

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

**Proposed Amendment to
The Commission's Rules**

Docket No. RM2004-1

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

The Association for Postal Commerce ("PostCom") offers the following comments on the Commission's latest proposal to define "postal service" in the above-referenced rulemaking, with the understanding that they should be read only in the context of clarifying the existing definition of "postal service" under current law. The broader issue of how, as a matter of public policy, that term should be defined is a matter for Congress, where it is pending.

I. Purely electronic services unrelated to physical mail delivery are not "postal services" within the meaning of the 1970 Act; and the Postal Service cannot offer such services

In two earlier sets of comments in this proceeding, PostCom has explained its position that based on the language of the Postal Reorganization Act of 1970 ("PRA" or "Act"), and its legislative history, the Postal Service is not authorized to offer electronic services that are not directly related to the delivery of "written and printed matter, parcels, and like materials"¹ whether on a regulated or an unregulated basis. Since the Postal Service is not authorized to offer such services, neither can these offerings be within the jurisdiction of this Commission. For the reasons set forth below, PostCom remains unpersuaded by the Commission's latest rationale for determining that electronic services are "postal services."

In Order No. 1424, the Commission places great weight on the language in H.R. Rep. No 91-1104 which, in the section-by-section analysis (of Section 101), uses the word

¹ 39 U.S.C. § 403.

"communications".² The Commission states: "the policy that the Postal Service is to be operated as a 'basic communications service' can only be fulfilled if the Postal Service can avail itself, consistent with the Act, of technological innovations effecting [sic] communications."³ However, the phrase "basic communications service" does not appear in Section 101 of the PRA. "Communications" is a term which reaches far beyond the picture conjured by the statutory terms "correspondence" and "mail". 39 U.S.C. §§ 101 and 403. In this Twenty-First century, electronic communications include facsimile (including fax to computer), Voice-Over-Internet-Protocol (which includes voice to text conversion), and video conferencing. Under the 1970 Act, the term "postal service" does not and cannot include all manner of technological innovations affecting communications. To read the full expanse of electronic communications technology into "postal service" would open a Pandora's box of confusing federal jurisdictional issues.⁴ Technological innovations affecting communications must, therefore, be limited to the context of traditional, hard copy, mail: "written and printed matter, parcels, and like materials." 39 U.S.C. § 403.

In 1970, Congress simply could not have contemplated technological advances that -- to use the Commission's startling example -- would allow the Postal Service to assign every American an e-mail address. Those technological advances that Congress did contemplate are those that contribute to the efficient physical carriage of mail. As the Commission explains, stagecoaches were supplanted by railroads, which gave way to trucks and airplanes. But Airmail and Express Mail are not really "wholly new forms of 'postal service'" as the

² Notice and Order Concerning Proposed Amendment to the Commission's Rules of Practice and Procedure, PRC Order No. 1424, November 18, 2004, slip at 32 (69 Fed. Reg. at 67523), citing H.R. Rep. No. 91-1104, *reprinted in* 1970 U.S.C.C.A.N. vol. 2, 3649, 3671.

³ *Id.*

⁴ PostCom described some of these issues in its earlier comments in this proceeding.

Commission states.⁵ Rather, as a practical matter, these services are new means to deliver the same written and printed matter, and parcels. The Commission should indeed consider "the common meaning of the term 'postal services,'" as it suggests.⁶ And in common parlance, "e-mail" and "snail mail" are readily distinguishable.

For the Commission to point out in support of its definition that the Postal Service has considered electronic mail as an extension of traditional mail service⁷ is mere bootstrapping. And rigid adherence to or rationalization of the Commission's own precedent⁸ is also an insufficient basis for issuing an overly broad definition. There are certain services provided by the Postal Service that are historic anomalies; some are "postal services," and some are not. But anomalies should not determine the scope of a definition that will be applied prospectively.⁹ Electronic mail services simply were not contemplated by the Act, and it is overreaching to read them in under the general idea that Congress contemplated technological advances.

II. Assuming that the Commission Will Proceed with Defining "Postal Service", PostCom Recommends More Complete Tracking of the Existing Statute

The Commission most recently proposes the following definition:

"Postal service means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed

⁵ PRC Order No. 1424, at 35 (69 Fed. Reg. at 67524), citing PRC Order No. 1389, January 16, 2004, at 8.

⁶ PRC Order No. 1424, at 11, n. 28 (69 Fed. Reg. at 67517), citing *Associated Third Class Mail Users v. U.S. Postal Service*, 405 F. Supp. 1109, 1117 (D.D.C. 1975).

⁷ PRC Order No. 1424, at 35 (69 Fed. Reg. at 67524).

⁸ *See generally*, PRC Order No. 1424, at 36-39 (69 Fed. Reg. at 67525).

⁹ For example, the Commission attempts to draw a parallel between eBillPay and money orders, and notes that "[t]he Postal Service described the service as an all electronic service, *except* for any payments mailed at standard rates of postage." But money orders were determined to be "*very closely related to the delivery of mail*" based on the fact that "the vast majority ... sold at post offices *are actually sent by mail.*" *Associated Third Class Mail Users v. U.S. Postal Service*, 405 F. Supp. 1109, 1117 (D.D.C. 1975). Money orders offer no parallel to an electronic bill payment service when "the vast majority" of payments are not actually sent by mail.

matter, and like materials; mailable packages; or other services supportive or ancillary thereto."

Given current law, PostCom generally supports the Commission's approach of tracking the statutory language of Title 39, Section 403. PostCom accepts the Commission's observation that PostCom offers no statutory support for the phrase "directly related". However, PostCom similarly observes that the only support the Commission now offers for the terms "and other services supportive or ancillary thereto" are interpretive decisions. The Commission does not claim the terms "supportive or ancillary" have any statutory derivation, and it is these very terms that over-extend the definition of "postal services" to encompass electronic communications services unrelated to physical mail delivery.

Section 403 of the PRA provides that the Postal Service

"shall receive, transmit, and deliver ... written and printed matter, parcels, and like materials, and provide such *other services incidental thereto* as it finds appropriate to its functions and in the public interest."

"Incidental" usually means something that is contemporaneous and subordinate.¹⁰ So, for example, some electronic service enhancers such as Address Correction, CONFIRM, Delivery and Signature Confirmation, and Postal One! would nevertheless be services incidental to the delivery of "written or printed matter, or parcels". Hybrid services that begin electronically, but end in the delivery of written or printed matter or parcels, such as Mailing On-Line, may be postal services.¹¹ In general, incidental services enhance the value of physical mail, or enable the Postal Service to operate more efficiently within its core functions. Where they

¹⁰ See, e.g., Webster's II New Riverside Dictionary Rev. Ed. (Houghton Mifflin Co. 1996) (which defines "incidental" as "1. occurring or likely to occur at the same time or as a result. 2. subordinate : minor"); Webster's Third New International Dictionary (G & C Merriam Co. 1976) ("subordinate, nonessential, or attendant in position or significance"); The Random House Dictionary of the English Language (Random House Inc. 1973) ("happening or likely to happen in fortuitous or subordinate conjunction with something else").

¹¹ The Postal Service acknowledged this by filing a request for a recommended decision in the Mailing Online proceeding. *Request of the United States Postal Service for a Recommended Decision on and Experimental Classification and Fee Schedule Mailing Online Service*, PRC Docket No. MC98-1 (July 15, 1998).

involve a postage rate or classification, incidental services would be jurisdictional to this Commission. However, end-to-end electronic services unrelated to traditional mail delivery are entirely distinct services, and not incidental to the delivery of "written or printed matter, or parcels." Wholly alternative or surrogate services, such as e-mail or any other service which results only in electronic delivery of a message, are simply not "incidental services" contemplated by the Act.

Therefore, if the Commission is presently compelled to define "postal service", PostCom recommends that the Commission derive its definition *entirely* (and not selectively) from Section 403. Consistent with this approach, PostCom recommends substituting the statutorily derived phrase "other services incidental thereto" for "other services supportive or ancillary thereto". PostCom further observes that the phrase "including, but not limited to" also does not appear in Section 403. The phrase is redundant to the statutorily derived phrase "and like materials," and the Commission should delete it from the proposed definition.¹²

Respectfully submitted,

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February 1, 2005

DC2:\615131

¹² Following the sequence of the terms as they appear in Section 403 would eliminate the need for the phrase "including, but not limited to". While we observe other deviations from the precise wording of Section 403, PostCom does not anticipate these other deviations significantly alter the intent of the statute. We therefore refrain from further comment on them.