UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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

POSTCOM REPLY COMMENTS ON THE PROPOSED RULEMAKING CONCERNING THE DEFINITION OF "POSTAL SERVICE"

The Association for Postal Commerce ("PostCom") offers the following reply comments on the proposal to define "Postal Service" in the above-referenced rulemaking.

A review of the comments in this proceeding serves only to reinforce PostCom's belief that a comprehensive definition of the term "Postal Services", and consequentially, a determination of this Commission's jurisdiction, can only be undertaken by Congress. The comments are unanimous in their agreement on the proposition (which would be self evident anyway) that the term "Postal Services" encompasses the delivery of hard copy information and parcels, and that the Commission has jurisdiction over changes in rates or classification of these products. The adoption of such a rule would serve little purpose precisely because that conclusion has never been controverted. Rather, the legal and policy issues disclosed by the comments address the Postal Service's involvement in – and the Commission's jurisdiction over – services that do not self evidently fall within the accepted meaning of the statutory term. This is for good reason: in its proposed rule the Commission carefully avoids offering any guidance with respect to whether, in its view, a proposed end-to-end or hybrid service is postal or nonpostal.

Among the commenting parties, there is no agreement as to whether the Postal Service is permitted by the statute to provide purely electronic services, or whether the offering of such services is subject to the Commission's jurisdiction; and there is very little discussion, much less agreement, as to what electronic services may be considered "reasonably ancillary" to the Postal Service's core

provision of hard copy information and parcel service, and the extent to which such services are, or are not, subject to this Commission's oversight. We believe that the legislative history of the 1970 Act provides some general indication as to how these questions might, as a policy matter, be resolved. However, the fact is that many of the services that lie within these areas of controversy, and the technology which makes them possible, simply did not exist 34 years ago. As a consequence, any attempt by the Commission to address these issues in a rulemaking would not involve the traditional function of a regulatory agency in filling in the interstices of a statutory term by resolving ambiguities. Rather, this Commission's promulgation of a regulation purporting to classify pure electronic services or to define the boundary between electronic services that are reasonably ancillary to Postal Services and those which are not, would involve the making of new law on matters of basic public policy. This is a task for which this Commission simply was not constituted.

The following discussion will, PostCom hopes, serve to explicate these conclusions.

1. In its comments, the Postal Service asserts that purely electronic services are not "postal services" within the meaning of the 1970 Act. It is correct. It does not follow, however, as the Postal Service seems to believe, that it may offer electronic services and may do so on an unregulated basis. In any event, it would be strategically ill-advised for the Postal Service to continue to provide purely electronic services. As the President's Commission succinctly stated, the core mission of the Postal Service should be "to provide high-quality, essential postal services to all persons and communities by the most cost-effective and efficient means possible at affordable, and where appropriate, uniform rates." Purely electronic services are not "postal services", and they are not essential. Plainly, however, a Commission rule dealing with end-to-end electronic service is not going to resolve the question of the Postal Service's power to offer such services. That question, in this forum, is largely academic. A Congressional determination, on the other hand, would put the matter to rest.

2. The OCA/CA argue that Congress's understanding of "nonpostal" services in 1970 were those services furnished on behalf of other governmental agencies. We agree, but, under current law, that conclusion cannot be enforced through rulemaking by this agency: When no rate case is filed, this Commission simply has no vehicle to effectively regulate Postal Service activities, and adoption of rule limiting the Postal Service's power to offer non-postal services to those furnished on behalf of other governmental entities is not going to change that. As this Commission pointed out in its Order Denying, In Part and Granting In Part, Consumer Action's Petition for Review of Unclassified Services, under the statute, only the Postal Service is authorized to initiate rate requests. So, a Commission-initiated classification proceeding at most results in a recommendation for a shell classification that is likely to be rejected by the Postal Service Board of Governors. The fact is that the Postal Service has a long record of electronic service ventures which (to put it politely) failed to further the Postal Service's revenue contribution objectives, and with respect to which this Commission took no action. Therefore, in PostCom's view, the time has arrived for Congress, rather than this Commission, to address the Postal Service's authority or lack thereof to offer nonpostal, non-governmental services.

3. Nor can these basic policy questions be resolved by ignoring them and focusing instead – as do some parties in their comments – exclusively on the question of the Commission's jurisdiction over end-to-end electronic services. Such an approach invites an even more profound policy conflict. Some end-to-end services are plainly subject to the primary and very possibly the exclusive jurisdiction of the Federal Communications Commission. Indeed, in the 1970's, that agency specifically held that a proposed Postal Service hybrid mail offering was a communication service. *In the Matter of Request for Declaratory Ruling and Investigation by Graphnet Systems, Inc. Concerning a Proposed Offering of Electronic Computer Originated Mail (ECOM)*, CC Docket No. 79-6, 73 F.C.C. 2d 283, Memorandum Opinion and Order (1979). As a result of the 1996 Telecommunications

Act, the definition of telecommunications service and the scope of the FCC's jurisdiction has changed; and the FCC's *ECOM* decision may no longer have force. But the potential for policy and jurisdictional conflict between the Postal Rate Commission's assertion of jurisdiction and the Communications Act is, if anything, greater than it was when the *ECOM* decision was issued. This is because under the 1996 Telecommunications Act (and FCC's policies which led up to its enactment), "information services" are distinguished from "telecommunications services." Because a robust competitive market exists, the former are unregulated. It is very probably the case that all of the end-to-end or hybrid services the Postal Service has offered to date would fall within the definition of an information services. Thus, a holding that all end-to-end electronic services are "postal services," is untenable as a matter of public policy: it entails either (i) the contradictory conclusion that an information service offered by the Postal Service is unregulated under the 1996 Telecommunications Act, but nonetheless remains subject to regulation under the 1970 Postal Reorganization Act, or (ii) that a telecommunications service offered by the Postal Service is subject to regulation by both the FCC and Rate Commission. If a service otherwise intended by Congress to be unregulated (because the market for it is highly competitive) is nonetheless to be regulated by the Rate Commission, this is a decision which Congress – and only Congress – should make. Equally, the question of whether a service should be regulated by two agencies – under very different standards – is not one that either agency should make.

4. Finally, PostCom submits that OCA/CA's proposed definition fails to describe what is or is not a "postal service." Rather, the proposal either (1) defines a number of circumstances which may indicate whether or not a rate or classification change has taken place or should take place, or (2) sets forth possible bases for a complaint before this Commission. In this respect, OCA/CA may have raised issues worthy of consideration, but this is not the appropriate proceeding in which to address them.

For these reasons, at the very least, the Commission should explicitly decline to address the issue of whether and if so, to what extent, electronic services – whether end-to-end or in support of a traditional postal function – constitute "postal services" within the meaning of the 1970 Postal Reorganization Act. Pending the outcome of postal reform legislation, these issues should be dealt with as they historically have been, on a case by case basis.

Respectfully submitted,

Ian D. Volner
Rita L. Brickman
Venable LLP
575 7th Street, N.W.
Washington, DC 20004-1601
(202) 344-4800

Counsel to PostCom

April 15, 2004

DC2:\534359