

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 COMMENTS ON PROPOSED AMENDMENT
TO THE COMMISSION'S RULES
(February 1, 2005)

The Office of the Consumer Advocate ("OCA") and Consumer Action ("CA") hereby file comments in response to the Commission's Notice and Order ("Order No. 1424") re-noticing the Commission's proposed amendment to the Commission's Rules of Practice and Procedure in 39 C.F.R. §3001.5 ("Rule 5") to define "postal service."¹ CA is an independent non-profit membership organization founded in San Francisco in 1971. It serves consumers nationwide by advancing consumer rights.²

OCA commends the Commission for its thorough, astute analysis of the Postal Reorganization Act ("PRA") that leads to the formulation of a definition of postal

¹ "Notice and Order Concerning Amendment to the Commission's Rules of Practice and Procedure," Order No. 1424, November 12, 2004. Pursuant to "Order Granting Extension," December 9, 2004, initial comments are due to be filed by February 1, 2005. The deadline for filing reply comments is March 1, 2005.

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," *Consumer Action Petition for Review of Unclassified Services*, Order No. 1388, January 16, 2004.

services. The Commission's reasoning that Congress intended the powers of the Postal Service to match its mission is both simple and elegant – always the hallmark of a sound conclusion. By contrast, the Postal Service's convoluted, internally inconsistent interpretation of the PRA³ is unlikely to convince anyone – certainly not a court – that Congress intended to invest it with the power to stray widely from its core responsibilities and sell anything, at any price, to anyone, without oversight by any entity.

The Commission's decision to make Consumer Action's petition a springboard for two rulemakings is also a prudent, efficient way to proceed. First, the Commission will establish a definition of postal services (and by extension, define services that fall outside that definition as "not postal" services). Second, following the codification of a rule that defines "postal services," the Commission will then judge complaints and petitions challenging the Postal Service's engagement in a wide range of retail activities against that standard.

OCA and CA support the revised definition of postal service proposed by the Commission in Order No. 1424. By tracking very closely the PRA language, the revised definition more accurately reflects the congressional intent as to the nature of a postal service. As the Commission said, it is "preferable to define the term postal service by reference to the Postal Service's statutory duties...." (Order No. 1424 at 3)

In the course of revising the proposed rule, the Commission's Order No. 1424 reached conclusions regarding the Postal Service's authority under the PRA relating to electronic and other commercial activities. Given those conclusions, which we believe

³ The Commission describes the Postal Service's construction as "curious" and "confounding." Order No. 1424 at 20 and 21, respectively.

are sound, it follows that the Commission has the statutory authority to review all of the commercial activities of the Postal Service for conformity with the PRA. The Commission may monitor the commercial activities of the Postal Service through either of two ways: (1) exercise its power to initiate a classification proceeding to determine whether appropriate classifications are in place, or (2) exercise its power upon complaint pursuant to the provisions in §3662 of the PRA to determine whether the Postal Service is charging rates which do not conform to the policies of Title 39. In either case, if the activities are found to be unauthorized by the PRA, the Commission should recommend or report that they ought to be terminated as unauthorized commercial activities of the Postal Service.

I. THE COMMISSION'S JURISDICTIONAL FINDINGS IN ORDER NO. 1424

OCA and CA fully support the Commission's discussion and determinations in Order No. 1424 which resolved two significant issues regarding the interpretation of the PRA. Supported by a thorough analysis, the Commission concluded, as OCA and CA have contended, that Congress intended that the term "postal services" recognize and include future technological advancements for the movement of correspondence by the Postal Service. Consequently, the Commission concluded that modern electronic services offered by the Postal Service utilizing the internet, in whole or in part, that provide an alternative to traditional mail services are "postal services" within the meaning of the PRA and subject to Commission rate and classification jurisdiction.⁴

⁴ "As a general matter, the Commission concludes that services offered by the Postal Service that provide an alternative to more traditional mail services, such as electronic communication services, would fall within the proposed definition." (Order No. 1424 at 32)

The caveat offered by the Commission is that not all internet services by the Postal Service are postal services, only those related to correspondence:

Nevertheless, inclusion of these services in the definition should not be read as a conclusion that all such services are jurisdictional; only such services that entail correspondence become postal services. (Order No. 1424 at 4)

Thus, the Commission suggests that the Postal Service may conduct certain internet activities that are not jurisdictional to this Commission. The Commission's implicit suggestion that the Postal Service may undertake internet services not involving correspondence ignored the issue of whether the Postal Service is authorized to undertake such internet services under the PRA and if not, how the Commission should deal with such activities as they may impact jurisdictional ratepayers.

As discussed below, in our view, the Commission should not merely wash its hands of commercial services that may not be authorized by the Act. To paraphrase an important court opinion, the Commission is not merely to act as an umpire blandly calling balls and strikes, but to take action providing affirmative protection to the mailing public.⁵ We ask that, at the conclusion of this rulemaking, the Commission apply the new definition of postal services through its classification authority and undertake a review of the commercial internet services and other services offered by the Postal Service.

Significantly, the Commission also determined in Order No. 1424 that the general powers and duties, and specific powers, of the Postal Service are limited to providing

⁵ *Scenic Hudson Preservation Conf. v. F.P.C.*, 354 F.2d 608, 620 (1965).

postal services and matters incidental thereto, rather than extending broader authority for commercial ventures beyond those related or incidental to the carriage of mail.

The Commission's order accepts the OCA and CA interpretation that §404(a)(6) only relates to Postal Service activities undertaken on behalf of other governmental agencies. Nowhere else in the Act is there any support for the Postal Service view that it is authorized to undertake other "nonpostal" activities. That is, the best interpretation of §404(a)(6) is that the Congress intended that the Postal Service might undertake only certain "special nonpostal or similar services" on behalf of other governmental offices, and Congress denominated those nonpostal services as "special" to distinguish them from nonpostal services generally.

The Act's reference to "or similar" services is not mere surplusage. We submit it refers to similar special services provided on behalf of other governmental agencies. In this, we respectfully disagree with the following conclusion in the order:

OCA/CA's interpretation would render the phrase "similar services" surplusage. If nonpostal is restricted to services provided only to other government agencies, no other service could be "similar," thereby making it meaningless. (Order No. 1424 at 17)

We do not read the words "or similar" out of the Act. "Similar" refers to other similar special nonpostal services like those authorized to be taken on behalf of other governmental agencies. In fact, the word "similar" provides the authority to justify the Postal Service's more recent governmental service activities and community service activities undertaken on behalf of non-federal governmental bodies. The language in §404(a)(6), "or similar", does not in any way suggest the Postal Service is to be free to undertake a litany of other nonpostal services. The insertion at that point in the section of "or similar" anticipates there could be, in the future, services provided to other

governmental bodies that differed from those provided at the time the legislation was passed- i.e. different (but similar) *special* nonpostal services, not different (but similar) nonpostal services. Significantly, the Commission goes on to decide that the Postal Service is not granted authority in the PRA to undertake activities that are not postal in nature.

As to community type services, these are services “similar” to those other non-postal services that are undertaken for other governmental bodies—no requirement is expressed in the Act that those activities must relate to a federal governmental duty.

The Commission Order No. 1424 is consistent with our view:

Overwhelmingly, available information supports the conclusion that, at a minimum, nonpostal services encompass services performed “mainly for other Government agencies (e.g., sale of documentary stamps, provision of custodial services for building space occupied by other Government agencies).”⁶ As discussed above, the Postal Service has historically performed other public service-type services, which, while not performed for another government agency, may reasonably be considered nonpostal in nature. Surely, in passing the Postal Reorganization Act, Congress was aware of the Postal Service’s extensive history of providing these various nonpostal services. (Order No. 1424 at 19-20)

The Commission noted that in the past it has determined certain activities to be non jurisdictional and for which a fee is charged such as photocopy service, record retrieval, vending stands and vending machines and certain community type services.

The Commission assessed each service based on its relationship to the carriage of mail. “Those which can fairly be said to be ancillary to the collection, transmission, or delivery of mail are postal services within the meaning of §3622.”* [citing to PRC Op. R76-1, Vol. 2, Appendix F at 3.] Among other things, the Commission found several special user charges were not jurisdictional, including the sale of philatelic products, photocopy service, record retrieval, the sale of postal related products,

⁶ Kappel Commission Report, Annex II, at 6-7; *id.* at 6-9 and 6-10; see *also* Kappel Commission Report at 136-138; and section 2303(a)(3) of former title 39, Pub. L. 86-682, September 2, 1960.

and vending stands and vending machines.* [citing *Id.* at 18-25.] In addition, the Commission disclaimed jurisdiction over community type services, specifically characterizing the provision of notary public services as “clearly non-postal.”* [footnote, *Id.* at 25. The Commission also found that international ancillary services were beyond its jurisdiction. *Id.* at 17. It did not substantively address the final category, services for which a charge could be made. *Id.* at 25-26.] (Order No. 1424 at 15)

And subsequently the Commission further stated:

Historically, the Postal Service has performed various minor, miscellaneous services, including photocopying and community type services (maintaining bulletin boards and notaries public). Any claim that these services were postal would be tenuous at best. Rather, such services are provided more as a convenience to postal patrons than as commercial endeavors. Thus, for example, copying service may be available in a post office lobby as a minor benefit to mailers, enabling them to copy miscellaneous papers prior to mailing, *e.g.*, tax returns. (Order No. 1424 at 17)

Some of the Postal Service activities are ancillary to mail service, or are related to the provision of philatelic services, and others are related to asset management and facilities management, which is expressly provided for in §402 of the PRA. Activities such as providing photocopying machines in postal facilities relate to the convenience of customers and could be said to involve the management of the postal facility for the convenience of the patrons using the facility and thus within the authority of §402. Thus, some long-standing activities of the Postal Service are grounded in specific statutory grants of authority. All this is to say that the Commission's overall findings in Order No. 1424 are consistent with the OCA and CA contention that §406 is not an independent grant of authority to the Postal Service to provide, unfettered, commercial services.

The Commission soundly rejected the Postal Service's contention that the enabling section of the Act provides it broad authority:

The Postal Service's assertion that because Congress did not, in section 404(a)(6), "explicitly exclude any type of service," it may unilaterally engage in whatever commercial, nonpostal activities it chooses is utterly unconvincing. (Order No. 1424 at 20, footnote omitted)

And the Commission further concluded:

In contrast, the Postal Reorganization Act contains no explicit authorization enabling the Postal Service to offer commercial, nonpostal services. (Order No. 1424 at 23)

Section 403 of the PRA provides that the *general duties* of the Postal Service are to provide "postal service." The Commission determined that the *specific* powers enabling the Postal Service to carry out its duty to provide postal services, as enumerated in §404 of the PRA, provide no independent authority to carry out either commercial ventures not related to postal services or certain special services not related to postal services. The few activities for which the PRA does authorize the Postal Service to undertake relate to those on behalf of other governmental agencies and certain other activities not relevant here.⁷ More specifically, the Commission concluded: "Analysis of the statute, legislative history, and precedent confirms that the Postal Service is not free to engage in unfettered commercial activities under the guise that they are nonpostal." (Order No. 1424 at 2) The Commission later in the order concluded:

⁷ For instance, the Postal Service does have separate authority under §401 to manage its facilities and properties, including leasing. Some Postal Service activities that we suggested in our previous pleadings might be postal services may be, on further review, authorized under that provision. For instance, the antenna program involves renting space on Postal Service buildings for antennas. We ask the Commission to undertake a thorough review of all of these commercial activities for compliance with the classification provisions of the PRA and, where appropriate, to declare they are not authorized by the PRA.

At the other end of the spectrum, the Postal Service's support for the proposition that it is authorized to engage in unlimited commercial, nonpostal activities is also unconvincing.* [footnote: While the Commission's jurisdiction does not extend to nonpostal services, it is necessary to address the Postal Service's interpretation because of its jurisdictional implications concerning postal services.] (Order No. 24 at 18)

Beyond that, the Commission stated it is unable to find in the legislation any specific grant of authority for the Postal Service to undertake other commercial activities not in the nature of the carriage of mail or services incidental thereto.⁸ The Commission concluded:

Against this considerable backdrop, it is unreasonable to suggest that the simple reference to "nonpostal" in section 404(a)(6) can be read to empower the Postal Service to offer unilaterally to the public whatever service, commercial or otherwise, it might wish. Such a reading is too at odds with the statute, legislative history, and historical operations to be credible. Had Congress intended something more, it would have been explicit, as it was when it detailed the Postal Service's postal functions. (Order No. 1424 at 29)

Thus, the Commission has undoubtedly decided that the Postal Service does *not* have authority to enter into commercial ventures which are not postal services.

II. THE COMMISSION SHOULD REVIEW ALL UNCLASSIFIED POSTAL SERVICE COMMERCIAL ACTIVITIES UPON ITS OWN INITIATIVE UNDER §3623 TO DETERMINE WHETHER CLASSIFICATION AS POSTAL SERVICES OF THOSE COMMERCIAL ACTIVITIES IS APPROPRIATE OR UPON COMPLAINT UNDER §3662 TO DETERMINE IF THOSE COMMERCIAL ACTIVITIES CONFORM TO THE POLICIES OF TITLE 39

We now have the benefit of the Commission's analysis of the Postal Service's powers under the PRA. The Commission's interpretation of the statute carries

⁸ Footnote No. 67 in Order No. 1424 states that the Commission takes no position on the Postal Service's contention that it has authority to carry out nonpostal commercial activities. This is belied by the several pages of careful analysis of the PRA's legislative history that reject the Postal Service's contention.

significant weight and, the Commission having reached that conclusion, the OCA and CA now contend the way is clear for Commission review (prior to judicial consideration of the question) of all Postal Service activities. Two avenues are open to the Commission under the PRA. The first avenue for review of Postal Service activities is found in the authority to initiate classification proceedings to determine whether a change in Postal Service classifications is necessary for any particular service. Second, the complaint procedures call for Commission review of complaints and the issuance of a public report upon complaints found to be justified where it is alleged rates are charged that are not in conformity with the policies set out in the PRA.

A. OCA and CA Request the Commission to Review Upon Its Own Initiative All Unclassified Postal Service Commercial Activities Pursuant to §3623 of the PRA

Since the Commission is now on the brink of a successful conclusion of the instant rulemaking proceeding, and will soon be issuing a rule in its final form, CA respectfully renews its former request to have the Commission initiate a classification proceeding to make a final disposition of the services that were the subject of the petition in Docket No. *2003. OCA and CA recognize that a number of the commercial services placed at issue in the petition are likely to fall outside of the Commission's definition of postal services. However, as services offered unilaterally by the Postal Service, never subjected to scrutiny by the Commission or any other entity, very little is known about them. OCA and CA would like to have the opportunity in a classification proceeding to learn more about them – to see, upon closer examination of the facts, whether they share the characteristics of services recognized to be “postal” in character.

Several of the services are almost certainly “postal” under the Commission’s proposed definition – NetPost CardStore and NetPost CertifiedMail – being two examples. Those that have been discontinued (and not resurrected under a different name) of course should not be included. OCA and CA ask that the current status of each of the services listed in the petition be explicitly stated by the Postal Service, including whether a variant of a service placed at issue is now being offered.⁹

The OCA and CA request that the Commission initiate classification proceedings pursuant to §3623 of the PRA to review the current commercial services offered by the Postal Service. This is consistent with the ruling of the Commission upon the previous CA complaint seeking review of many of the commercial activities of the Postal Service.¹⁰ There the Commission indicated that after a rule determining the definition of a postal service, the need to review those commercial services cited in that proceeding would be reviewed. Due to the passage of time and changes in the services offered, it is now necessary to conduct a thorough review from scratch of the terms and

⁹ OCA has reservations about the accuracy of statements that a service has been terminated. For example, Daniel Foucheaux, Chief Counsel, Ratemaking, sent a letter to Commission Secretary Steven Williams on August 29, 2003, stating that NetPost Mailing Online had been terminated:

Notices of the termination of the NetPost Mailing Online experiment will be published in both the Federal Register and the Postal Bulletin shortly. Those notices will briefly describe the termination as well as revise the Domestic Mail Manual to delete the specific regulations governing the experiment.

Nevertheless, NetPost Mailing Online continues to be offered to the public at the Postal Service’s website: <http://www.usps.com/mailingonline/welcome.htm> NetPost Mailing Online is unquestionably a postal service under the Commission’s proposed definition; yet the Postal Service offers it without ever filing a classification request with the Commission under 39 U.S.C. §§3622 and 3623.

¹⁰ "Petition of Consumer Action Requesting that the Commission Institute Proceedings to (1) Review the Jurisdictional Status of 14 Specified Services and (2) Establish Rules to Require a Full Accounting of the Costs and Revenues of Non-Jurisdictional Domestic Services, October 15, 2002." In support of its petition, CA incorporated by reference a letter signed by its executive director and the Office of the Consumer Advocate (OCA) that provided the legal basis for the petition and the substantive and procedural relief requested (Joint Letter). See, *Consumer Action Petition for Review of Unclassified Services*, Order Denying in Part, and Granting, in Part, Petition, Docket No. *2003, January 16, 2004.

provisions of those services and new services now offered by or through the Postal Service which are not now classified as postal services.

The Commission may review all of the Postal Service's commercial activities pursuant to its classification and fee review authority to determine whether any given Postal Service activity is a postal service requiring a classification and the establishment of an appropriate fee. In effect, any activity of the Postal Service may be reviewed upon the Commission's own initiative under §3623 to determine if classification is appropriate and the appropriate postal service classification. If the Commission initially concludes that the activity is neither a postal service, nor a service incidental to a postal service, the Commission should issue a recommendation by way of a declaratory order that the service should be terminated for failing to comply with the terms of the statute, *i.e.* a postal service classification is inappropriate because it does not relate to a postal service and is not otherwise authorized.

OCA and CA recognize that this interpretation and approach is somewhat at variance with the interpretation and regulatory approach we previously offered to the Commission in our prior pleadings in this docket and in other proceedings noted above. We previously suggested that except for the limited non-postal services for other governmental agencies (and international and philatelic services) all other activities of the Postal Service should be deemed postal services and classified and their fees regulated. We suggested that the Commission should therefore establish classifications and rates or fees for *all* of the Postal Service activities, even if they were not ancillary to the carriage of mail. However, as a result of Order No. 1424, our proposed interpretation is now modified, but the result is similar--Commission review of all Postal

Service activities to assure compliance with the PRA.¹¹ In one respect, this newer interpretation moves further, it follows from the Commission's view of the PRA that services that are not postal services (and not otherwise allowed under the Act) are not authorized by the PRA. If not authorized, they should be terminated.

In our previous pleadings, in an effort to reconcile the need to protect the public interest and our reading of the structure of the PRA, we suggested that even if certain activities of the Postal Service were not postal services, then the Commission nevertheless has the authority to review the fees pursuant to §3622. This was partly based on the need to reconcile the somewhat ambiguous language in §404((a)(6) concerning special nonpostal services and the historically confused usage of the term nonpostal. However, the Commission's Order No. 1424 helps to clarify the matter.

In each classification proceeding, the Commission follows the terms of §3623. In the absence of a Postal Service filing wherein the Postal Service is seeking a Commission recommendation for a classification, the Commission may review any activity for compliance with the requirements of the PRA. The only difference may be that if the activity clearly involves one that is not a postal service, such as the selling of donuts, the initial factual question of whether a postal service, or a service incidental thereto, is involved can be more easily resolved. But, whether the activity is clearly not related to a postal service, or is a close question as to whether it is a postal service, or is found to be a postal service but classification is inappropriate because the service is ill-conceived, the statutory framework for proceeding is identical. In either case, the Commission may, on its own, initiate review to determine if a postal classification is

¹¹ However, consistent with the Commission's interpretation, the Postal Service should not even undertake non-postal commercial ventures as there is no authority for such activities within the PRA.

appropriate. If the Commission decides that *no* classification is appropriate, whether or not a postal service is involved, the Commission should issue a declaratory order stating its finding that the commercial service is inappropriate or unauthorized, as the case may be.¹² We recognize that, in any case, if the Postal Service persists in its activity, the Commission has no authority to order it to cease and desist. The public must rely initially upon the good faith of the Postal Service to cease an activity the Commission finds is not appropriate for classification. Beyond that, it is a matter for courts to decide upon complaint.

Thus, the Commission is not left powerless under the statute to proceed and to rule on any and all Postal Service activities and may reach a finding that certain services fail to comply with the terms of the PRA classification requirements. Of course, the Commission even has authority to review, at least in the first instance, activities that might be determined to be postal services, but which are ultimately determined to be areas specifically outside the Commission's regulatory authority such as philatelic services, services for other governmental agencies under §406 and §411, international services, activities related to the management of its facilities and asset management, and labor management activities.

A complaint case currently lies before the Commission relating to postal service material described as "stamped stationery" which the Postal Service contends is

¹² In the first round of the "Pack & Send" case where the Commission found the proposed activity, for which the Postal Service had not sought classification authority, to be a postal service, the Commission issued a declaratory order rather than a recommendation order. The declaratory order thus provided a means to interested parties to appeal the Commission's ruling in district court. *Complaint of Coalition Against Unfair USPS Competition*, Order No. 1145, "Declaratory Order Finding Complaint to be Justified and Providing for Further Proceedings," Docket No. C96-1, December 16, 1996.

philatelic in nature and not a matter over which the Commission asserts jurisdiction.¹³

There cannot be any serious contention that the Commission does not have jurisdiction in the first instance to determine whether or not this involves philatelic material outside of the Commission's jurisdiction or postal service matter for which postal classification is appropriate.

In this way, the PRA provides the Commission with the procedural tools necessary to determine if the targeted venture of the Postal Service warrants classification as a postal service and is otherwise in conformity with the other requirements of the PRA, just as the Commission has with obvious postal services. If the Commission finds, in the first instance, that an activity is not even a postal service, then it must recommend against classification and should state through a declaratory order that the service is not an activity appropriate for classification as a mail service and should be terminated as an *ultra vires* or an illegal act of the Postal Service.¹⁴

Such a declaratory order by the Commission would not be an empty meaningless determination. It would be a first step in assuring compliance with the Commission's interpretation of the PRA as precluding unauthorized commercial ventures and would be the step necessary to exhaust administrative remedies of those who would challenge the action of the Postal Service. The Commission's view that it lacks equity powers to order the Postal Service to cease and desist unauthorized commercial activities ("As the

¹³ *Complaint on Stamped Stationery*, "Order Concerning Complaint of Douglas F. Carlson," Docket No. C2004-3, filed June 24, 2004.

¹⁴ The phrase *ultra vires* has been used to designate not only acts beyond the express powers of corporations but acts contrary to public policy or express statutory prohibition, but the latter class is now termed illegal and the term *ultra vires* confined to actions contrary to the express and implied powers of a corporation. *In re Grand Union Co.*, 219 F. 353, 363 (C.C.A.N.Y.).

Commission has noted previously, it lacks equitable powers to enjoin Postal Service actions.” Order No. 1424 at 30) does not render the process meaningless.

Furthermore, this request that the Commission initiate a classification proceeding following conclusion of this rulemaking procedure is not at odds with the Commission’s assurances in Order No. 1424 that the rule does not expand the authority of the Commission. There the Commission said correctly:

The proposed rule in no way restricts the types of services, postal or otherwise, that the Postal Service may wish to offer. It is free to offer whatever services it chooses *subject to the requirements of the Act*. For those activities that are postal services, within the meaning of the proposed rule, the Postal Service has an obligation to request a recommended decision before commencing service or charging rates. Nothing in the proposed rule affects the lawfulness of Postal Service products or services that are *not* postal.¹⁵ (Order No. 1424 at 2-3, 7; emphasis supplied)

The rule simply defines postal service as the Commission interprets that phrase in the statute. The definition does not reach the further question as to the meaning of the PRA regarding commercial activities that are not postal services. Clearly, the Postal Service is not free to offer whatever services it chooses. The services are limited by the authority of the Act. We submit the Act provides very limited and, for the most part, explicit guidance as to the general category of services the Postal Service may perform that are not related to postal services. They are cited and briefly discussed at pages 10-11 in Order No. 1424.

¹⁵ The footnote states, “To clarify, the Commission takes no position on services offered by the Postal Service that fall outside the proposed definition.” We believe the Commission having found very limited authority for the Postal Service to act outside the proposed definition should and must under the structure of the Act take steps to insure the intent of Congress under the Act is not thwarted by a runaway Postal Service acting beyond its authority. The mechanism we propose is already in the Act.

B. Upon Complaint, the Commission May Review Commercial Activities of the Postal Service Pursuant to §3662 to Determine if the Activities Conform to the Policies of the PRA

OCA wishes to draw the attention of the Commission to one of the powers given to it by Congress in §3662 of title 39 that relates importantly to the Postal Service's offering of unauthorized commercial services.¹⁶ In Order No. 1424, the Commission decisively resolves the question whether the Postal Service is authorized by the PRA "to engage in an unlimited variety of commercial, nonpostal activities," finding that:

Had Congress intended such a sea change in the meaning of the term nonpostal surely it would have elaborated on the point. It did not. (Order No. 1424 at 20)

The Commission rejects the idea that:

Contrary to the carefully crafted balance reflected in the Act . . . Congress granted the Postal Service *carte blanche* to engage in whatever "new services" it may wish without any opportunity for regulatory review or public input. (Order No. 1424 at 25)

OCA recognizes that the Commission has no power to enjoin the Postal Service from engaging in unauthorized retail activities that are "not postal" in character. In §3662, however, Congress did delegate to the Commission the power to issue a public report presenting Commission findings that activities of the Postal Service "do not conform to the policies set out in this title." Specifically,

- "Interested persons who believe the Postal Service is charging rates which do not conform to the policies set out in this title . . . may lodge a complaint with the Postal Rate Commission"
- "The Commission may in its discretion hold hearings on such complaint."
- "If a matter not covered by subchapter II of this chapter is involved, and the Commission after hearing finds the complaint to be justified, it shall render a

¹⁶ The Commission cites examples such as donut shops and car dealerships that could never reasonably be viewed as closely related to the Postal Service's core mission.

public report thereon to the Postal Service which shall take such action as it deems appropriate.”

These provisions, therefore, allow the Commission to hear complaints on rates that do not conform to the policies set out in this title. OCA and CA submit that the Postal Service’s offering of retail services to the public that are unauthorized by the PRA (as discussed above) come under the definition of rates that do not conform to the policies of title 39. OCA and CA urge the Commission to exercise its discretion in such cases by holding hearings.

Following these hearings, in a declaratory order, such as that issued in Docket No. C96-1,¹⁷ the Commission should then present its determination whether a complained-of retail service is “postal” or not. If a service is “postal” in character, as the Commission has defined it in its proposed definition, then it is to be hoped that the Postal Service will cease to provide such a service and resume offering it only after the Commission has recommended it to the Governors under §§3622 and 3623. If the Commission finds the service not to be “postal” in character, but a commercial activity never authorized by Congress, then OCA and CA respectfully request that the Commission render a public report advising the Postal Service to desist from continuing to offer such services.

The Commission currently has pending a Complaint on Electronic Postmark, filed by DigiStamp, on February 25, 2004.¹⁸ Once a final definition of “postal services” is adopted, the Commission should initiate hearings to adduce facts concerning the nature

¹⁷ Order No. 1145, “Declaratory Order Finding Complaint to be Justified and Providing for Further Proceedings,” December 16, 1996, *re Complaint of Coalition Against Unfair USPS Competition*.

¹⁸ Docket No. C2004-2. Electronic Postmark is one of the services placed at issue by the CA petition.

of Electronic Postmark. In our view, Electronic Postmark falls squarely within the proposed definition of postal services, as it consists of the receipt, transmission, *and* delivery of correspondence. It functions like a letter (or other printed matter) deliberately mailed via the Postal Service to document officially that written material contains specific text or graphic images that have not been altered since the date that the Electronic Postmark was applied. A sealed, postmarked letter to oneself, or another person, functions in the same way.

DigiStamp supplemented its Complaint with an example that showed that the Postal Service solicits the purchase of Electronic Postmark as a substitute for: “Certified or Registered U.S. Mail for certain types of electronic communications . . . [that] will carry the same force of law and legal effect as those physical mail services.”¹⁹ Once hearings are completed, a declaratory order stating the “postal” character of Electronic Postmark should be issued. In the unlikely event that the Commission finds that Electronic Postmark is not a “postal service,” OCA and CA ask that the Commission render a public report advising the Postal Service to desist from offering a service that does not conform to the policies of title 39.

IV. CONCLUSION

In conclusion, OCA and CA support the language of the proposed rule. Further, although the Commission does not have the equity powers to order the Postal Service to cease and desist from unauthorized activities for which a postal service classification and fee are not appropriate, OCA and CA urge the Commission to determine upon the conclusion of this rulemaking that it will initiate classification proceedings on its own, or

¹⁹ “Motion to Notify the Postal Rate Commission of a Recent Example Where the Use of USPS EPM Replaces Traditional Mail Service,” November 12, 2004, at 2.

pursuant to appropriate complaint, to review and decide in a final administrative order those activities of the Postal Service which are postal services for which a classification must be filed. If the Commission determines a classification does not lie for any particular commercial activity of the Postal Service, because it is outside the authority of the Postal Service, OCA and CA urge the Commission to consequently issue a declaratory order with respect to those services indicating the commercial activity is deemed illegal and should be terminated by the Postal Service.

Respectfully submitted,

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