

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

Proposed Amendment to the )  
Commission's Rules )

Docket No. RM2004-1

OFFICE OF THE CONSUMER ADVOCATE AND  
CONSUMER ACTION REPLY COMMENTS  
ON PROPOSED AMENDMENT TO THE COMMISSION'S RULES  
(March 1, 2005)

The Office of the Consumer Advocate ("OCA") and Consumer Action ("CA") hereby file reply comments in response to the comments upon the Commission's Notice and Order ("Order No. 1424") proposing to amend the Commission's Rules of Practice and Procedure in 39 C.F.R. §3001.5 ("Rule 5") to define "postal service."<sup>1</sup> 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> "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, the deadline for filing reply comments is March 1, 2005.

<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 February 1, 2005 by the OCA and CA,<sup>3</sup> the Postal Service<sup>4</sup>, Post Com<sup>5</sup>, and Pitney Bowes Inc.<sup>6</sup> The OCA and CA have no objections to the proposed definition of postal service. The OCA and CA also strongly support the Commission's conclusions that the Postal Service does not have authority to undertake activities other than its core activities related to postal services and that it does not have authority to enter into commercial ventures which are not postal services. We further ask that the Commission exercise regulatory oversight and review all unclassified commercial activities of the Postal Service through its authority under the Postal Reorganization Act. Pitney Bowes' comments indicate that, it too, supports a regulatory definition providing the Commission with broad jurisdiction to review products and services introduced by the Postal Service (Pitney Bowes comments at note 2.). This is to insure that the non-core activities of the Postal Service are not subsidized by the jurisdictional activities of the Postal Service.

The Postal Service's comments reiterated the position previously expressed in its comments on Order No. 1389, in this docket, asking the Commission to include a footnote in the definition of postal service. The Postal Service wants a citation to the court of appeals *NAGCP I* decision in order to clarify that the effect of the Commission's definition is to restate the "prevailing law" as interpreted by the courts. The Postal Service therefore requests the Commission to include the following footnote within the

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<sup>3</sup> "Office of the Consumer Advocate and Consumer Action Comments on Proposed Amendment to the Commission's Rules."

<sup>4</sup> "Initial Comments of the United States Postal Service in Response to Order No. 1424."

<sup>5</sup> "Postcom Comments on Proposed Rulemaking Concerning the Definition of 'Postal Service.'"

<sup>6</sup> "Comments of Pitney Bowes Inc."

rule: "See *National Association of Greeting Card Publishers v. U.S. Postal Service*, 569 F2d 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)." The Postal Service is concerned that the definition proposed in Order No. 1424 expands the Commission's jurisdiction over "what has been formulated by the courts" and any definition "which extends beyond prevailing law cannot bind the Postal Service." (USPS Comments at 4.).<sup>7</sup> In the Postal Service's view, the definition of postal service should not cover certain electronic services offered by the Postal Services because that crosses the line established by the courts between postal and nonpostal services and, it says, the Commission does not have such authority to bind the Postal Service.

The Postal Service incorrectly believes that previous court decisions have drawn a bright line that is crossed by the Commission's proposed definition. In fact, the court opinions do not draw a bright line defining postal service. The *NAGCP I* case does not even attempt to draw a specific line. The court's holding is limited to an affirmation of the District Court's decision below. It relates only to the services at issue in that proceeding. The test applied by the court of appeals does not resolve the issue as to any other services by the Postal Service.

The court there merely said,

Giving 'postal services' a plain meaning, all of the services here at issue may reasonably be so classified. With one possible exception each clearly involves an aspect in the posting, handling and delivery of mail matter.<sup>8</sup> (569 F2d at 596.)

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<sup>7</sup> The Postal Service later restated this position, "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." (Comments at 7.)

<sup>8</sup> Note that the "posting and handling" are not words drawn from the statute and that "mail matter" is not defined by the court in the opinion. The Commission has determined commercial electronic

The court continued:

As for the one possible exception-money orders-it is undisputed that the great majority of these are sent through the mail and that therefore the provision of money orders may itself reasonably be viewed as intimately a part of postal services. (*Ibid.*)

The only activity in issue that did not easily fit into the definition of postal services was money orders. In applying the standard that money orders are within the definition of postal services, the court's view broadened the reach of the statute in a way that is contrary to the result that the Postal Service seeks here, which would narrow the scope of the Commission's jurisdiction over electronic services. Thus, if anything, the *NAGCP / case* undercuts the Postal Service's position.<sup>9</sup>

If the line drawn by the courts were as bright as the Postal Service claims, there would be no need for this rulemaking. But the issue of the applicability of the Postal Reorganization Act to technological changes in communications needs to be resolved and the court opinion did not reach that issue, even in dicta. There is no established precedent binding the Commission on the question of the applicability of technological changes. If the Commission merely cited to court of appeals decisions for the definition of postal services, to (as the Postal Service suggests) "leave concerned parties to research the law and ferret out the prevailing court opinion on their own," (Comments at 9) those parties would have an endless search for definitive court guidance on this

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communications services by the Postal Service do involve or are ancillary to the receipt, transmission or delivery of mail matter.

<sup>9</sup> Most of the court's discussion dealt with rejecting what it described as appellant's rather strained arguments related to previous legislative history and a restrictive statutory construction attempting to divide regulatory responsibility between the Commission as to postage and the Postal Service as to the establishment of fees.

issue. Consequently citing the court of appeals opinion would be meaningless, misleading and confusing.

The Commission is not, in this rulemaking, revising its views as to postal and nonpostal services. This is essentially a case of first impression as to electronic services. The issue has been raised in other dockets where the Commission has discussed, but not ruled on, the question of the applicability the Commission's jurisdiction over electronic services offered by the Postal Service. The Commission is only now defining postal services--clearly it is not ignoring any court precedent as the Postal Service suggests. Therefore, this being a case of first impression, the Commission is within its statutory authority to interpret the statute and promulgate a rule. The Commission is under no obligation to "await judicial resolution" before it may act. Indeed, the Postal Service is silent as to the process by which judicial resolution of this issue might arise in the absence of Commission action.

PostCom apparently does not believe that the *NAGCP I* opinion would assist in defining postal services. It agrees that the Postal Service is not authorized to offer electronic services that are not related to its statutory activities. (PostCom Comments at 1.) But, PostCom does not suggest that the *NAGCP I* opinion speaks to this issue or that it even provides any guidance for the definition of postal services or electronic postal services.

PostCom, however, further contends that no electronic communication services are related to the Postal Service's statutory activities. It argues that because the Postal Service is not authorized to carry out electronic services, whether regulated or not, the Commission is wrong to conclude that it has jurisdiction over those activities. PostCom

points to the language of the statute and concludes that end-to-end electronic services unrelated to traditional mail delivery are not an extension of traditional mail service. It thus contends the Commission errs in suggesting the Postal Service may operate communications services. PostCom contends this opens a Pandora's box of confusing jurisdictional questions because, it says, surely the Postal Reorganization Act did not cover all types of electronic communications such as facsimile, Voice-Over-Protocol and video conferencing.

PostCom's concerns are unfounded as it reads the Commission's findings too broadly. The rule would not apply Commission jurisdiction to all electronic activities by the Postal Service or others. The Commission's rule would apply only to commercial activities of the Postal Service, not to such activities by others or even to activities by the Postal Service if they are not commercial in nature.

The Postal Service also objects that the proposed rule does not "align the proposed definition with the terms of the statute." However, comparison of the two proposed rules demonstrates that the most recent proposal more nearly follows the statutory language in §403 of the Postal Reorganization Act. That section of the statute, and the first part of the sentence in the new definition, each refer to the receipt, transmission and delivery by the Postal Service, whereas the initial proposal focused on delivery, which was to include acceptance, collection, processing and transmission. Also, the end of the sentence in the new definition includes the phrase "and like materials." It is drawn directly from §403. The newest proposal thus does follow the statute much more closely than the first proposal in Order No. 1389 and the Postal

Service is incorrect to suggest the Order No. 1389 definition more closely followed the Postal Service's statutory duties.

In conclusion, OCA and CA support the language of the proposed rule. None of the comments filed raise issues that require a modification of the Commission's proposal. Additionally, as we stated in our initial comments, we urge the Commission, upon the conclusion of this rulemaking, to initiate classification proceedings on its own, or pursuant to appropriate complaint, and to review and decide by 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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