

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

Proposed Amendments to the
Commission's Rules

Docket No. RM2004-1

REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE
(April 15, 2004)

On January 16, 2004, the Postal Rate Commission issued Order No. 1389 (Order), soliciting comments on a proposed amendment to its rules to incorporate a definition of the term "postal service."¹ The due date for initial comments was ultimately set at March 15, 2004, and, in addition to those filed by the Postal Service, seven other sets of initial comments were filed. The Postal Service hereby submits its reply to those initial comments which offer tangible suggestions meriting response.

PostCom and UPS

Only three parties actually appear to have proposed modifications to the wording of the rule proposed by the Commission: the Postal Service, Association for Postal Commerce (PostCom), and United Parcel Service (UPS). The comments of the Office of the Consumer Advocate (OCA) and Consumer Action (CA), which will be discussed separately, propose an entirely different approach rather than modifications in wording.

¹ Proposed Rulemaking Concerning Amendments to the Rules of Practice and Procedure, Order No. 1389, Docket No. RM2004-1 (Jan. 16, 2004).

The comments of UPS, filed on March 9, make two suggestions, one regarding the prominence of delivery in the definition, and a second regarding electronic services. The Postal Service emphatically disagrees with the second of the two suggestions to expand the definition by adding language that postal services can include “partially or wholly electronic services.” UPS Comments at 3-4. The Postal Service already noted its position on this matter in footnote 2 of page 2 of its Initial Comments. In contrast with UPS, PostCom asserts that postal services should be limited to physical delivery of hardcopy matter. PostCom Comments at 4-6. The Postal Service, however, is not convinced that PostCom’s proposed resolution, explicit addition of the term “physical,” is necessary.

UPS’s first suggested refinement involves the removal of language it fears will require any postal service to include delivery. UPS comments at 2-3. It appears, however, that the concerns of UPS in this regard would already be alleviated by adoption of the alternative “carriage” language suggested by the Postal Service in its Initial Comments.

PostCom, on the other hand, notes concerns about the final phrase “supportive or ancillary thereto,” and offers alternative language to address its concerns. PostCom Comments at 4-6. The Postal Service does not agree that PostCom’s suggested “directly related services and functions” language improves the Commission’s proposed language, which tracks the approach used consistently for decades. Also, PostCom observes that use of the word “transmission” could be misinterpreted to suggest electronic rather than physical delivery. The Postal Service tends to agree, and

suggests that “transmission” can be omitted without materially changing the scope of the intended definition. Lastly, in apparent concurrence with the Postal Service’s observations regarding the potential problems of explicitly including a 70-pound limit on parcels, PostCom has simply omitted that language entirely. That solution would be acceptable, as would be the Postal Service’s approach of substituting the word “mailable” in place of the 70-pound limit.

Based on these considerations, the Postal Service’s now favors a text of the definition which would read as follows:

Postal service means the carriage of letters, printed matter, or mailable packages, including acceptance, collection, processing, delivery, or other services supportive or ancillary thereto.

The Postal Service also still favors inclusion of the footnote with the *NAGCP I* citation, as discussed on page 4 of its Initial Comments.²

The OCA and Consumer Action

The extensive joint comments filed on March 15 by the OCA and Consumer Action (CA/OCA Comments) appear to serve a variety of purposes. In some respects, the comments recommend and support refinements in the Commission’s proposed definition of postal services within its rules of practice and procedure. Rather than merely supplement or augment the Commission’s formulation, however, CA/OCA

² One beneficial feature of the *NAGCP I* opinion was its thorough examination of legislative history, which it made in the process of affirming the conclusion of the district court that the term “postal service” in the statute was intended to encompass those services that would be considered postal services “in ordinary parlance.” See *NAGCP I*, 469 F2d at 595-598. The definition suggested in the text above would meet this standard.

propose a far-reaching revision designed to reinforce their radical views on the proper scope of the Commission's purported authority to oversee, influence, and, in effect, regulate Postal Service activities. In this respect, the CA/OCA comments reaffirm the thrust of their original petition seeking Commission inquiry into several Postal Service programs and services.³ As the Postal Service noted in its response to the CA/OCA Petition, that characterization of the Commission's authority under the Postal Reorganization Act (PRA) is founded on a radical distortion of the carefully constructed balance of authorities embodied in the PRA. The Postal Service stated:

CA and the OCA portray a sweeping need for comprehensive regulatory oversight of Postal Service activities. They regard the Commission as the Postal Service's "regulator," and they perceive the Postal Service's practice of exercising its statutory prerogatives to establish new, nonpostal services as a serious "gap in the system of regulation" established by the PRA.⁴

The Postal Service addressed these views at length in its response to the CA/OCA Petition. We will not repeat those arguments here, but incorporate them as foundation for our opposition to the CA/OCA proposals offered in this rulemaking proceeding. The CA/OCA's proposed alternative rule (CA/OCA Comments, Appendix A) accordingly serves to support their vision of a Commission broadly empowered to regulate all aspects of Postal Service decision making. Structurally, it seeks to define what may not be undertaken, either at all, or at least not without prior Commission

³ 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)(hereinafter CA/OCA Petition).

⁴ Comments of the United States Postal Service on Consumer Action Petition, at 10-11 (footnote continued...)

review and approval. In this regard, we note that the Commission's reaction to the CA/OCA's portrayal of the Commission's role in the statutory scheme was, at most, a partial and oblique disagreement. When the Commission declined to grant the CA/OCA Petition's request that it undertake a review of fourteen services, it also repudiated the Postal Service's position that the Commission lacked the authority to impose its regulatory will, if it chose, to investigate and proscribe Postal Service conduct falling outside the Commission's primary jurisdiction.⁵ On this issue, the Postal Service must forcefully reaffirm its own position regarding the limits of the Commission's authority. We acknowledge, however, that the differences between the Commission's and the Postal Service's interpretations of the legislative scheme stem from a clash of perspectives that likely will only be reconciled by judicial intervention.

Similarly, with respect to the CA/OCA's views on the Postal Service's fundamental authority to engage in nonpostal commercial enterprise, the Commission deflected, but did not entirely reject the CA/OCA approach. The Commission observed that the CA/OCA position that the Postal Service lacked the authority to offer the fourteen identified services without prior Commission approval was flawed. Order No. 1388, at 18. This conclusion followed primarily the need to reconcile the current dispute over the Postal Service's powers with several instances in which the Commission's own precedent either explicitly or implicitly acknowledged the delegation of nonpostal authority to the Postal Service that is embodied in the PRA. Yet, the Commission has

(...footnote continued)
(January 30, 2003)(footnote omitted).

declined to take a position on the central feature of the CA/OCA approach, namely, that the only “nonpostal” activities authorized by Congress are those provided by the Postal Service to other government agencies.⁶ Once again, we will not repeat the Postal Service’s arguments counter to that contention, but reaffirm and rely on the Postal Service’s own conclusions.⁷ We also note the Supreme Court’s sound observation in its recent decision in *Flamingo Industries Ltd.*, No. 02-1290, slip op. (Feb 25, 2004):

The Postal Service does operate nonpostal lines of business, for which it is free to set prices independent of the Commission, and in which it may seek profits to offset losses in the postal business.⁸

The CA/OCA comments and proposed alternative rule rest fundamentally on their position regarding the Postal Service’s authority. Their logic and approach proceed from their conclusion that the PRA only authorizes, as “nonpostal,” services that are provided to other government agencies. Everything else that the Postal Service might undertake is “postal,” and within the Commission’s jurisdiction to regulate. CA/OCA are simply unwilling to accept the Commission’s decision not to adopt their

(...footnote continued)

⁵ Order No. 1388, at 11-15.

⁶ The Commission stated: “[R]egardless whether they are correct that the Postal Service may only provide ‘nonpostal’ services for other government agencies, the issue of the lawfulness of any ‘nonpostal’ service would be a matter for the courts, not the Commission.” *Id.* at 18 (emphasis added). In its notice initiating RM2004-2, the Commission referred to “the *unresolved* dispute concerning the scope of the Postal Service’s authority to engage in such nonpostal activities under the Act.” Proposed Rulemaking Concerning Reporting Requirements for Nonpostal Services, Order No. 1394, at 5-6 (March 5, 2004)(footnote omitted, emphasis added).

⁷ See Comments of the United States Postal Service on Consumer Action Petition, at 12-20.

⁸ *Id.* CA/OCA try unsuccessfully to refute the importance of this acknowledgement by the Supreme Court. CA/OCA Comments at 13-15.

view explicitly, in light of the Commission's own precedent. Accordingly, they, "with deep regret," implore the Commission to reconsider its earlier conclusions regarding the Postal Service's authority to offer commercial, nonpostal services. CA/OCA Comments, at 9, 15. They propose that the Commission first adopt, as part of its rules, a definition of nonpostal that conforms to their erroneous interpretation of the PRA.⁹ By "definition," then, everything else that is not nonpostal will fall under the Commission's purview under 39 U.S.C. Chapter 36.¹⁰ Furthermore, leaving nothing to chance, they proceed to "define" postal services more specifically by attempting to identify every possible implication or effect resulting from any Postal Service activity that might escape detection and review under their primary simplistic formula.¹¹

In these respects, the CA/OCA Comments stray well beyond the intended scope of this narrowly-defined rulemaking proceeding. More importantly, the threshold positions staked out by the OCA and Consumer Action preclude meaningful reliance on their comments to evaluate the Commission's proposed new rule. Simply put, the effect of the proposed new rule is to aid the public in understanding the accepted line between

⁹ They also propose that the Commission supplement its proposed reporting requirements rule, by including the same definition of nonpostal to qualify the information and services the Postal Service must report in proceedings under 39 U.S.C. § 3622. As noted in the Postal Service's comments in Docket No. RM2004-2, filed today, the Postal Service opposes this proposal.

¹⁰ CA/OCA fail to address, for example, how the Postal Service would approach the Commission to establish prices for surplus vehicles or real estate, a type of review clearly not intended under the statutory scheme.

¹¹ See CA/OCA Comments, Appendix A. Ironically, with regard to Docket No. RM2004-2, they warn the Commission that failing to define "nonpostal" in the instant rulemaking could lead to the Postal Service adopting the CA/OCA's restrictive interpretation of that term, and thus avoiding the responsibility to report on a range of commercial activities.

(footnote continued...)

postal services, which by definition are within the Commission's Chapter 36 jurisdiction, and nonpostal services, which are outside of that jurisdiction. See Order No. 1389 at 1-2, 10-12. According to the views espoused in the CA/OCA Comments, however, there is no line to distinguish, because there are no nonpostal services (except those limited services offered on behalf of other government agencies). CA/OCA Comments at 18.¹²

Regarding the legal effect of including the proposed definition in the Commission's rules, the Postal Service must reassert the position taken in its initial comments in this proceeding. The Commission cannot arrogate to itself through its procedural rules authority not given to it by Congress in the statute. Postal Service Comments, at 3-5. The whole thrust of the CA/OCA comments and proposed alternative seem to be predicated on the belief that it can.¹³ Furthermore, notwithstanding qualifications expressed in several pertinent orders, even the Commission seems to assume that its rules could have that effect. In its order initiating the instant proceeding, it states "[t]he Commission has the primary responsibility for interpreting whether services offered or proposed by the Postal Service are subject to Chapter 36 of the Act." Order No. 1389, at 11 (footnote omitted). As noted in the Postal

(...footnote continued)

Id. at 15-16.

¹² For a variety of reasons, including those expressed in Commission Order No. 1388, at 15-18, and in the Comments of the United States Postal Service on Consumer Action Petition, at 14-17, that world view is fundamentally flawed. Certainly, however, this rulemaking creates no opportunity to revisit the matter.

¹³ CA/OCA congratulate the Commission on formulating a "canny" (i.e., clever) "administrative solution" to a "vexing" problem." CA/OCA comments at 3.

Service's many pleadings on this topic, however, the Postal Service firmly rejects that interpretation.

Finally, the Postal Service opposes the CA/OCA attempt to elicit from this limited rulemaking prejudicial conclusions by the Commission regarding the status of current Postal Service activities. In developing the context for the reassertion of its arguments in the earlier CA/OCA Petition, CA/OCA complain about the Postal Service's conduct in implementing specific practices and programs, including electronic confirmation of Certified Mail and expansion of carrier pickup practices. *Id.* at 6-7, 23-32. They also discuss and warn the Commission regarding the status of pilot tests, strategic alliances, and electronic services. *Id.* at 32-39. With respect to these representations, the Postal Service urges the Commission to refrain from addressing the merits of the CA/OCA's arguments and conclusions regarding any current or future Postal Service activities. In light of what the Postal Service understands to be the limited nature of the definitional rule proposed in this proceeding, or the reporting requirements in Docket No. RM2004-2, any attempt by the Commission to assess the status of such practices and programs, or, through some abstract formulation, to categorize services for purposes of reporting, would be prejudicial, unwise, and potentially invalid. Without itself attempting to address the specifics of the CA/OCA allegations regarding these matters, furthermore, the Postal Service rejects their conclusions regarding the status of any current or imagined service.

In conclusion, the Postal Service respectfully recommends that, if the Commission proceeds with its proposal to incorporate a definition of "postal services"

into its Rules of Practice and Procedure, that definition should appear as stated on page three in these reply comments.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux
Chief Counsel
Ratemaking

Eric P. Koetting

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2992/ Fax: -5402
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document in accordance with Section 12 of the Rules of Practice.

Eric P. Koetting

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
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