

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

Proposed Amendment to  
The Commission's Rules

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Docket No. RM2004-1

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

The Office of the Consumer Advocate ("OCA") and Consumer Action ("CA") hereby file reply comments upon the responses to the Commission's Proposed Rulemaking ("Notice") to revise the Commission's Rules of Practice and Procedure in 39 C.F.R. §3001.5 ("Rule 5").<sup>1</sup> As stated in the initial comments, CA is an independent non-profit membership organization founded in San Francisco in 1971. It serves consumers nationwide by advancing consumer rights.<sup>2</sup>

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<sup>1</sup> "Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure," Order No. 1389, January 16, 2004. Initial comments were due to be filed by March 15, 2004. The deadline for filing reply comments was set for April 15, 2004, in Order No. 1393, "Order Granting Motion for Extension of Comment Deadlines," issued February 27, 2004.

<sup>2</sup> 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," *Consumer Action Petition for Review of Unclassified Services*, Order No. 1388, January 16, 2004.

Comments were filed by six participants including OCA and CA.<sup>3</sup> All participants except PostCom support a Commission rule defining postal services. But only one participant, Parcel Shippers Association, supports the rule as proposed. The OCA and CA strongly support a rule defining postal services, but only if modified as we suggested in our initial comments. Appended to our initial comments was a version of new rules that incorporated significant changes to broaden the coverage of the definition of a postal service.

The OCA and CA propose revisions to the rule to make it clear that electronic postal services are jurisdictional services under Chapter 36 and may be retailed to the public only after the Commission has issued a recommended decision under 39 U.S.C. §§3622 and 3623. OCA and CA observe that the United Parcel Service comments propose that the definition of postal services explicitly state that “partially or wholly electronic services” are postal services subject to the Commission’s jurisdiction.<sup>4</sup> OCA and CA fully support this proposal.

Pitney Bowes proposes to broaden the definition of postal services to insure the Postal Service focuses on its core mission. Similarly, Lifetime Addressing, Inc. agrees there are issues associated with unregulated service offered by the Postal Service in competition with the private sector.<sup>5</sup>

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<sup>3</sup> Other than OCA and CA, comments were filed by Lifetime Addressing, Inc., Parcel Shippers Association, Pitney Bowes Inc., Association for Postal Commerce ("PostCom"), United Parcel Service and the United States Postal Service.

<sup>4</sup> “Comments of United Parcel Service in Support of Proposed Rule,” March 9, 2004.

<sup>5</sup> Lifetime Addressing also wants the Commission to call the attention of the Postal Service to methods of utilizing technology advances, thereby improving the efficiency of core service and reducing overhead.

PostCom prefers no rule at this time because it would either be over or under inclusive and may stifle innovation or complaints. Also, it believes case by case determinations are better, especially since the Postal Service has already cut back its nonpostal services. PostCom alternatively offers a narrower definition of postal services than the Commission proposes, limiting it to the *physical* delivery of letters so as to exclude electronic services from postal services.

In this reply, OCA and CA discuss the suggestions of the Postal Service and explain why the Postal Service arguments add nothing of significance for Commission consideration and would draw the definition of postal services too narrowly.

In contrast to the views of other commenters, OCA and CA propose more inclusive language for the rule defining postal services,<sup>6</sup> based upon our view that a correct reading of the Postal Reorganization Act's historical purpose and intent provides for Commission jurisdiction over, not only activities related directly to mail, but those activities that constitute constructive changes to postal classifications. OCA and CA also propose a definition in a new Rule 5(s) for nonpostal services, limited to those services provided on behalf of other governmental agencies.

The Postal Service does not oppose supplementing the existing definitions but its comments seek to reserve its position that the Commission does not have the "primary" responsibility for interpreting whether services offered by the Postal Service are subject to Chapter 36. (Comments at 2). Its argument misses the point. Primary responsibility

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<sup>6</sup> The OCA and CA proposal is set out in Appendix A of the initial comments,

shifts--first it is with the Commission and then, on review, the court will have primary or final responsibility to decide the issue. Notwithstanding the Postal Service's meager attempt to dispute the applicability of this longstanding doctrine in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and to disparage its applicability, the fact remains that the Commission has the jurisdiction to determine, in the first instance, its own jurisdiction subject, of course, to court review. The Postal Service misinterprets Order No. 1388 by contending the order suggests *Chevron* case dicta allows judicial review of an agency's action to "expand the Commission's actual authority in the context of the statutory scheme embodied in the Act." (Note 2 at 4, citing Order No. 1388 at 20). The Commission's order made no such claim.

Of course, judicial review cannot expand agency authority beyond the confines of the enabling statute. However, it is clearly a rule of statutory construction, as noted in *Chevron*, that the reviewing court will give deference to an agency's interpretation of its own jurisdiction. That deference does not include expanding authority beyond the underlying statute. Further, the Commission also noted in Order No. 1388 that this doctrine has been applied by a court with respect to this Commission's interpretation in matters involving rates and mail classifications, citing *United Parcel Service v. U.S. Postal Service*, 604 F.2d 1370, 1381 (3d Cir. 1979), *cert denied*, 446 U.S. 957(1980). Consequently, the Postal Service misreads the Commission's statements in Order No. 1388, as that order in no way suggests a reviewing court can expand the authority granted to the Commission under the Postal Reorganization Act. Nor, contrary to the further contention of the Postal Service (Note 2), would application of the doctrine that an agency has jurisdiction to determine its own jurisdiction tread upon the balance of

functions established by Congress because it is those very functions that the Commission must weigh in determining Commission jurisdiction, subject to judicial review.

The Postal Service also continues to thrust the arguments upon the Commission that it made in response to the CA petition that was the subject of Order No. 1388. The Postal Service persists in arguing that the Commission's Order in this docket (at pages 8-12) is at odds with the Postal Service's perception of this Commission's role. But the Commission has considered the Postal Service arguments at least twice, both in Order No. 1388 and in Order No. 1389 in this proceeding. The Postal Service's reciting of its previous contentions offers nothing new for the Commission's consideration.

The Postal Service also complains the Commission has suggested that "electronic mail" is a postal service and reserves its position. Again, the Commission has presented its preliminary views in previous orders but the issue is still open for resolution. The Postal Services cites to previous argument as to why "electronic service" is not a postal service, but offers nothing new. OCA and CA continue to maintain that such services are subject to the Commission's Chapter 36 rate and classification authority.

The Postal Service contends that the Commission's regulations do not establish limits on Postal Service authority and that the "Postal Service would not in any way be bound by the definition which the Commission is now proposing to incorporate into its rules." (Comments at 3). As the Postal Service says, "actual programs or service, have not yet been judicially reviewed. Until they are, we submit that the Commission cannot

authoritatively impose its own formulation and interpretation on the Postal Service's conduct." (Comments at 4).

The Postal Service seems to want the cart before the horse. Amazingly, the Postal Service argues that, until a court reviews the rule, it may apply its own interpretation of the Commission's authority to issue rules when determining whether to comply with the Commission's rules. To the contrary, rules properly promulgated under the Administrative Procedure Act establish requirements on the Postal Service, enforceable at law, unless they are challenged and overturned by a duly authorized court. It is fundamental that unless and until the rules are stayed or overturned by a court, the Postal Service must comply with the Commission's rules. It is for the Postal Service or another entity to challenge the Commission's rules in a court of law or otherwise abide by them. If the Postal Service refuses to comply, then to enforce compliance with the rules, the Commission may seek enforcement through the appropriate court.<sup>7</sup> At that point, the court will decide the matter finally. The Postal Service's position is at odds with the settled legal framework of regulatory law. Until a final court decision resolves the lawfulness of a Commission rule, the Postal Service will refuse at its peril to comply with the rule.

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<sup>7</sup> We recognize the difficulty of Commission enforcement because two executive branch agencies are involved and the Commission is required to consult with the Department of Justice prior to seeking court enforcement of Commission action.

In conclusion, OCA and CA urge the Commission to add descriptive and definitional language to its rules so as to resolve remaining disagreements and uncertainties. The proposed language appears in Appendix A of the initial OCA and CA comments in this rulemaking.

Respectfully submitted,

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