confusion about which

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[18] *See* id. at 870.

[19] "Proposed Rulemaking Concerning Reporting Requirements for Nonpostal Services," issued March 5, 2004.

products and services are subject to the new, detailed reporting requirements and which are not. The Commission uses the phrase "commercial nonpostal activities" which is not a phrase used in the legislative history of the PRA, and which appears to be inconsistent with Congress' and Judge Sirica's use of the phrase. Reference to nonpostal commercial services and products cannot be found in any of the cited authorities. As far as OCA and CA are able to determine, there is no consistent, universal understanding or agreement of what is meant by a "nonpostal commercial service." Confusion will be minimized, therefore, by fully *describing* the types of products and services subject to the rule, as opposed to the use of the word "nonpostal" for which there are conflicting interpretations.

OCA and CA also want to point out the risk of allowing the Postal Service to define the term "nonpostal" according to its policies and institutional culture. In the Report on Nonpostal Initiatives,[20] the Postal Service states plainly that the services cited in CA's petition are sometimes classified as "nonpostal" services by the Postal Service and sometimes not:

> The Petition lumps together a disparate array of . . . initiatives, some of which involve nonpostal services provided by the Postal Service to the public, and some of which do not provide services to the public or *have never been characterized as "nonpostal" services*.

In addition, the Postal Service claims authorization for the provision of non-traditional services under more than just the "nonpostal" section of the PRA, i.e., 39 U.S.C.§404(a)(6). In its Comments in Docket No. *2003,[21] the Postal Service states

[20] At 2 (emphasis added).

[21] Filed on January 30, 2003, at 16 – 17.

that it "does not rely exclusively on section 404(a)(6)." It claims that this authority also comes from its "statutory mission and functions." The Postal Service frequently cites a statement contained in one of the House Reports on H.R. 17070:[22]

> The Postal Service is empowered to engage in research and development programs directed toward the expansion of present postal services and the development of new services responsive to the evolving needs of the United States.

Use of the term "nonpostal" in the new accounting/reporting rule leaves the definition of "nonpostal" entirely up to the Postal Service. It is possible to imagine the Postal Service accepting OCA's argument that "nonpostal" means "governmental" or "public service" for purposes of reporting under the rule, or to abandon the characterization of non-traditional commercial activities as "nonpostal services" and devise a new label for them. If that were to be the case, then it is possible that the Postal Service could conclude it had little or nothing to report under the new reporting rule.

It is far safer to describe exactly which services are to be reported on in the new rules. The approach recommended by OCA and CA is not as susceptible of judgmental and subjective interpretations. In OCA's and CA's formulation, whether the services that are subject to the new accounting and reporting rules have been recommended by the Commission under 39 U.S.C. §§3622 and 3623 is a fact not subject to interpretation.

[22] E.g., "Report on Nonpostal Initiatives," Docket No. *2003, at 1.

B. Postal Services

The second type of U.S. Postal Service activity contemplated by the Congress in the PRA is postal services. If Congress' intent in using the term "nonpostal" was to refer to a distinct type of service that would be provided by the Postal Service on behalf of other governmental entities, then it necessarily follows that any other types of services retailed to the public were intended by Congress to be Chapter 36 postal services. This is because they are activities used to fund the Postal Service's universal service obligation and other mail services mission. Thus, if commercial services and products retailed by the Postal Service (whether traditional in character or not) are not *nonpostal* services, the conclusion is inescapable that they are *postal* services.

No activity other than "postal services" involving services or sales to the public (other than international mail and philatelic services) is discussed, referenced or recognized in the legislation. The legislative history is silent as to any activities of the Postal Service that are not related to its core mission and indicates that Congress did not contemplate activities by the Postal Service not related to its core mission (binding the Nation together through the personal, educational, literary, and business correspondence of the people). No suggestion is made in the legislation or its history that the Postal Service could or would undertake activities in the nature of service or sales to the public that were anything other than postal services. The silence in the legislative history regarding any activities by the Postal Service that are outside of those functionally related to mail indicates that the regulatory regimen was designed to cover all of the anticipated service and sales activities by the Postal Service. Otherwise Congress would have wrestled with the idea of just how to draw the line between those

activities subject to Postal Rate Commission rate and classification jurisdiction and those that are not. Instead, the statute provides for jurisdiction over fees for postal services. It does not limit jurisdiction to fees for mail services or to fees for services functionally related to mail, but to postal services; that is, services undertaken by the Postal Service.

This conclusion is supported by the rules of statutory construction. A court will look at the overall context of a statute and the purposes for which it was designed. And if the statute is silent on an issue, then it looks to the underlying regulatory purpose of the legislation. Here it is apparent that Congress assumed the Postal Service would only carry on activities related to its core mission. If that is so, then Congress provided for review by the Commission of all of those activities not otherwise covered as international, philatelic, or inter-governmental in nature. Congress never suggested that any activities of the Postal Service would not be subject to rate and classification review. When Congress used the term "postal services" it was not using a term of art, but referring broadly to service by the Postal Service. Even where the Postal Service undertakes activities that are not the sale of postage or the carrying of mail, it is providing postal services and the fees and classes of those "postal services" are subject to Commission review under Chapter 36. To date, when such services are functionally related to mail but are not mail, they have been denominated "Special Services." Other services have not been reviewed and labeled.[23] Although many of the services of the Postal Service in the electronic field are the functional equivalent to mail, others are

[23] In one case the Commission has deemed handling charges for philatelic services to be outside the regulatory regime of the statute.

merely related to mail, and some may be characterized as not related to mail at all. Yet all of them are postal services and covered by the regulatory scheme of the PRA.

Case law prior to February 25, 2004,[24] addressing Postal Service forays that circumvented the provisions of Chapter 36, support OCA's and CA's view that Congress never intended to give the Postal Service the unfettered freedom to sell any product or service to anyone, in any market, under any terms, at any price, with no review by an outside agency. For example, the Third Circuit in the *UPS* case (604 F.2d at 1379) states emphatically:

> any reasonable examination of the purposes of the Act discloses congress' implicit design that the distinct functions of service provision and rate adjustment be divided between the Postal Service and the Rate Commission. . . . The Postal Rate Commission . . . was created specifically to oversee the ratemaking process. Its expertise is in the setting of rates and fees that are fair and equitable . . . .

The District Court in the *UPS* case[25] explained that a vital congressional purpose in establishing a Postal Rate Commission was to have:

> An agency independent of the Postal Service [to] provide for public notice and hearing input of those affected by the proposed action and full and on the record. . . . Congress was, after all, relinquishing the bulk of its control over the post office and it had to be sure that legitimate public interests were protected, for it would no longer be able to provide that assurance itself. Thus, the Postal Rate Commission . . . also was designed as a sort of sunshine mechanism to avoid undue political influence and to assure that the public is heard from and the public interest represented before rate, classification, and significant service changes are made.

The District Court articulated additional reasons that Congress viewed the oversight by the Commission as imperative: "possible managerial favoritism, political or

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[24] The *Flamingo* opinion is discussed above.

[25] 455 F. Supp. 857, 869 (E.D. Pa. 1978)

otherwise, avoidable and harsh impact on that part of the private sector that competes with the Postal Service" are minimized or eliminated when the Commission performs its review of rate, classification, and service changes under Chapter 36.[26]

OCA and CA find the landmark case, *Phillips Petroleum v. Wisconsin*, 347 U.S. 672 (1954) (("*Phillips*"), instructive in this matter. In *Phillips*, the Federal Power Commission ("FPC") decided to follow its past restrictive interpretation of the legislative history of the Natural Gas Act ("NGA") and ruled that sales of natural gas by a producer to an interstate gas pipeline were part of non-jurisdictional production and gathering activities. Thus, it concluded that it did not have rate jurisdiction over the natural gas producer sales of natural gas to interstate gas pipelines. This longstanding interpretation and practice by FPC was rejected by both the Court of Appeals and the Supreme Court. Both Courts held that the NGA provided for the FPC's rate jurisdiction over those sales. This holding was based on the Courts' reading of the statutory language and legislative history of the NGA and filled a gap in the regulatory scheme theretofore unrecognized as within the purview of the FPC.

The Supreme Court said:

> In our view, the statutory language, the pertinent legislative history, and the past decisions of this Court all support the conclusion of the Court of Appeals that Phillips is a 'natural gas company' . . . subject to the jurisdiction of and regulation by the Federal Power Commission.

347 U.S. at 677. The Court's ruling overturned past practice of the FPC despite the large number (thousands) of producer sales that were thereby brought under FPC rate jurisdiction. The potential impact of recognizing the Postal Rate Commission's

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[26] *Id*.

jurisdiction over non-traditional Postal Service commercial activities to fill a comparable regulatory gap pales in comparison to the broad impact of the Court's decision in *Phillips*.

In its ruling, the Supreme Court pointed to language in one of its previous holdings[27] that points out the significance of a congressional legislative intent to protect the interests of consumers from unreasonable charges:

> We have held that these sales are in interstate commerce. It cannot be doubted that their regulation is predominantly a matter of national, as contrasted to local concern . . . Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed.

Likewise, Chapter 36 of the PRA fundamentally provides for the protection of the mailing public and competing businesses from unreasonable charges and fixed costs that must be paid by the ultimate consumer. Unregulated and unreviewed, non-traditional commercial activities of the Postal Service may well violate that standard and are the very types of activities that the statutory scheme covers.

[27] *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682 at 692-93, cited at 347 U.S. 680.

III. Other Issues Relating to Postal Services

The previous discussion relates to the dichotomy of governmental services (all nonpostal services) and all other services of the Postal Service that should be denominated as postal services subject to Chapter 36 of the PRA. Within the latter group of postal services, there are several types of situations that require separate discussion. Below, we discuss significant changes in service that rise to the level of classification changes, pilot tests, strategic alliances by the Postal Service with other parties, and electronic services.

A. De Facto New Services Are Subject to Chapter 36 Requirements

Another matter that OCA and CA ask the Commission to address in the definitions to its rules is the extent of the Postal Service's power to make significant de facto classification or service changes without first requesting a decision from the Commission under §3623. Two recent examples of such changes are (1) the Postal Service's recent offering (apparently now permanent and nationwide, formerly a pilot test) of a new carrier pickup service that has many of the service characteristics of a Commission-authorized rate element in Express Mail, Priority Mail, and Parcel Post, i.e., Carrier Pickup on Demand; and (2) *Electronic Tracking Confirmation* for Certified Mail that was marketed as a distinct new service by Postal Service partners, first as a pilot test, and later as a permanent new feature of Certified Mail.

OCA and CA believe that both of these unilateral changes to current services are unauthorized classification changes and that language should be added to the Commission's rules making it clear that significant changes in the provision of service

as outlined in the rule proposed by OCA and CA may be made only upon a recommendation of the Commission under §3623.

Since issuing its policy statement on "the proper scope, detail, and related objectives" of the DMCS in Docket No. MC76-5,[28] the Commission has had few occasions to revisit the question of what types of operational changes made by the Postal Service constitute changes in classification. The Commission did state plainly, however, that it viewed the classification schedule as evolutionary and that it expected to be presented with issues in future proceedings bearing on the scope and degree of detail embodied in the DMCS.[29] The definitional process would have evolving nuances, refinements, and improvements.[30]

Two of the Commission's primary objectives in devising the DMCS were to:[31]

- Indicate clearly to postal patrons, the Postal Service, and the general public what their respective rights and duties were.
- This objective is accomplished by including in the DMCS all classifications, practices, rules, and regulations that "in any manner" affect postal rates and charges and postal services.[32]

With respect to rate design, the Commission stated that only three characteristics justify differences in rates: differences in cost, differences in value of service, and

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28 "Basic Mail Classification Reform Schedule – Proper Scope and Extent of Schedule," November 29, 1978, Vol. 1 at 4.

29 *Id*. at 9.

30 *Id*. at 24.

31 *Id*. at 11.

32 Emphasis in original.

statutory command.[33] Categories of service that are distinguishable by different operational functions must have those functions appear in the DMCS.[34]

It is OCA's and CA's position that the Postal Service has embarked on a course of making *substantial changes in the features of existing services and establishing new, distinct services unilaterally*, without first requesting a recommended decision from the Commission under §3623. For example, the recently established Carrier Pickup service was first offered in six postal districts in November 2003.[35] Three months later it was greatly expanded to additional ZIP codes and appears to be available across the nation (although not in every location).[36]

The Postal Service began offering Carrier Pickup service nationwide on February 1, 2004. Users of this service may go to the Postal Service's Web Site and submit a request for a carrier to pick up packages the next time he or she delivers mail. The service is free. During a pilot test of the service, average volume per pickup was 30 packages. The total volume picked up during the pilot test was more than 17,500 packages. One pilot-test customer was so pleased with the new service that he decided to cancel his UPS account.

Carrier Pickup service seems to be a substitute for an existing jurisdictional service: "Pickup on Demand." The jurisdictional service appears in the DMCS and costs $12.50. A customer using Pickup on Demand requests the pickup over the phone

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33 Id. at 15.

34 "[S]uch references must, of necessity, appear in the DMCS." Id. at 16.

35 "Front Door Service, *Carrier Pickup* Expands Sunday," USPS' linkonline, January 30, 2004 at http://www.usps.com/news/link/2004jan30_1.htm

36 Id.

or the Internet and can schedule the pickup for any time between two hours after the request and six days after the request.

The differences between Carrier Pickup (new service) and Pickup on Demand (existing service) are as follows.

1. Customers of Pickup on Demand may use a 1-800 number as well as the Internet to place requests. Customers of Carrier Pickup must use the Internet.

2. Customers of Pickup on Demand may place a request as early as six days in advance and choose a two-hour window for pickup. Carrier Pickup service can only be requested for the next delivery day (e.g., no pickups on Sundays or holidays).

3. Customers of Pickup on Demand may place a request as late as two hours before the desired pickup. Customers of Carrier Pickup must place their request by 2:00AM CST on the next delivery day.

The Postal Service has, in effect, deaveraged its existing package pickup service. There are now two package pickup services: a low-priced pickup service and a premium pickup service. The premium service is described in the current Domestic Classification Schedule (DMCS); the fee is $12.50. DMCS, Rate Schs. 121, 122, 123, 223, note 2; 521.2A, note 7; 521.2B, note 5. The low-priced service is not described in the DMCS. It is, however, displayed prominently at the Postal Service's Homepage, USPS.com. The Postal Service does not charge for its low-priced service, although, as described below, the Postal Service must incur extra costs to provide it.

Pickup on Demand service evolved out of Express Mail. When Express Mail was first established as a permanent class of mail (PRC Op. MC76-1-4, June 15, 1977; official record at 6857-58), pickup service was available only through negotiated

agreements between the Postal Service and a customer. The fee for pickup service was $5.25 per occurrence.

In Docket No. R87-1 the pickup service was made available to all users of Express Mail. PRC Op. R87-1, App. Two at 11. The charge per pickup was reduced to $4.00. *Id*. at App. One, Schedules 500-503. See generally *id*. at 758-59. It was the Postal Service's stated intent to provide pickup service using employees already in the area whenever possible in order to keep costs low. According to Postal Service witness Develin, many pickups were already being performed by city carriers and collection personnel. In addition to the rate reduction for pickup service, the Postal Service obtained from the Commission a relaxation of DMCS provisions so as to allow local management flexibility in determining the manner in which pickup service would be provided.

In Docket No. R90-1 the pickup service was extended to Priority Mail and parcel post. PRC Op. R90-1 at V-94, V-389. The fee itself was increased from $4.00 to $4.50. *Id*. Since that case, pickup service has been available for a fee to mailers of Express Mail, Priority Mail, and parcel post.

OCA and CA are perfectly willing to accept a representation from the Postal Service that management believes—and has convinced the Board—that a free pickup service makes financial sense. However, OCA and CA cannot square the existence of Carrier Pickup service with the definition of "postal service" proposed in this rulemaking. Perhaps the proposed definition could be redrafted to explicitly exclude Postal Service marketing initiatives designed to increase volume of existing services by offering

ancillary services for free. Such a definition would be consistent with the spirit of language in Commission Order No. 1388.

On the other hand, Carrier Pickup service seems to meet the Commission's original standard for inclusion in the DMCS. In PRC Op. Docket No. MC76-5, the Commission stated that any service that should bear its own rate or fee should be described in the DMCS. Carrier Pickup service is a service that potentially should bear a fee. The new service is very similar to Pickup on Demand service, which currently costs $12.50. Part of that $12.50 reflects the cost of providing the service. It seems unlikely that the minor differences between the two services could reduce costs for Carrier Pickup to zero.[37] Obviously, provision of Carrier Pickup service requires the use of postal resources. Hauling an average of 30 packages back to a carrier's vehicle would seem to require more time than returning to the vehicle unburdened. A certain amount of computer capacity is required to accept orders over the Internet. Someone at each carrier station must check for orders each morning and notify carriers of any orders. Carriers must keep records of their pickups.

The existence of extra costs incurred to supply Carrier Pickup service suggests that the service should bear a fee to cover those costs. The existence of demand for the service suggests that the market could support a fee for the service. And the clear

[37] A member of the OCA staff tested the new Carrier Pickup service recently and observed that considerable additional carrier time was incurred to pick up the Priority Mail package that was involved. Normally mail is delivered to the OCA staff member's curbside box. The stop at the box probably involves about 15 – 30 seconds of carrier time; but in order to provide the Carrier Pickup service, the carrier had to drive onto the staff member's driveway, park, exit the vehicle, walk up the sidewalk to the house, ring the doorbell, and wait for the staff member to answer the door. This took several minutes, as opposed to the usual fraction of a minute. Given an average city carrier wage, with benefits, of $32.50 (National Payroll Hours Summary Report, PFY 2003, Accounting Period 13, at p. 41, filed with the Commission on March 5, 2004), an additional $4-6 of cost may have been incurred in this pickup.

intent of the Postal Service in providing the service (to divert volume from competitors to the Postal Service) virtually demands Commission examination of the propriety of offering the service. Such an examination would be consistent with the Commission's language in the Capital One NSA case.

Under the Commission's policy for what constitutes a distinct new classification (or classification change), the new Carrier Pickup service produced a significant increase in the intrinsic cost of providing Express Mail service and a significant increase in the intrinsic cost of providing Priority Mail service. In addition, there appears to be a significant increase in the intrinsic value of Express Mail and Priority Mail. The nature of the increase in value is that mailers can now expend far less time in entering Express Mail and Priority Mail packages into the postal system, with far more convenience. According to the cited press release, Carrier Pickup is intended to produce additional volumes of Express Mail packages and Priority Mail packages, presumably as a result of the increased intrinsic value of Express and Priority Mail. The potential downside of introducing the new service is that there may be a substantial reduction in revenues from the $12.50 fees that are charged "for each pickup stop" under the Express Mail, Priority Mail, and Parcel Post rate schedules. In OCA's and CA's view, changes as significant as those included in Carrier Pickup are de facto classification changes that can only be offered to the public following completion of a proceeding under 39 U.S.C. §3623 and a Commission recommendation to the Governors.

In another recent case, the Postal Service unilaterally undertook substantial changes in services. The Walz Complaint on Bulk Access (Batch Processing) of

Delivery Confirmation Information for Certified Mail[38] concerned a significant Postal Service departure from the description of electronic access to Certified Mail delivery information that had been presented by a Postal Service witness in Docket No. R2001-1, the proceeding in which a classification change permitting such access was recommended by the Commission to the Postal Service Governors. The testimony of Postal Service witness Mayo was that the Postal Service would provide retail-style, one-at-a-time access to delivery information produced when a carrier scans a Certified Mail label with a hand scanner.[39] Before, during, and after the R2001-1 proceeding, however, the Postal Service offered bulk electronic access to large numbers of Certified Mail pieces in a single transmission.[40]

The Complainant, Walz Postal Solutions, complained that the batch access provided through three handpicked intermediate vendors was discriminatory and constituted a constructive change in rates and classification. The Commission declined to hear the Complaint, holding that there was no apparent dissonance between the introduction of the new batch access feature and the policies of the PRA. Therefore, the Commission believed there was no substantive issue for it to consider.[41]

The Commission was far from complacent about the wrongs done to Walz and the Postal Service's failure to submit a request to the Commission for such a change, its

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38 Docket No. C2003-2, filed April 29, 2003.

39 USPS-T-36 at 26, "Direct Testimony of Susan W. Mayo," Docket No. R2001-1.

40 Order No. 1385, "Order Dismissing Complaint of Walz Solutions," issued October 9, 2003, *inter alia*.

41 *Id.* at 16.

failure to notify the Commission about the change,[42] and the failure to indicate in the R2001-1 filing that such a method for providing Certified Mail delivery information was being planned.[43] The Commission decided that the main injury to Walz, its exclusion (and the exclusion of any member of the public with the exception of three handpicked intermediate vendors) from participating in batch access to delivery information, was rectified by the Postal Service's post-Complaint notice in the *Postal Bulletin* that members of the public with the technical capability could receive the electronic information in a "batch" form.[44]

The Commission did not make a definitive statement that the addition of "batch access" to electronic information constituted a constructive classification change. However, under the rule proposed by OCA and CA, this would constitute a distinct new postal service. Batch access is significantly less expensive per piece than retail access to delivery information at the Postal Service's website or by telephone. This would appear to meet the Commission's Docket No. MC76-5 test of a distinct classification change, i.e., a distinctly different intrinsic cost for batch (as opposed to retail) access. The fact that batch access was less costly than retail access was an important factor in

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[42] "There may be changes to services that the Postal Service considers so minor, or in the realm of operational management, or that might technically fit within existing DMCS language, such that they might not statutorily require a proceeding before the Commission. This does not obviate the benefits of informing the Commission, or alleviate the Commission's need to be informed of how the parameters of a service are changing, and of what services are being offered." *Id*.

[43] "Rule 64(a)(1) requires '[e]ach formal request filed under this subpart shall include such information and data and such statements of reasons and bases as are necessary and appropriate fully to inform the Commission and the parties of the nature, scope, significance, and impact of the proposed new mail classification schedule or the proposed changes therein. . . . Every proposal should be sufficient to inform the Commission, potential participants, and actual participants of all service options." *Id*. at 11.

[44] *Id*. at 19.

the Commission's decision not to proceed with the Complaint.[45] Furthermore, there undoubtedly were distinctly different levels of intrinsic value in retail access versus batch access – Postal Service witness Mayo had projected an increase in Certified Mail usage as a result of the new retail access to electronic delivery information;[46] yet Walz alleged that the availability of batch access cannibalized the revenues of return receipt.

In Docket No. MC76-5, the Commission took the position that a service feature that "bears significantly on the intrinsic value of a single postal service *or on the relative values of different postal services*" would be a mark of a distinct classification. Hence, the Postal Service's unauthorized addition of batch access to delivery information was indeed a constructive classification change under the Commission's Docket No. MC76-5 classification doctrine. In OCA's and CA's view, Complaints such as that filed by Walz can be avoided if the Commission makes clear in its rules that significant deviations by the Postal Service from an established method of providing service or significant deviations from the evidentiary record that is the basis for the existing rate or classification must be offered to the public only following a recommended decision by the Commission under 39 U.S.C. §§3622 and 3623.

B. Pilot Tests of Postal Services

Pilot tests of postal services and classification changes are also in violation of the PRA under the Third Circuit's interpretation of the PRA in the *UPS* case. In the *UPS* case, the Postal Service's position was that only changes in service that were to be implemented on a nationwide, permanent basis were subject to the Commission's

45 *Id*. at 17 – 18.

46 USPS-T-36 at 26, Docket No. R2001-1.

authority under 39 U.S.C. §§3622 and 3623.[47] Consequently, the Postal Service proceeded to establish agreements with twenty selected shippers in five metropolitan communities that set prices below those of other Parcel Post mailers in exchange for alleged cost-saving measures taken by the mailers.[48] According to the Postal Service, agreements such as these were merely experiments and not changes to rates or classifications.[49] The Court underscored that the PRA contains "no express exception for experiments which involve changes in rates and classifications."[50]

The court reasoned:[51]

> We recognize that the Postal Service is under a duty to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." 39 U.S.C. § 403(a). In discharging its duty to plan and develop, we can understand the desire of the Postal Service to institute test plans or experiments so that postal efficiencies will result. However, it is apparent that in fulfilling its duty to "plan, develop (and) promote," the Postal Service is just as subject to the rate and classification provisions of Chapter 36 of the Act, 39 U.S.C. § 3601 et seq. as it is in fulfilling its duty to "provide adequate and efficient postal services at fair and reasonable rates and fees." Under the Act no distinction is made in favor of experiments or tests which involve changes in rates or mail classification. Rather, the Act is completely unequivocal in requiring *all* changes in *any* rates and *any* mail classification to be processed through and by the Commission.

The Postal Service also maintained that a distinct service made available to a set of mailers constituting less than the entire public – only twenty mailers in the *UPS* case

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47 604 F. 2d 1372.

48 *Id*.

49 *Id*. at 1374 –75.

50 *Id.* at 1375.

51 *Id*.

– should not be construed as a change in classification.[52] The Court flatly rejected the Postal Service's contention:[53]

> We reject this argument. In essence this position taken by the Postal Service would permit unregulated changes in rates and mail classification at any time and under any circumstances whereby less than all members of the public were entitled to benefits stemming from such changes. We have been shown nothing in the Act which supports the distinction on which the Postal Service relies and we can find no authorization for such a construction of the Act.

The Court added that there is no exception in the PRA for a test plan such as that undertaken by the Postal Service.[54] The Court could not condone "De facto and unregulated changes in either rates or mail classifications" merely because the changes were neither permanent nor nationwide.[55] According to the Court, "Such a view finds no support in the Act or in the legislative history. Indeed, such a construction of the Act is capable of completely undermining Congressional regulation . . . ."[56] The Court held:[57]

> that any proposal which would effect a change in mail classification or a rate, including a test or experiment embodying those features, must be submitted to the Rate Commission, no matter how experimental, temporary, or limited in scope the change.

The Commission should add to the definition of postal services that changes to the rates or terms of service for any mailer that deviates from the classification language contained in the DMCS or from the evidentiary record that established the terms of

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52 *Id*. at 1376.

53 *Id*. at 1377.

54 *Id*.

55 *Id*. at 1379.

56 *Id*.

57 *Id*. at 1380.

service constitute §3623 classification changes, whether they are denominated pilot tests or some other type of test or trial. Provision of such a service to even a single mailer, whether in a limited geographic area or not, constitutes a “de facto” classification change that is subject to the jurisdiction of the Commission.

Judge Becker of the U.S. District Court for the Eastern District of Pennsylvania[58] counseled the parties on the dividing line between types of experimental or trial services that are/are not subject to sections 3622 and 3623 of title 39:

> [W]here the "experiment" does not consist of mock packages mailed at hypothetical rates but instead requires the payment of real postage by real shippers for real parcel post service, there have been changes, however limited, in rates of postage and classifications of mail that affect these shippers and that fall within a "plain meaning" reading of the statutory language.

Thus, it would appear that “mock packages mailed at hypothetical rates” do not rise to the level of classification changes, but when the Postal Service offers a variant of a service that is not specifically defined in the DMCS or is inconsistent with the evidentiary support for the Postal Service’s initial proposal to change the DMCS, then this variant is a section 3623 classification when some real mailers benefit from the variant (while others do not). By contrast, a purely hypothetical operational exercise or technical trial not conferring new benefits on some mailers, but not others, would be in harmony with the Courts’ holdings in both of the *UPS* decisions, both at the district court and appellate levels.[59]

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[58] *United Parcel Service v. United States Postal Service*, 455 F. Supp. 857, 864 (1978).

[59] 455 F. Supp. 857 and 604 F. 2d 1372.

C. Services Provided by the Postal Service by Means of Strategic Alliances or Contracts with One or More Parties

Another issue that remains unresolved is whether the Postal Service is exempt from the operation of sections 3622 and 3623 when it enters into a strategic alliance or contract with another party to provide a service to the public. Some of these are characterized by the Postal Service as "nonpostal services provided by the Postal Service to the public." Others are characterized as not being provided to the public; while still others are not viewed by the Postal Service as any type of "nonpostal" service. One of the dominant characteristics of these Postal Service/private sector alliances is to "leverag[e] the postal brand." At the Association of National Advertisers' Conference in Dana Point, CA, in October 2003, Stephen Kearney, senior vice president of corporate and business development for the Postal Service, explained the Postal Service's strategy to leverage its brand:

> We are trusted, secure and we guarantee privacy. With that foundation, we believe we can open e-bill payment and popularize it.

It is noteworthy that these brand attributes arise from the Postal Service's traditional role in physically accepting, transporting, and delivering mail (especially First-Class Mail) that is sealed against inspection and well secured against theft by means of physical security measures, such as collection box design and construction, and the threat of prosecution under postal criminal laws.

The Postal Service defends its decision to offer NetPost CardStore without first proceeding under Chapter 36 by characterizing the service as "a private sector service offered by TouchPoint with Postal Service branding." The Postal Service adds that the website connection is "conceptually similar to an out-lease of space on Postal Service

real property for the transaction of private services." Also, the "Postal Service does not charge fees to the public for connection to CardStore, and is compensated for access to the postal website by TouchPoint." The Postal Service contends that NetPost CardStore is analogous to placement of Federal Express drop boxes on Postal Service real property.

OCA and CA vigorously dispute the Federal Express analogy. If the Postal Service were to throw a shroud over the FedEx drop box with the Postal Service logo prominently displayed and colored only with the familiar Postal Service red, white, and blue colors (not FedEx's distinctive white, orange and purple colors), that might be analogous to its "leveraging" its brand on its website. The Postal Service would have to mislead the public into believing that items dropped into the shrouded drop box were going to be accepted, processed, and delivered by the Postal Service, while in fact, FedEx would be providing the service. This is not the way FedEx drop boxes are used, however. It is very clear to those individuals who drop items into a FedEx box that they will be doing business with FedEx, not the Postal Service. By contrast, when the Postal Service "leverages its brand image" with private sector partners, the dominant purpose of the partnership is to mislead the public into thinking that the "trusted" Postal Service will be providing the service, not the private sector partner.

The Postal Service's interactions and representations to the public are the main determinant for concluding that a service or product offered through a partnership arrangement that leverages the Postal Service's "brand" is a Chapter 36 "postal service." OCA and CA believe that the Postal Service should not be permitted to evade Commission jurisdiction and consequent review over such services by characterizing

them as private-partner-provided. When the Postal Service deliberately uses its brand image as a "trusted, secure" provider to induce purchases by members of the public, a significant role by a private sector provider should not be allowed to operate as an escape hatch from Chapter 36. Significant Postal Service involvement in a service or product retailed to the public rises to the level of a distinct postal service and ought to afford to the public the protections of §§3622 and 3623.

D. Electronic Services

OCA and CA also believe that it is imperative to state explicitly in a new rule defining postal services that services provided in part, or in whole, by electronic means are postal services. There is reason to believe that the Commission favors such a result since Order No. 1389 makes the following key points:

1. "The concept of postal service is not static. It is evolutionary, with technology driving the change." Order No. 1389 at 8.

2. The Postal Service's entry into electronic mail is a natural progression of technology that uses electronics to move the mail. *Id*.

3. Technological advances give rise to "wholly new forms of 'postal service.'" *Id*.

4. The character of services provided by the Postal Service changes with advances in technology. *Id*. at 9.

5. Order No. 1389 quotes with favor an earlier Commission statement made in Order No. 1239, May 3, 1999, at 19 (Docket No. C99-1):

> the fact that a given service accomplishes one or more functional components of 'the carriage of mail' by means that do not involve a physical object does not necessarily support a conclusion that the service is 'non-postal.' *Id*. at 13.

6. In numerous public statements, even the Postal Service indicates that electronic service offerings are an extension of traditional mail services. *Id*.

7. Some electronic services offered through the Postal Service's website are described as mail or its functional equivalent. *Id*.

OCA and CA observe that United Parcel Service proposes that the definition of postal services explicitly state that "partially or wholly electronic services" are postal services subject to the Commission's jurisdiction.[60] OCA and CA fully support the UPS proposal.

In conclusion, in lieu of the Commission's proposed rule, OCA and CA propose rules defining postal services subject to Commission review and nonpostal services in Appendix A attached to these comments.

[60] "Comments of United Parcel Service in Support of Proposed Rule," filed March 9, 2004.

Respectfully submitted,

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Appendix A

Rule 3001.5(r). *Postal service*: United States Postal Service activity constitutes the provision of a *postal service* if one or more of the following conditions holds.

(i) The activity significantly affects the intrinsic cost of an existing class, subclass, or rate category in the DMCS.

(ii) The activity significantly affects the relative costs of existing classes, subclasses, or rate categories in the DMCS.

(iii) The activity significantly affects the intrinsic value of service of an existing class, subclass, or rate category in the DMCS.

(iv) The activity significantly affects the relative value of service of existing classes, subclasses, or rate categories in the DMCS.

(v) The activity places significant revenues of the Postal Service at risk of loss.

(vi) The activity has a significant adverse effect on the market for a product or service provided by private businesses.

(vii) The activity significantly affects a competitor of the Postal Service. The measure of significance is its impact on the competitor.

(viii) The activity has a significant discriminatory effect on any person.

(ix) The activity grants a significant preference to any person.

(x) The activity deviates significantly from established methods of providing a service.

(xi) The activity deviates from the evidentiary record that is the basis for the existing rate or classification.

(xii) The following types of activities do not exempt a service from its character as a postal service:

(a) The service is provided in whole or in part by electronic means.

(b) The service is provided primarily through a strategic alliance or contract between the Postal Service and one or more parties.

(c) The service is non-permanent.

(d) The service is of short duration.

(e) The service is provided to a limited number of recipients.

(f) The service is limited in geographic scope.

Rule 3001.5(s) *Nonpostal services*: *Nonpostal services* are those provided by the United States Postal Service on behalf of other governmental agencies.