

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

Proposed Amendments to the
Commission's Rules

Docket No. RM2004-1

INITIAL COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN RESPONSE TO ORDER NO. 1424
(February 1, 2005)

On January 16, 2004, the Postal Rate Commission issued Order No. 1389, initiating this rulemaking and soliciting comments on a proposed amendment to its rules to incorporate a definition of the term "postal service." As requested by that Order, the Postal Service and other parties offered initial and reply comments on the proposed definition in March and April. On November 12, 2004, the Commission issued Order No. 1424, advancing for comment a new proposed definition. The Postal Service hereby offers its initial comments in response to Order No. 1424.

Both the definition previously proposed in Order No. 1389 and the definition now proposed in Order No. 1424 are intended to provide a reference base for interested parties to distinguish between postal services and nonpostal services. The significance of the distinction between the two types of services, broadly speaking, is that (domestic) postal services are subject to Commission jurisdiction, and nonpostal services are not. Over the last several decades, despite recognition (e.g., Order No. 1424 at 9) that the Postal Reorganization Act does not define postal services directly, there has been no

particular uncertainty regarding how to approach defining postal services for purposes of evaluating Commission jurisdiction. That question was resolved in court litigation in the 1970s, and both the Commission and the Postal Service have been employing the resulting legal standard since that time. For example, citing the same *ATCMU* and *NAGCP I* cases cited on pages 10-11 of Order No. 1424, the Commission in 1996 itself summarized the relevant test as follows:

The courts have stated that the fundamental inquiry to be made is whether the service under scrutiny is a “postal service” in ordinary parlance, the “plain meaning” of which is established by reference to the routine postal functions of accepting, handling, and delivering mail matter.

Order No. 1145, Docket No. C96-1 (December 16, 1996) at 11-12.

When this rulemaking was initiated, Order No. 1389 appeared to follow the consistent line of instances in which the Commission basically tracked the approach to defining postal services adopted by the courts. The definition proposed in Order No. 1389 stated that

Postal service means the delivery of letters, printed matter, or packages weighing up to 70 pounds, including acceptance, collection, processing, transmission, or other services supportive or ancillary thereto.

Order No. 1389 summarized its intended relationship to previous definitions as follows:

The principal standard that has been applied in analyzing different services is “the relationship of the service 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 with the meaning of § 3622.” Thus, the proposed definition is intended not to represent a change, but to clarify the definition to all interested persons.

Order No. 1389 at 12 (footnote omitted). Order No. 1389 therefore not only linked the proposed definition to the standard employed since the 1970s, but also explicitly noted that no change in the established standard was intended.¹

In its comments in response to Order No. 1389, the Postal Service certainly took solace from the Commission's assurances that no change was intended. See Initial Comments of the United States Postal Service (March 15, 2004) at 3-4. The Postal Service also cautioned that "[w]hile the Commission cites its own interpretation of prevailing law as the reference point, however, we believe that the more accurate points of reference are the statute and the controlling judicial interpretation." *Id.* at 4. In accordance with that view, the Postal Service included the following suggestion:

One way to improve the proposed rule in this respect would be to cite to the D.C. Circuit Court of Appeals opinion on which both the Commission and the Postal Service have relied to support their respective views on the nature of postal services. The definition could simply include the following footnote:

¹ See *National Association of Greeting Card Publishers v. U.S. Postal Service*, 569 F.2d 570, 595-98 (DC Cir. 1976), *vacated on other grounds*, *U.S. Postal Service v. Associated Third Class Mail Users*, 434 U.S. 884 (1977)

This amendment would clarify that the effect of the proposed definition would be merely to restate prevailing law, as it has been interpreted by the courts.

Id. at 4-5.

¹ Thus, it is little short of disingenuous for Order No. 1424 (pg. 47, note 178) now to assert that "[p]reviously, the Postal Service evaluated postal services in terms of processing the mail." In fact, it was the courts, the Postal Service, *and* the Commission that heretofore *all* evaluated postal services under that standard. Resort to revisionist history does not lend confidence to the objectivity of the Order's reasoning.

Thus, even in response to Order No. 1389, which appeared to propose a definition of “postal services” with which the Postal Service had no fundamental disagreement, the Postal Service was nonetheless careful to emphasize that the scope of the exercise needed to be confined to restating prevailing law, as interpreted by the courts. Such a limitation is required because any definition of postal services promulgated by the Commission which extends beyond prevailing law cannot bind the Postal Service. The Postal Service has articulated this principle repeatedly and consistently, both in this docket, in its Initial Comments in response to Order No. 1389 (*id.* at 2-4), as well as in major portions of its Comments of the United States Postal Service on Consumer Action Petition (Jan. 30, 2003).

Order No. 1424 exemplifies the type of Commission action about which the Postal Service has always been concerned, and demonstrates why those concerns were justified. In sharp contrast with the approach employed in Order No. 1389, rather than merely endeavoring to restate existing law, Order No. 1424 seeks to expand the Commission’s jurisdiction by promulgation of a definition of postal services that extends well beyond what has been formulated by the courts. The Order attempts to justify the framework of its new approach as follows:

Early consideration of what constituted a “postal service” was limited perforce to hard copy mail. That, after all, simply reflected the state of Postal Service operations at the time. One of the issues now before the Commission is whether services relying on new technology, such as electronic services, fall within the ambit of postal services under the Act. As elaborated below, the Commission concludes that those services in which the Postal Service receives, transmits, or delivers correspondence constitute postal services.

Order No. 1424 at 31. The Order, moreover, makes it abundantly clear that the impetus for the changes between the first and second definitions was the desire to assert jurisdiction over electronic services:

Since the definition focuses on the Postal Service's statutory functions, the proposed definition is distinguishable from that proposed in Order No. 1389. A major distinction is that the revised definition covers certain electronic services offered by the Postal Service, a result urged by several commenters. The Commission's decision to include certain electronic services is grounded on the statute and legislative history, both of which contemplate the use of technological advances in the provision of postal services.

Id. at 4.

Order No. 1424 also explains exactly what the Commission believes to be the practical consequences of its chosen definition of postal services:

The Postal Service argues that a Commission definition of the term postal service imposes no limits on its authority under the Act. The Commission does not disagree. The rule in no way restricts the types of service, postal or otherwise, that the Postal Service may wish to offer. The Postal Service is free to offer whatever services or products it wishes subject to the strictures of the Act. However, for those that are postal services, **as defined by the Commission**, the Postal Service has an obligation to obtain a recommended decision before commencing a service or charging the public.

Order No. 1424 at 7-8 (footnotes omitted, emphasis added). The full manifestations of this assertion are clear. The Commission believes that however it expands its definition of postal services, the Postal Service would be required to seek its approval prior to offering any service that the Commission had defined to be a postal service.

To put the matter in context, consider as examples two services that the Consumer Action petition sought to have included under the Commission's jurisdiction, but which Order No. 1424 appears to indicate, albeit tentatively, are not postal services

under the Commission's current thinking. The two examples are the Unisite Antenna program (see Order No. 1424 at 18) and the First-Class Phone Card program (*id.* at 47).² Yet if the Commission later changed its tentative thinking and chose to redraw the line between postal and nonpostal services, by further changing its definition in such a way that those two programs then fell within the expanded definition of postal services, the Postal Service, under the views espoused in Order No. 1424, would automatically be required to seek recommended decisions regarding those two programs. In effect, Order No. 1424 implicitly asserts that the previous line between postal and nonpostal services drawn by the courts in the 1970s would no longer be controlling, and that, instead of being guiding by judicial precedent, the Postal Service would in the future be bound to conform to the Commission's definition.³

The portion of Order No. 1424 quoted above is written as if the current statute explicitly delegated to the Commission the authority to define services as postal or nonpostal. Were that so, the Commission could promulgate a binding definition and, presumably, change that definition as it sees fit. The Postal Reorganization Act, however, includes neither an explicit nor an implicit delegation of authority to the

² The particulars of these two programs are not critical. They are offered as examples merely because the Commission has indicated how it tends to view these programs at the moment, but any current or potential service which falls on the nonpostal side of the line suggested under the prevailing standard (i.e., pre-Order No. 1424) would suffice for purposes of this discussion.

³ Order No. 1424 includes on page 30 the assertion that "[n]othing in the rule affects the lawfulness of the Postal Service's initiatives that are not postal." Yet that is true only if the proposed definition were to bifurcate perfectly all services into postal and nonpostal. If a service which truly is nonpostal were nonetheless erroneously classified as postal by the Commission's new definition, the rule would, in fact, unduly impede the
(footnote continued...)

Commission to define postal and nonpostal services. Unless and until Congress changes the statute, or the courts change the standards they articulated in previous judicial opinions, the Commission is no more free to deviate from prevailing law than is the Postal Service. The postal or nonpostal character of a service is intrinsic to that service, and does not change merely because the Commission may have chosen to adopt a new definition within its rules of practice.

Once again, therefore, the Postal Service finds itself reiterating its views that the competing notions of the Commission's intended role under the Postal Reorganization Act apparently must await judicial resolution. The Postal Service stated these views earlier in this docket (see Initial Comments at 2-4), and at greater length in its filings in response to the Consumer Action petition. In fact, Order No. 1424 at page 30 acknowledges the Postal Service's position in this regard. The Postal Service remains steadfast in its view that the Commission lacks authority to promulgate a definition of postal services which can extend or contract the scope of prevailing law, as interpreted by the courts.

One final aspect of Order No. 1424 merits comment. In several places, the Order suggests that the new definition is to be preferred over that proposed earlier in this docket because of its use of statutorily derived terms:

The rule proposed herein represents an improvement over that proposed in Order No. 1389 since it makes the Service's "postal service" duties the touchstone of the definition rather than any specific activities that the Postal Service may or may not perform. . . . Because the definition

(...footnote continued)
Postal Service's ability to offer that service.

focuses on the Postal Service's statutory functions, the proposed definition is distinguishable from that proposed in Order No. 1389.

Order No. 1424 at 3-4. Similar statements are found on pages 33-34 of Order No.

1424. The Postal Service finds these discussions to be, at best, puzzling. Consider the definition proposed in Order No. 1389:

Postal service means the delivery of letters, printed matter, or packages weighing up to 70 pounds, including acceptance, collection, processing, transmission, or other services supportive or ancillary thereto.

Next, consider the following portion of the section of the Act which specifies the general duties of the Postal Service:

The Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such services incidental thereto as it finds appropriate to its functions and in the public interest.

39 U.S.C. §403(a) (in part). It is self-evident that the definition proposed in Order No. 1389 was based on the Postal Service's statutory duties and functions, and employed statutorily derived terms. Any suggestion that the changes enunciated in Order No. 1424 were necessary in order to align the proposed definition with the terms of the statute simply does not withstand honest scrutiny. Some other motivation had to be at work. Apparently, as discussed above, that motivation was to abandon an approach that was limited to a restatement of the prevailing standards, and to affirmatively expand the Commission's claim of jurisdiction to include services, such as purely electronic services, that are not encompassed within the existing standards.

At this juncture, the Postal Service can only urge the Commission to abandon the shift in direction embodied in Order No. 1424. Perhaps the best course of action would simply be to terminate further efforts to incorporate a definition in the rules, and to leave concerned parties to research the law and ferret out the prevailing court opinions on their own. Alternatively, if a definition is still to be pursued, a necessary first step would be to return to the language proposed in Order No. 1389. Second, it would become even more imperative for the Commission to include the footnote suggested by the Postal Service in its Initial Comments, referring to the *NAGCP I* opinion and signifying that the intent of the definition is merely to inform interested parties of the standards previously enunciated by the courts. With respect to the Postal Service's suggested language regarding "carriage of mail," (discussed at page 41 of Order No. 1424), the Postal Service does not object to the original "delivery of mail" formulation. Lastly, since there is no disagreement between the Postal Service and the Commission regarding the preference for the "mailable packages" language over "packages weighing up to 70

pounds,” the Order No. 1389 definition should be modified to reflect the former.

Respectfully submitted,

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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.

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