

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

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1

UNITED STATES POSTAL SERVICE NOTICE OF
SUBMISSION OF SWORN STATEMENT ON
“NONPOSTAL SERVICES” PURSUANT TO 39 U.S.C. § 404(e)
(March 19, 2008)

On December 20, 2007, the Commission issued Order No. 50, instituting the above-referenced docket, in order to “fulfill its responsibilities under section 404(e)” of title 39, as amended by the Postal Accountability and Enhancement Act (PAEA).¹ Section 102 of the PAEA amended title 39 to remove former section 404(a)(6), which authorized the Postal Service to provide “special nonpostal or similar services.” In its stead, the PAEA added a new provision, section 404(e), that defines “nonpostal service” as “any service that is not a postal service defined under section 102(5) [of title 39],”² and states in part: “Nothing in this section shall be considered to permit or require that the Postal Service provide any nonpostal service, except that the Postal Service may provide nonpostal services which were offered as of January 1, 2006, as provided under this subsection.”

Under section 404(e), the Commission is to review any “nonpostal service” offered by the Postal Service to determine whether that service may be continued, based on the public need for the service, and the ability of the private sector to meet

¹ See PRC Order No. 50 at 2.

² 39 U.S.C. § 102(5) defines “postal service” as “the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto.”

that public need. To that end, Order No. 50 requires the Postal Service to provide, by March 19, 2008, a statement identifying, describing, and justifying, based on the standards set forth in the law, each “nonpostal service” subject to the requirements of section 404(e).³ The Commission also invited the submission of legal memorandum at any time.⁴

Pursuant to this Order, the Postal Service hereby files the statement of Ms. Tina Lance. In her statement, Ms. Lance identifies those services that the Postal Service respectfully submits should be added to the Mail Classification Schedule (MCS) by the Commission pursuant to section 404(e). Ms. Lance’s statement is discussed further in Part I below.

In addition to providing this statement, the Postal Service discusses in this filing how other services not previously regulated by the Commission fit within the statutory framework of title 39, as it has been amended by the PAEA. The Postal Service does this to explain why certain services that some may have expected to be part of this proceeding are not included in Ms. Lance’s statement. As discussed in Part II below, a number of services not previously regulated by the Commission fit within the statutory definition of “postal service,” and thus should be added to the MCS on that basis. Other services, meanwhile, are expressly authorized by provisions of title 39 that were untouched by Congress when it enacted the PAEA, including section 411, which authorizes the Postal Service to provide government services, and section 404(a)(5), which authorizes the Postal Service to provide philatelic services. As discussed in Part III below, these types of discrete services are not implicated by section 404(e). Instead,

³ PRC Order No. 50 at 2.

⁴ *Id.* at 3 n.3.

section 404(e) was intended to eliminate the ambiguous grant of authority embodied by former section 404(a)(6), and to affect existing services offered pursuant to that former grant of authority.

Thus, the new statutory framework of title 39 shows that the Postal Service is authorized to directly provide three types of services to the public: 1) “postal services” within the meaning of section 102(5); 2) “nonpostal services” within the meaning of section 404(e) (which are those services that are “nonpostal” within the meaning of former section 404(a)(6)), if authorized by the Commission; and 3) services that are not “postal services,” but are authorized by a discrete grant of authority in title 39, such as government services and philatelic services. Only the second kind of service is directly implicated by this proceeding.

Furthermore, as discussed in Part IV below, section 404(e) implicates the offering of services by the Postal Service to the public, rather than the collection of revenues. Many sources of revenue for the Postal Service cannot fairly be characterized as a “service” that the Postal Service offers to the public, and are thus also not implicated by this proceeding. This includes situations in which the Postal Service is simply allowing parties to access its real property, or is allowing parties to use one or several of the intangible assets comprising its intellectual property portfolio.

I. THE COMMISSION SHOULD AUTHORIZE THE CONTINUED PROVISION OF SEVERAL “NONPOSTAL SERVICES” IN THIS PROCEEDING, AS DISCUSSED IN THE STATEMENT OF MS. LANCE

The statement of Ms. Lance discusses and justifies the continued offering by the Postal Service of the following services, which are “nonpostal” within the meaning of section 404(e): Passport Photo Service, Photocopying Service, Notary Public Service,

Stored Value Cards, and Officially Licensed Retail Products (OLRP). The Postal Service requests that the Commission add these services to the MCS, on the competitive side. The Postal Service submits that Ms. Lance's statement justifies the continued offering of each service discussed therein, taking into account the standards set forth in section 404(e)(3).

Two additional issues presented by Ms. Lance's statement merit discussion here. First, the OLRP program encompasses a number of individual items of merchandise sold directly by the Postal Service. The Commission should consider the OLRP program as a whole to be the relevant "nonpostal service" for purposes of section 404(e). In other words, the Commission should authorize the continued offering of "Officially Licensed Retail Products," and treat OLRP as a competitive product in the MCS. The Postal Service would have the authority to introduce new individual OLRP items (rather than be limited to those items offered as of January 1, 2006), subject to the appropriate updating of the product description for OLRP in the MCS, and the appropriate notice of the price being charged for each item.⁵

Second, with respect to Stored Value Cards, section 404(e)(2) states that the Postal Service is authorized to provide "nonpostal services" that were offered as of January 1, 2006, subject to approval by the Commission, while section 404(e)(3) states that the Commission shall in this proceeding "review each nonpostal service offered by the Postal Service on the date of enactment of the [PAEA]." Stored Value Cards (in the specific form of the First-Class Phonecard) were offered on January 1, 2006, but were discontinued in October 2006, prior to the date of enactment of the PAEA.

⁵ In the alternative, certain OLRP items, such as Postal Service-branded scales, could be considered "postal services" within the statutory meaning of that term, due to their direct support of the hardcopy carriage of mail. Part II discusses the statutory term "postal service."

The Postal Service submits that the operative date for purposes of section 404(e) should be the date set forth in section 404(e)(2) (January 1, 2006), rather than (e)(3) (December 20, 2006). Section 404(e)(2) specifically addresses the Postal Service's altered substantive authority to provide "nonpostal services," stating that the Postal Service "may provide nonpostal services which were offered as of January 1, 2006," if approved by the Commission. On the other hand, the first several lines of section 404(e)(3), in which the concept of the "date of enactment" is introduced, are procedural, rather than substantive, in focus. The Postal Service therefore posits that the appropriate resolution of the ambiguity created by these two dates is to conclude that "nonpostal services" offered on January 1, 2006 may be authorized by the Commission in this proceeding, even if they were not being offered "on the date of enactment" of the PAEA. This preserves the full force and effect of the specific "grandfather" clause set forth by Congress.⁶

II. MANY SERVICES NOT PREVIOUSLY REGULATED BY THE COMMISSION FALL WITHIN THE STATUTORY DEFINITION OF "POSTAL SERVICE"

There are a number of services that have not heretofore been subject to Commission review that should be characterized as "postal services" within the statutory meaning of that term. "Postal service" is defined as "the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto."⁷ Products and services that are

⁶ Furthermore, interpreting section 404(e)(3) literally would implicitly suggest that the Commission could review and authorize the continued offering of any "nonpostal service" offered on the date of enactment of the PAEA, even if it was not being offered on January 1, 2006. While no service presents this issue, the implausibility of such a reading further illustrates why the Postal Service's approach should be applied.

⁷ 39 U.S.C. § 102(5).

closely related to, and directly supportive of, the provision of mail service clearly fall within this definition.

In the past, under the Postal Reorganization Act (PRA), courts and the Commission determined the “postal” character of a service in part by examining its relationship to mail, including whether it could “fairly be said to be ancillary to the collection, transmission, or delivery of mail.”⁸ When considering the scope of the new statutory definition of “postal service,” it is instructive (though not necessarily dispositive) to consider this precedent, because a determination of whether a service is “ancillary” to the carriage of mail is a relevant consideration under that definition.

Two considerations that have been employed in making this determination have been the so-called “structural” and “statistical” tests. In Docket No. C96-1, the Commission summarized this approach as follows:

Determining whether [a] service is “postal” or “non-postal” in character requires the application of legal standards to the available facts. While it has been stated a variety of ways, the primary 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 within the meaning of § 3622 [of the PRA].

Application of this standard looks not only at the intrinsic features and terms of the service [*i.e.*, the “structural” approach], but also considers the extent to which use of the service culminates in use of the mails [*i.e.*, the “statistical” approach].⁹

In Docket No. R76-1, the Commission applied this standard when asserting jurisdiction over a number of services.¹⁰ Though the Commission initially expressed

⁸ See PRC Op., R76-1, Appendix F, page 3.

⁹ See PRC Order No. 1128 at 10 (July 30, 1996) (internal footnotes omitted).

¹⁰ See PRC Op., R76-1, Appendix F.

some reservations about the use of a statistical approach,¹¹ it employed that test along with the structural test in Docket No. C96-1, finding that “Pack and Send” (a packaging service previously offered in select locations by the Postal Service) was a “postal service” given its structural relationship to the acceptance of mail, and the likelihood that most people who would use the Postal Service to package their items would also use the Postal Service to deliver that package.¹²

There are a number of services not currently within the MCS (as proposed by the Postal Service in Docket No. RM2007-1) that fall comfortably within the definition of “postal service,” due to, among other things, their “structural” and/or “statistical” relationship to the acceptance, collection, sorting, transportation, and delivery of mail.¹³ These are products that are closely related to, and directly supportive of, the carriage of mail. Two such services are Address Management Services and ReadyPost, which are discussed below. For services such as these, which the Postal Service believes are properly considered “postal services,” the Postal Service will take the appropriate actions, in the near future, to add them to the MCS.

The Postal Service offers a number of Address Management Services that enable mailers to improve the quality of addresses on their mailpieces, and in some instances to qualify for postage discounts. These include City State service, which validates the city name and ZIP Code™ of an address, Delivery Sequence File 2nd Generation service (DSF 2™), which identifies incomplete or inaccurate addresses,

¹¹ See *id.* at 12-13.

¹² See PRC Order No. 1145 (December 16, 1996).

¹³ The Postal Service is not suggesting here that these are the only possible criteria for determining whether something is a “postal service” within the new statutory definition of that term. *Cf. id.* at 11 (noting that, with regard to determining the “postal” nature of a service, it is “neither necessary nor productive to canonize any one particular test in preference to, or to the exclusion of, every other potentially applicable criterion.”).

Delivery Point Validation service (DPV™), which identifies erroneous addresses, and National Change of Address—Link service (NCOA^{Link®}), which updates addresses with current change-of-address information. Improved address quality assists the Postal Service in maximizing its ability to deliver mail quickly and efficiently, and reduces the volume of mail that cannot be delivered. By using these services, mailers can standardize addresses in the correct format, confirm that addresses contain all necessary elements, check that addresses are valid Postal Service delivery points, and ensure that address information is current.¹⁴

The Postal Service also offers ReadyPost, a line of mailing and shipping supplies for sale in postal retail locations. The Postal Service believes that ReadyPost is properly considered a “postal service,” due to the fact that the purchase of envelopes and packaging materials from a Postal Service retail lobby is very closely related to the acceptance, and thereby the delivery, of mail. In addition, ReadyPost products that are purchased by consumers are likely to end up in the mailstream. Indeed, the very purpose of ReadyPost materials is to be mailed, by providing customers with convenient access to the materials necessary to enter their letters, gifts, or other items into the mailstream.

The Postal Service recognizes that the Commission previously concluded, in Docket No. R76-1, that the sale of packaging materials was not a “postal service” under the PRA.¹⁵ However, the Postal Service believes that the reasoning employed in making that decision does not provide a sound basis for concluding that ReadyPost is

¹⁴ The Commission has stated before that “the correction of addresses on a mailing list bears a sufficiently close relationship to the transmission and delivery mail to establish it as” a postal service. PRC Op., R76-1, Appendix F, page 7.

¹⁵ *Id.* at 20-21.

not a “postal service” under the PAEA. Indeed, the reasoning employed in that docket seems to directly conflict with the Commission’s later decision in Docket No. C96-1, the “Pack and Send” case. In Docket No. R76-1, the Commission found that the sale of packaging materials was not a “postal service” for two reasons: 1) even though the most obvious use of such materials is to send mail, there is “no reason to suppose that their use is limited exclusively to [that] function”; and 2) packaging materials “can be purchased from sources other than the Postal Service.”¹⁶ In Docket No. C96-1, on the other hand, the Commission found “Pack and Send” to be a “postal service,” despite recognizing that it was possible that some “Pack and Send” packages would not be mailed,¹⁷ and despite the availability of packaging services from other sources. This later decision seems to directly undercut the rationales underlying the Commission’s earlier decision.¹⁸

Furthermore, a conclusion that packaging materials fall outside the definition of “postal service” cannot be founded simply on the bases that packaging materials may not be used “exclusively” to send mail, and are available from alternative sources. The proper inquiry is on the relationship of a service to the mail, and it seems difficult to conclude that the sale of packaging materials in a retail lobby is “nonpostal,” especially when the packaging of items by a window clerk would be “postal.” While there is a

¹⁶ See *id.*

¹⁷ See PRC Order No. 1145 at 15.

¹⁸ The Postal Service recognizes that later, in Docket No. C2004-3, the Commission distinguished stamped stationery from packaging supplies (in holding that the former was a “postal service” within the meaning of the PRA) by noting that stamped stationery was only available from the Postal Service, while packaging supplies could be acquired from numerous sources. See PRC Order No. 1475 at 8, 11-12 (August 24, 2006). Even if that decision could be read as partly undercutting the Commission’s earlier decision in the Pack and Send case to de-emphasize the “alternative source” criterion (which the Postal Service does not believe is the case), determining whether a service is a “postal service” based on whether that service is available from alternative sources does not bear a sufficient nexus to the statutory definition of that term, as discussed in the text above. Indeed, the fact that “postal services” may be “competitive” would seem to preclude giving much (if any) weight to such a criterion.

difference in terms of the identity of the person who ultimately encloses the mailable item in the package, that difference should not be seen as having any important legal significance with respect to identifying “postal services.”

Finally, as a concluding note, the Postal Service calls attention to another service it believes should be considered “postal” in nature: International Money Transfer Services (IMTS). In the draft MCS submitted in Docket No. RM2007-1, the Postal Service proposed that IMTS, which would include both hardcopy and electronic money transfer services, including Dinero Seguro (Sure Money), be listed as a competitive postal product.¹⁹ Thereafter, in Order No. 43, the Commission issued product lists, which include IMTS as a competitive postal product.²⁰ The Postal Service has long provided domestic and international money orders, and is also expressly authorized by section 408 to establish money transfer products with other foreign postal administrations.²¹ The Postal Service currently exercises its authority under section 408 through the framework established by the Universal Postal Union (UPU) Postal Payment Services Agreement, to which the United States is a signatory, and which provides that postal administrations may engage in both hardcopy and electronic money transfers.²²

¹⁹ See Docket No. RM2007-1, United States Postal Service Submission of Initial Mail Classification Schedule in Response to Order No. 26, page 26 n.35 (September 24, 2007).

²⁰ See PRC Order No. 43, Appendix A, page 9.

²¹ To the extent that purely electronic post-to-post money orders are not considered “postal services,” this section would provide an independent statutory basis for the offering of such services by the Postal Service.

²² Specifically, Article 6.1 of the UPU Postal Payment Services Agreement provides the following: “1 Money order exchanges shall be carried out by means of the electronic networks provided for by the International Bureau of the UPU or by other organizations. 2 Electronic exchanges shall be carried out by dispatch sent directly to the paying office or to an office of exchange. The security and the quality of the exchanges must be guaranteed, either by the technical specifications relative to the networks used, or by bilateral agreement between the postal administrations. 3 Postal administrations may agree to exchange money orders by means of paper-based forms, provided for in the Regulations, and sent by priority mail. 4 Postal administrations may agree to use other means of exchange.” See also UPU Postal Payment

III. SECTION 404(e) DOES NOT APPLY TO THE POSTAL SERVICE'S PROVISION OF THE DISCRETE "NONPOSTAL" SERVICES THAT ARE EXPRESSLY AUTHORIZED BY PROVISIONS OF TITLE 39 LEFT UNDISTURBED BY THE PAEA.

Ms. Lance's statement does not include a number of services offered by the Postal Service to the public which can, in a generic sense, be considered "nonpostal." When Congress amended title 39 through its enactment of the PAEA, it left untouched a variety of pre-existing provisions that authorize the Postal Service to provide services which fall outside of the definition of "postal services," but are also separate and distinct from the Postal Service's former authority under section 404(a)(6).²³ As discussed below, these services do not fall within the proper scope of section 404(e).

A. Title 39 expressly authorizes the Postal Service to provide a variety of services that are not "postal services"

In the past, the phrase "nonpostal" has been broadly applied to describe any services that were not "postal" in nature. Going forward, however, it is necessary to distinguish between services that are "nonpostal" within the meaning of former section 404(a)(6), and "nonpostal" in the more generic sense that they fall outside the definition of "postal service."²⁴ The latter type of service includes:

Services Agreement Arts. 2-3; Regulations RF 201.3, RF 301.3; RF 601.1; Commentary to Art. 6 (which provides "[t]he UPU has developed IFS (International Financial System), which provides full functions for the electronic processing and transmission of international money orders, including accounting and settlement procedures, as defined in the Postal Payment Services Agr.)

²³ Unlike the PRA, the PAEA did not represent a complete replacement of title 39; instead, the PAEA amended certain portions of title 39, and kept other portions intact.

²⁴ The Commission has previously recognized that there is a distinction between "nonpostal" services offered pursuant to former section 404(a)(6), and "nonpostal" services offered pursuant to other statutory provisions. See PRC Order No. 1394 at 4 n.17 (March 5, 2004); PRC Order No. 1145 at 12 ("[O]ne conclusive basis on which a service can be found to be 'nonpostal' applies where the service pertains exclusively to performance of a statutory function of the Postal Service that is distinct from the carriage of mail. Philatelic sales and services, performed pursuant to the separate grant of authority in 39 U.S.C. § 404(a)(5), exemplify such statutorily non-postal services.")

i) Government Services

In section 411, the Postal Service is authorized to provide “executive agencies within the meaning of section 105 of title 5 and the Government Printing Office” with “personal and nonpersonal services.”²⁵ The provision of such services “shall be under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.” These services are provided pursuant to inter-agency agreement, and oftentimes reflect the need of a federal agency to take advantage of the Postal Service’s extensive retail and delivery networks.²⁶

This provision authorizes the Postal Service to provide services to other federal agencies that lack any close nexus to the mail, services which have therefore previously been characterized as being “nonpostal” in nature.²⁷ Current services offered by the Postal Service pursuant to section 411 include Passport Application Acceptance²⁸ and Selective Service Registration. In addition, the Postal Service has in the recent past distributed pamphlets for the Federal Emergency Management Agency (FEMA) in areas affected by Hurricane Katrina.

ii) Philatelic Services

Section 404(a)(5) authorizes the Postal Service to provide “philatelic services,” which are services designed for stamp collectors. While there are certain items that can

²⁵ Relatedly, the Postal Service interacts with the Department of Defense concerning the provision of mail services to the Armed Forces. The Postal Service and the Department of Defense have divided responsibilities with respect to the provision of military mail. See USPS Publication 38, POSTAL AGREEMENT WITH THE DEPARTMENT OF DEFENSE.

²⁶ As noted by the House Committee on Post Office and Civil Service, however, the services that may be furnished to other government agencies under this provision are “not limited.” See H.R REP. NO. 91-1104, at 26 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3674.

²⁷ See, e.g., PRC Order No. 1424 at 19. In the past, there was some argument over the proper scope of section 411, as compared to former section 404(a)(6). This issue is in Part III.B.iii below.

²⁸ Furthermore, 22 U.S.C. § 214 expressly contemplates that the Postal Service will provide passport acceptance services.

in a broad sense be considered “philatelic” that also fit into the definition of “postal service,”²⁹ it has always been understood that there are a set of “philatelic services” that are separate and distinct from “postal services.”³⁰ In Docket No. R76-1, the Commission considered the issuance of commemorative stamps to be outside of the realm of “postal services,” noting that while they “represent purchase of postage just as regular stamps do,” they are “offered primarily for reasons other than the payment of postage.”³¹ In Docket No. C95-1, furthermore, the Commission held that the shipping and handling charges for orders placed with the Philatelic Fulfillment Service Center were not closely related to the delivery of mail, and thus were not “postal services.”³²

In sum, “philatelic services” are a discrete set of items intended for philatelists rather than mailers, and which are therefore not related closely enough to the actual delivery of mail to be considered “postal services.” They include first day covers, commemorative stamps, commemorative panels, and related items intended for stamp collectors, which generally are found in the *USA Philatelic* catalog published by the Postal Service, or on the *Postal Store* website.³³

²⁹ In Docket No. C2004-3, for example, stamped stationery was held to be a “postal service” even though it also has philatelic characteristics. See PRC Order No. 1475.

³⁰ See, e.g., PRC Order No. 1424 at 13; PRC Order No. 1145 at 12.

³¹ PRC Op., R76-1, Appendix F, pages 19-20.

³² See PRC Order No. 1075 at 5 (September 11, 1995); PRC Order No. 1145 at 9 (noting that Docket No. C95-1 involved “philatelic services”).

³³ It does not, however, include OLRP items such as teddy bears, key chains, etc. with stamp images on them, which are not intended primarily for philatelists.

B. The language of title 39 and history of the PAEA demonstrates that these services are not implicated by this proceeding

i) The Commission must harmonize section 404(e) with title 39 as a whole

The facially expansive definition of “nonpostal service” in section 404(e), and the concomitant ban on new “nonpostal services,” conflicts with those provisions of title 39 that continue to authorize the Postal Service to offer, without limitation, certain discrete services that are not “postal services.” The Commission must interpret section 404(e) in a way that recognizes and gives effect to the entirety of the statutory scheme set forth in title 39. As the D.C. Circuit recently noted, when Congress amends only part of a law, and leaves other parts of the law untouched, “the normal assumption” is that the revised and unrevised portions of the law are “designed to function as parts of an integrated whole.”³⁴ This rule is consistent with the general principle of “whole act” statutory interpretation, in which statutory language is not considered in isolation, but is interpreted by reference to the entire statutory scheme, so as to produce a harmonious result.³⁵ In particular, all provisions of the law must be given effect, so that no provision is rendered “inoperative or superfluous, void or insignificant.”³⁶

These principles clearly dictate that it is not proper to look at section 404(e)(1)’s definition of “nonpostal service” in isolation, and to thereby conclude that the scope of section 404(e) necessarily extends to every type of service that is not a “postal service.”

³⁴ See *Cody v. Cox*, 509 F.3d 606, 609 (D.C. Cir. 2007) (quoting *Markham v. Cabell*, 326 U.S. 404, 411 (1945)).

³⁵ See, e.g., *FDA v. Brown and Williamson Tobacco Corp.*, 529 US 120, 132-33 (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret a statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into [a] harmonious whole.”) (internal citations and quotation marks omitted). See generally 2A SINGER SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (6th ed. 2000).

³⁶ See, e.g., *National Association of Recycling Industries, Inc. v. ICC*, 660 F.2d 795, 799 (D.C.Cir.1981). See generally SUTHERLAND STATUTORY CONSTRUCTION § 46.06.

Rather, that definition must be considered in the context of the overall statutory scheme, in order to produce a coherent, harmonious whole. When this is done, it is apparent that section 404(e)'s definition of "nonpostal service" creates inconsistencies with other provisions of title 39, and is not as expansive as it superficially suggests. In particular, a consideration of that provision's language and history, as well as the statutory scheme as a whole, belies any conclusion that the PAEA amended title 39 so as to create a strict dichotomy with regard to services offered by the Postal Service to the public, in which all such services are either "postal" within the meaning of section 102(5), or "nonpostal" within the meaning of section 404(e).

To begin with, the literal text of section 404(e) undercuts any attempt to find such a strict dichotomy in the statutory scheme. When read literally, section 404(e) makes clear that certain services which are not "postal services" are not implicated by that provision. This is because section 404(e)(2) states, "Nothing in this *section [i.e., section 404]* shall be considered to permit or require that the Postal Service provide any nonpostal service, except that the Postal Service may provide nonpostal services which were offered as of January 1, 2006, as provided under this subsection."³⁷ Thus, when read literally, section 404(e) only affects the Postal Service's authority to offer "nonpostal" services pursuant to the various provisions of section 404, and does not implicate the Postal Service's authority to provide "nonpostal" services pursuant to section 411, or any other provision of title 39 besides section 404.

Interpreting section 404(e) in the way suggested by a literal reading of its text presents a possible means of harmonizing that section with section 411. It raises, however, some confounding questions with regard to philatelic services, because

³⁷ Emphasis added.

philatelic services fall within the literal terms of the definition of “nonpostal services” in section 404(e), and the authority to offer such items falls within section 404. Thus, from a strictly literal reading of section 404(e), one could conclude that the Commission has the authority to terminate the Postal Service’s offering of philatelic services. This would render section 404(a)(5) a nullity, however, contrary to the principle that all statutory provisions should be given effect if possible. One could avoid that result by saying that while philatelic services are “nonpostal services” within the meaning of section 404(e), the Commission is compelled to allow philatelic services to continue;³⁸ indeed, that would seem to be the only appropriate outcome. This does not explain, however, why Congress would choose to structure the law as it did, ostensibly requiring that the Commission conduct a proceeding to examine the public need for philatelic services, and at least ostensibly empowering the Commission to order that philatelic services be terminated. Finally, and perhaps most fundamentally, there is simply no basis in the history of postal reform to conclude that Congress intended section 102 of the PAEA to implicate the Postal Service’s offering of philatelic services. As discussed below, it was the Postal Service’s offering of commercial, nonpostal services pursuant to former section 404(a)(6) that engendered controversy during the time period that postal reform was being deliberated by Congress, not the offering of first day covers and similar items to philatelists.³⁹

³⁸ Furthermore, even if the Commission were to conclude that “philatelic services” falls within the scope of section 404(e), this does not mean that the Postal Service could not offer new philatelic items (*i.e.*, could not expand the portfolio of philatelic items). The relevant “nonpostal service” for purposes of section 102 would not be each individual philatelic item, but rather the overall philatelic program. Such a reading would allow the Postal Service to continue introducing new philatelic items. This is consistent with the Postal Service’s approach to OLRP in this proceeding.

³⁹ *Cf. Financial Planning Ass’n v. SEC*, 482 F.3d 481, 487 (D.C. Cir. 2007) (in determining the meaning of a statutory provision, courts should look to the text, structure, and the overall statutory scheme, as well as the problem Congress sought to solve); SUTHERLAND STATUTORY CONSTRUCTION § 45.09 (“the primary

Rather than conclude that philatelic services fall within the scope of section 404(e), the Commission should conclude that section 404(e) does not affect services that, while in a generic sense “nonpostal,” are expressly authorized by discrete provisions of title 39 independent of former section 404(a)(6). This interpretation is consistent with the history and underlying purpose of section 102 of the PAEA. It is clear from this history that Congress intended section 102 solely to eliminate the legal rationale used by the Postal Service to justify its past provision of commercial, nonpostal services to the public (specifically, former section 404(a)(6)). Congress did not, however, intend section 102 to affect the Postal Service’s authority to offer government services or philatelic services, which have historically been offered by the Postal Service with little or no controversy.

Such an understanding of section 102 allows section 404(e) to fit harmoniously within the statutory scheme of title 39, as it gives real and substantial effect to that provision, while also preserving the Postal Service’s authority to offer those services expressly authorized, without limitation, by title 39. It fully reflects the fact that Congress did not amend section 404(a)(5), which has long been understood to give the Postal Service “broad and unilateral discretion over philatelic operations.”⁴⁰ It also reflects the fact that Congress did not amend section 411, whose plain language confers no

task of the court when construing a statute is to attribute to the enactment the meaning most consistent with its policies and with the obvious purpose of the legislature, by viewing the statute in light of the circumstance that motivated its passage”).

⁴⁰ See PRC Order No. 1145 at 9 (citing *Unicover v. Postal Service*, 859 F. Supp. 1437 (D. Wyo. 1994); *Morris v. Runyon*, 870 F. Supp. 362 (D.D.C. 1994)).

authority on the part of the Commission to affect the “terms and conditions” by which those services are provided.⁴¹

Harmonizing section 404(e) with the rest of title 39 in this way recognizes that the superficially broad definition of “nonpostal service” in that section, which seemingly encompasses any and all services offered to the public by the Postal Service that are not “postal,” must be interpreted by reference to the statutory scheme as a whole. Courts have often noted that statutory language that on its face suggests an expansive meaning, such as the word “any,” cannot be considered in isolation, and may be limited in scope in order to harmonize with other provisions of a statutory scheme,⁴² and with legislative intent.⁴³ For these reasons, the scope of section 404(e) should be

⁴¹ Instead, section 411 states that the services authorized under that provision are to be provided “under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.”

⁴² See, e.g., *Small v. United States*, 544 U.S. 385, 388 (2005) (stating that the meaning of the word “any” cannot be “considered alone”); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132 (2004) (“‘Any’ means different things depending on the setting.”); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (“[R]espondent errs in placing dispositive weight on the broad statutory reference to ‘any law enforcement officer or agency’ without considering the rest of the statute.”); *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1045 (D.C. Cir. 1997) (holding that the phrase “may provide any [] services” could not be taken literally as a broad grant of authority, but had to be considered in the context of the statute as a whole, as reading it in isolation would produce “marked inconsistencies” with another provision of the statute), *id.* at 1047-1048 (“Although petitioners rely on the expansive character of the word ‘any,’ the Supreme Court has specifically held that in context the word ‘any’ may be construed in a non-expansive fashion.”) (citing *O’Connor v. United States*, 479 U.S. 27, 31 (1986)). Even in cases where a court has determined that an expansive reading of “any” is appropriate, it has done so after determining whether the statutory context provided a basis for narrowing the scope the term. See *Ali v. Federal Bureau of Prisons*, ___ U.S. ___, 128 S.Ct. 831, 837 (2008) (“our construction of ‘any other law enforcement officer’ must, to the extent possible, ensure that the statutory scheme is coherent and consistent”), *id.* at 840 (“Nothing in the statutory context requires a narrowing construction” to a literal reading of the term “any”); *New York v. EPA*, 443 F.3d 880, 885-86 (D.C. Cir. 2006) (“the context of the Clean Air Act warrants no departure from...customary effect [of the word “any”].”).

⁴³ See *Lewis v. United States*, 523 U.S. 155, 160 (1998) (avoiding “literal reading of the words ‘any enactment’” because doing so “would dramatically separate the statute from its intended purpose.”); *Harrison v. PPG Industries*, 446 U.S. 578, 589-93 (1980) (employing an expansive understanding of the phrase “any other final action,” but only after determining whether the legislative history called for a narrowing construction of that term.).

appropriately understood as applying to any service that is not a postal service under section 102(5), *and that is not explicitly authorized elsewhere in title 39.*⁴⁴

ii) The history of the PAEA indicates that Congress did not intend section 404(e) to affect the Postal Service's offering of these services

Harmonizing section 404(e) with the rest of title 39 in this manner is consistent with the legislative history of section 102 of the PAEA, which clearly indicates that Congress intended to eliminate the ambiguous grant of authority of former section 404(a)(6), and did not mean to implicate the Postal Service's ability to offer the discrete services authorized elsewhere in title 39. Throughout the many years in which Congress deliberated over postal reform, section 102, in both the House and Senate bills, was limited in scope to eliminating former section 404(a)(6). The only substantive disagreement between the House and Senate was whether to include a grandfather clause for services offered by the Postal Service pursuant to former section 404(a)(6). The PAEA is most logically seen as a compromise between the House and Senate on the issue of the grandfather clause, rather than as a dramatic, last-minute extension of the scope of section 102.

The first introduced postal reform bill to include a "nonpostal" provision was the Postal Modernization Act of 1999, introduced by Rep. McHugh in the 106th Congress.⁴⁵ This bill amended section 404(a)(6) to allow the Postal Service to continue offering any "nonpostal product" first offered before January 1, 1994, but required any "nonpostal

⁴⁴ *Cf. Bell Atl. Tel. Cos. v. FCC*, 131 F.3d at 1049 (upholding the FCC's application of a "qualifying phrase not expressed within the language of" a provision using the term "any" in order to avoid a contradiction between that provision and another provision of the statute).

⁴⁵ H.R. 22, 106th Cong. § 205 (1999). This provision was identical to section 205 in the Postal Modernization Act of 1998, as agreed to by the Subcommittee on the Postal Service in the 105th Congress.

products” offered after that date to be provided through a private, for-profit corporation under the control of the Governors. Importantly, the bill defined “nonpostal product” by reference to section 404(a)(6), defining the term as “any product or service offered by the Postal Service (or that could have been offered by the Postal Service under section 404(a)(6), as last in effect before the date of enactment of the Postal Modernization Act of 1999) that is not a postal product.” Thus, the “nonpostal” provision in this bill was explicitly tied to the offering of “nonpostal” services under former section 404(a)(6), rather than other provisions of title 39.

In the 107th Congress, H.R. 4970 did not contain a definition of “nonpostal service.” Instead, it provided a definition of “postal service,” eliminated former section 404(a)(6), and added a new section that said, “Nothing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services.”⁴⁶ H.R. 4341, introduced in the 108th Congress, followed the same approach, except that it added a grandfather clause allowing for the provision of “special nonpostal or similar services provided by the Postal Service as of May 12, 2004.”⁴⁷ Thus, in both instances, the language used by the “nonpostal” provisions in these bills were explicitly tied to the language of former section 404(a)(6).

In the Senate, the two bills introduced during the 108th Congress (S. 1285 and S. 2468) followed a similar approach. Both defined “postal service,” and amended section 404 to eliminate former section (a)(6) and add a new section stating, “Nothing in this title shall be considered to permit or require that the Postal Service provide any special

⁴⁶ H.R. 4970, 107th Cong. § 102 (2002).

⁴⁷ H.R. 4341, 108th Cong. § 102 (2004).

nonpostal or similar services.”⁴⁸ This language was slightly revised when S. 2468 was reported out of the Senate Committee on Governmental Affairs, which added a reference to section 411: “Except as provided in section 411, nothing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services.”⁴⁹

In the 109th Congress, the House continued the approach of H.R. 4341 by tying the language of its “nonpostal” provision to the language of former section 404(a)(6), and including a grandfather clause. H.R. 22, as introduced and passed by the House, stated, “Nothing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services, except that nothing in this subsection shall prevent the Postal Service from providing any special nonpostal or similar services provided by the Postal Service as of January 4, 2005.”⁵⁰ In the Senate, S. 662 as introduced and reported out of committee continued the formulation of S. 2468 by stating, “Except as provided in section 411, nothing in this title shall be considered to permit or require that the Postal Service provide any special nonpostal or similar services.”⁵¹ When the Senate passed S. 662, styled as an amendment to H.R. 22, it maintained this language.⁵²

Thus, over many Congresses and many years, postal reform consistently had been confined to the elimination of the Postal Service’s authority to offer “nonpostal” services within the meaning of section 404(a)(6). Congress had before it, in the 109th Congress, two competing bills, one passed by the House and one by the Senate, whose

⁴⁸ S. 1285, 108th Cong. § 102 (2003); S. 2468, 108th Cong. § 102 (2004).

⁴⁹ This reference to section 411, which continued in the Senate bills up until the PAEA itself, is discussed further below.

⁵⁰ H.R. 22, 109th Cong. § 102 (2005) (as passed by the House).

⁵¹ S. 662, 109th Cong. § 102 (2005).

⁵² H.R. 22, 109th Cong. § 102 (2006) (as passed by Senate).

only substantive difference with regard to the “nonpostal” issue was the fact that the House version included a grandfather clause, and the Senate version did not.⁵³ In this context, the PAEA is most logically seen as a compromise between these two bills, in that it 1) kept a grandfather clause, but 2) required that the Commission review and approve the continued offering of any services authorized by the grandfather clause. The PAEA’s use of the vague and superficially expansive definition of “nonpostal service” in section 102, rather than explicitly tying that provision to the offering of “nonpostal” services pursuant to former section 404(a)(6), should not be viewed as a deliberate decision by Congress to abandon, at literally the very last minute, an approach that had been invariably followed since the 106th Congress, by *both* the Senate and the House.⁵⁴

Congress’ concern with eliminating the Postal Service’s authority to offer services pursuant to former section 404(a)(6) reflects the controversy that had arisen in the 1990s by the Postal Service’s offering of commercial, nonpostal services under that provision. In 1998, when Rep. McHugh first included a “nonpostal” provision in his postal reform bill (known at that time as the Postal Modernization Act of 1998), there was controversy over certain Postal Service commercial ventures that some saw as being outside of its core mission. This controversy was reflected by a GAO Report issued that year at the request of Rep. McHugh examining, in part, the Postal Service’s

⁵³ The other difference was that the Senate specifically exempted section 411, while the House bill did not. However, the House Report clarified that its language “should not be interpreted to limit the Postal Service’s ability to furnish government services to the public...in accordance with section 411 of title 39.” See H.R. REP. NO. 109-66, pt.1, at 45 (2005). This is discussed further below.

⁵⁴ As courts have noted before, “[i]n resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process.” See, e.g., *Cass v. United States*, 417 U.S. 72, 83 (1977) (citing with approval *Schmid v. United States*, 436 F.2d 987, 992 (Ct.Cl. 1971) (Nichols, J. dissenting); *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1186 (6th Cir. 1982); *United States v. Barcock*, 530 F.2d 1051, 1054 (D.C. Cir. 1976).

then-recent “nonpostal” offerings.⁵⁵ The GAO discussed how several of these offerings had engendered complaints by Members of Congress and private industry about the Postal Service’s expansion into nonpostal markets.⁵⁶ Further GAO Reports were issued in 2000 and 2001 at the request of Congress, reviewing the Postal Service’s electronic commerce initiatives.⁵⁷ The President’s Commission also discussed what it termed as “some dubious new business ventures for the Postal Service...far afield of its basic function [of] delivering the mail,” in which the Postal Service had entered into “competitive markets.”⁵⁸

The situation was captured quite accurately by the Commission in 2004, which discussed how, for most of the period following the passage of the PRA, the offering of “nonpostal” services by the Postal Service had generated little controversy, because they had largely entailed either the offering of services on behalf of other federal agencies, or minor convenience services to postal patrons such as photocopying.⁵⁹ However, the Commission noted that as the Postal Service engaged in more far-reaching commercial, nonpostal ventures in the 1990s, its provision of “nonpostal” services became contentious.⁶⁰ Thus, the controversy within Congress and the postal community during the period in which postal reform was being deliberated was the Postal Service’s offering of commercial, nonpostal services in competition with private

⁵⁵ See *U.S. Postal Service: Development and Inventory of New Products*, GAO/GGD-99-15 (November 24, 1998).

⁵⁶ See *id.* at 1.

⁵⁷ See *U.S. Postal Service: Postal Activities and Laws Related to Electronic Commerce*, GAO/GGD-00-188 (September 7, 2000); *U.S. Postal Service: Update on E-Commerce Activities and Privacy Protections*, GAO-02-79 (December 21, 2001).

⁵⁸ See *Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service*: Report of the President’s Commission on the United States Postal Service, at 9, 27-28 (July 31, 2003).

⁵⁹ See PRC Order No. 1394 at 4.

⁶⁰ *Id.*

industry pursuant to former section 404(a)(6), and not with the Postal Service's offering of philatelic services or government services.

Indeed, the legislative history clearly indicates that Congress did not intend section 102 to affect the Postal Service's authority to offer government services to the public pursuant to section 411. The House Report clarified that the provision in H.R. 22 eliminating former section 404(a)(6) "should not be interpreted to limit the Postal Service's ability to furnish government services to the public...in accordance with section 411 of title 39."⁶¹ The Senate went even farther, and expressly exempted section 411 in the language of its "nonpostal" provision, as discussed above.

iii) Section 411 authorizes the provision of services to the public on behalf of other federal agencies

The Senate's decision to expressly exempt section 411 in its provision eliminating the Postal Service's authority to offer "special nonpostal or similar services," and the House Report's emphasis that its "nonpostal" provision should not call into question the Postal Service's authority under section 411, seems on one level unnecessary, considering neither the House nor the Senate bills affected section 411. It seems safe to presume that Congress was reacting to the fact that several authorities had suggested that "nonpostal services" within the meaning of former section 404(a)(6) encompassed government services provided to the public. The district court opinion in *Associated Third Class Mail Users v. Postal Service* included dicta that speculated that the reference to "nonpostal" in former section 404(a)(6) "likely" was a reference to such government services.⁶² The Commission had also discussed the possibility that

⁶¹ H.R. REP. NO. 109-66, pt 1, at 45; H.R. REP. NO. 108-672, pt 1, at 5 (2004).

⁶² 405 F Supp 1109, 1117 n.3 (D.D.C. 1975).

“nonpostal” as used in that provision encompassed at least some government services, noting at one point that there was potentially a “distinction[] between nonpostal services provided to the public by the Postal Service on behalf of other federal agencies under section 404(a)(6) and those provided to other agencies pursuant to section 411 of the Act.”⁶³

The possible “distinction” noted by the Commission was the argument advanced by some parties that section 411 does not authorize the Postal Service to provide services *to the public* on behalf of other federal agencies, and that such authority is found instead in former section 404(a)(6) (and now, by extension, section 404(e)).⁶⁴ However, this argument finds no support in the text of section 411, and is belied by Congress’ clear statements concerning the proper scope of section 411 in the new statutory framework.

The language of section 411 certainly supports no such interpretation, since it simply says that the Postal Service is authorized to “furnish property and services to [executive agencies],” and does not in any way indicate that the furnishing of such services can only be to the agency itself, and not to the public as well. Indeed, any attempt to find such a distinction in the text is simply unsustainable. For example, the acceptance of passport applications from citizens is logically seen as a service *to the State Department*, who can take advantage of the efficiency benefits gained by utilizing

⁶³ See Order No. 1394 at 4 n.17. This was written before the House Report in 108th Congress was issued in September 2004, and before S. 2468 was reported out of committee having been revised to specifically exempt section 411 in August 2004. Later, in November 2004, the Commission rejected the notion that “nonpostal” as used in section 404(a)(6) was a term of art limited solely to government services provided to the public, but did not seek to definitively state its views concerning the proper boundaries between that provision and section 411. See PRC Order No. 1424 at 13-20.

⁶⁴ See Docket No. *2003, Consumer Action/Office of the Consumer Advocate Reply to Postal Service Comments and Report on Nonpostal Initiatives, at 3 (“Section 411 describes the bilateral exchange of services between the Postal Service and other federal agencies, while section 404(a)(6) clearly refers to services *provided to the public on behalf of other federal agencies.*”) (emphasis in original).

the Postal Service's extensive retail network, without having to provide for an alternative network of accepting passport applications. The fact that passport application acceptance is also a service *to* the general public, who enjoy easy access to a facility that accepts passport applications, cannot reasonably be seen as taking that service outside of the plain language of section 411.

Furthermore, Congress has clearly indicated that section 411 encompasses the provision of government services to the public. The House Report on H.R. 22 stated, "The changes made by [section 102] should not be interpreted to impact the Postal Service's ability to furnish government services *to the public*, such as acceptance of passport applications and sale of duck stamps, *in accordance with section 411 of title 39.*"⁶⁵ The Senate Report, meanwhile, described its exception for section 411 as permitting the Postal Service "to offer nonpostal products...in cooperation with other government agencies, for example, sale of federal migratory bird hunting and conservation stamps or acceptance of passport applications."⁶⁶ This accords with the description by the House Committee on Post Office and Civil Service in 1970, which stated that "the kinds of services that may be furnished [under section 411] are not limited."⁶⁷

⁶⁵ H.R. REP. NO. 109-66, pt 1, at 45 (emphases added).

⁶⁶ S. REP. NO. 108-318, at 6 (2004).

⁶⁷ See H.R. REP. NO. 91-1104, at 26. It also accords with the district court decision in *Garman v. United States Postal Service*, 509 F. Supp. 507 (D.C. Ind. 1981). In that case, the court noted that the Postal Service's offering of Selective Service registration to the public was "pursuant" to its authority under section 411. *Id.* at 508. As the court noted, "Pursuant to this statutory authority [*i.e.*, section 411], the Postal Service and Selective Service system have entered into an agreement whereby Postal Service personnel perform various ministerial tasks connected with the Selective Service registration. These tasks involve the distribution of registration forms and informational brochures, review of completed forms for legibility and accuracy[,] and forwarding the completed forms to a data processing center designated by the Selective Service System."

Thus, the elimination of former section 404(a)(6) by the House and Senate says nothing about the Postal Service's continued ability to offer government services to the public pursuant to section 411, a point which Congress (and especially the Senate) clearly wanted to emphasize. No mention by Congress was made of philatelic services, on the other hand, since there was no controversy as to whether they were encompassed by section 404(a)(6); instead, it was understood that even though they were "nonpostal" in a generic sense, they were authorized by section 404(a)(5), and were not "nonpostal" within the meaning of former section 404(a)(6).⁶⁸ There was thus no reason for Congress to specifically address those services, as it did the section 411 services, in its deliberations over eliminating the Postal Service's authority to offer "nonpostal services" pursuant to former section 404(a)(6).

IV. THE POSTAL SERVICE CONTINUES TO HAVE THE AUTHORITY TO DERIVE REVENUE FROM SOURCES THAT ARE NOT "SERVICES"

Title 39 confers authority on the part of the Postal Service to undertake general business activities such as entering into contracts, selling property and assets, and constructing, operating, or leasing facilities and equipment. The Postal Service derives revenues from many of these activities. However, these activities are not properly understood as constituting the provision of a "service" by the Postal Service to the public, comparable to the provision of postal services, government services, or philatelic services. As noted above, section 404(e) implicates the offering of *services* by the Postal Service, rather than the collection of revenues, and not every source of revenue for the Postal Service, derived pursuant to independent statutory authority, can fairly be characterized as a "service."

⁶⁸ See, e.g., Order No. 1424 at 13.

For example, section 401(5) authorizes the Postal Service to acquire property and to “hold, maintain, sell, lease, or otherwise dispose of such property.” This encompasses activities such as leasing Postal Service-owned buildings, or selling Postal Service-owned real property or surplus vehicles. Similarly, the Postal Service also has the authority to leverage its property for private use, by allowing private parties to access its retail lobbies, or by allowing private parties to utilize excess Postal Service capacity. For example, the Postal Service has a non-exclusive retail agreement with FedEx whereby it allows FedEx to place a certain number of its drop-boxes outside particular Postal Service retail facilities for the acceptance of overnight FedEx Express shipments. The Postal Service considers this retail agreement to be an exercise of its property rights under Section 401(5) as a lease of unused real property to private third parties for certain uses. In addition, the Postal Service has made space available for private parties to display marketing materials in its retail lobbies, one example being the placement in retail lobbies of exhibits promoting the use of Pitney Bowes postage meters. The Commission in the past has not intervened in such revenue-producing transactions involving Postal Service real and personal property (whether tangible or intangible), and the provisions of the PAEA would not lead to a change in this regard.

The Postal Service also enters into agreements permitting a third-party to use one or several of the intangible assets comprising its intellectual property portfolio, in exchange for compensation. This compensation is not the result of the provision of a service, but rather represents financial remuneration for the third-party’s use of the underlying piece of property. In this regard, the fee the Postal Service receives is comparable to the rent it receives from leasing a parcel of real property.

As is the case with many other entities (both governmental and commercial) today, intangible properties increasingly comprise a significant part of the Postal Service's total asset inventory. Its protected information, data, trademarks, patents, copyright-protected materials, and technical know-how are all valuable commodities that may prove useful in the commercial operations of other business or government entities. Just as an owner's rights in tangible property are defined by law, specific statutes and case law determine the "size" of a piece of intangible property (its scope or boundaries), whether it is infringed (trespassed), and how to license (lease) it, or assign (sell) it. Two examples of how the Postal Service has used its intellectual property to generate revenue are: (1) it licenses certain intellectual property, including its trademark "Moversguide", to a company that produces pamphlets of information and advertisements for residents who have just relocated; and (2) it licenses copyright-protected images of American political and cultural history to third-parties who wish to use the image in their business and product offerings.

For Electronic Postmark (EPM), a non-exclusive licensing agreement was entered into by the Postal Service and Authentidate on July 30, 2007, replacing the Strategic Alliance Agreement, which expired on that date. The new business model for EPM involves a branding and licensing agreement, which allows for continuation of the service without disruption, but also without direct postal management. Unlike the previous Strategic Alliance Agreement, the Postal Service no longer engages in marketing or promotion, does not have a role in setting prices or terms of service, does not engage in direct governance, and does not sign sales agreements with customers.

The Postal Service simply licenses its brand and marks, for a flat quarterly fee,⁶⁹ and insures quality control over the provision of the service through its ability to conduct audits and security standards in the license agreement. It is contemplated that other companies may also be interested in participating, although none have to date.

The Postal Service also has entered into a number of affiliate linking agreements, under which the Postal Service receives revenue in return for placing a link on USPS.com directing all those who click on the link to a website operated by selected private-sector parties. Typically, the revenue that the Postal Service receives under these agreements depends on the number of “click-throughs” which occur; that is, on the number of instances in which a visitor to USPS.com is directed to the third-party site as a result of clicking on the link on USPS.com. In other cases, there may be a flat yearly fee, or no fee charged. As might be expected, in many cases the parties with whom the Postal Service enters into a linking agreement offer mail-related services to the public, such as pre-printed or customized mailing labels, mailing and shipping supplies, direct mailing services, and the like. The Postal Service considers these linking agreements to be an exercise of its property rights under Section 401(5); in effect, the Postal Service is selling a limited amount of advertising space on USPS.com. In other words, this use of the “virtual real estate” consisting of the Postal Service’s public web site is analogous to the Postal Service’s lease of unused real property to private third parties for certain uses. Again, the Commission in the past has not intervened in such revenue-producing transactions involving Postal Service real and personal property (whether tangible or intangible), and the provisions of the PAEA would not lead to a change in this regard.

⁶⁹ There is an additional fee if volumes exceed certain levels, although that has not happened to date.

V. THE LIMITED SCOPE OF THE COMPLAINT AND ANNUAL COMPLIANCE REVIEW PROVISIONS DEMONSTRATES THAT CERTAIN SERVICES AND REVENUE-PRODUCING ACTIVITIES ARE OUTSIDE THE COMMISSION'S REMEDIAL AUTHORITY

The scope of the Commission's authority under sections 3653 and 3662 helps to demonstrate that certain services and revenue-producing activities fall outside of the Commission's remedial authority. Section 3662 expressly limits the Commission's complaint jurisdiction to claims founded on certain enumerated provisions of title 39: specifically, sections 101(d), 401(2), 403(c), 404a, or 601, or chapter 36. Thus, the Commission does not have the authority to review the exercise of the Postal Service's general powers under section 401 (except for section 401(2), which refers to the Postal Service's "rules and regulations"), including its power to dispose of its property. It also does not have the power to review the "terms and conditions" that "the Postal Service and the head of the agency concerned shall deem appropriate" with respect to section 411 services.

Earlier versions of postal reform, including the version that originally passed the House in the 109th Congress, and most of the versions introduced prior to the 109th Congress, would have placed these provisions within the scope of the Commission's complaint jurisdiction. Indeed, the House version of H.R. 22 in the 109th Congress would have allowed parties to bring a complaint with the Commission whenever they believed that the Postal Service was "not operating in conformance with the requirements of chapter 1, 4, 6, or [36] (or regulations promulgated under any of those chapters)."⁷⁰ Complaints could therefore have been filed challenging any Postal Service

⁷⁰ See H.R. 22, 109th Cong. § 205 (as passed by House). See also S. 662, 109th Cong. § 205; H.R. 4341, 108th Cong. § 205; S. 2468, 108th Cong. § 205; H.R. 4970, 107th Cong. § 205.

action as being inconsistent with the general policies of title 39, or with the Postal Service's general and specific powers. Instead, the PAEA followed the Senate version of H.R. 22 by constraining the Commission's jurisdiction to certain specific provisions in title 39.⁷¹ So, while Congress certainly wished to enhance the Commission's regulatory authority, it also did confine the Commission's authority within certain bounds.

Parties may challenge the Postal Service for not complying with the provisions of chapter 36 through a section 3662 complaint, as well as in the Annual Compliance Review process mandated by section 3653. This latter process follows the submission of the Postal Service's Annual Compliance Report under section 3652. Under section 3653, the Commission reviews whether 1) the prices for "products" both "individually and collectively" were in compliance with the provisions of chapter 36, and regulations promulgated thereunder, and 2) the service standards established under section 3691 for "market-dominant products" were met.⁷² Thus, section 3653 involves the review of "products," a term that does not encompass all services, or all revenue-producing activities undertaken by the Postal Service.

Section 102(6) defines "product" as "a postal service with a distinct cost or market characteristic for which a rate or rates are, are may reasonably be, applied." Under section 404(e)(5), the Commission must, for any "nonpostal service" that it allows the Postal Service to continue offering pursuant to that section, designate "whether the service shall be regulated under this title as a market dominant product, a competitive product, or an experimental product." However, as discussed above, "nonpostal services" within the meaning of section 404(e) should not be read as encompassing the

⁷¹ See H.R. 22, 109th Cong. § 205 (as passed by Senate).

⁷² 39 U.S.C. § 3653(b).

discrete services offered pursuant to independent, express grants of authority in title 39, or to revenue producing activities that do not constitute a “service.” They are therefore not “products” within the meaning of Act, and do not fall under chapter 36. As such, the Commission’s authority under sections 3653 and 3662 does not extend to those services or activities.

VI. CONCLUSION

The Commission should interpret section 404(e) in a way that harmonizes that provision with the rest of title 39, and reflects the problem that Congress was trying to address when it engaged the “nonpostal” issue during its deliberations over postal reform. Properly understood, section 404(e) does not implicate the Postal Service’s authority to offer the discrete services that fall outside the definition of “postal services,” but are expressly authorized by a grant of authority within title 39 independent of former section 404(a)(6). It therefore does not implicate the Postal Service’s offering of government services to the public pursuant to section 411, or the Postal Service’s offering of philatelic services pursuant to section 404(a)(5). Furthermore, section 404(e) does not implicate the Postal Service’s ability to derive revenue from sources that cannot be characterized as services offered by the Postal Service to the public, but instead represent the Postal Service’s leveraging of its property for third-party use.

To the extent the Commission disagrees with any of the views expressed by the Postal Service herein, and believes that certain other services not included in Ms. Lance’s statement should be subject to Commission review and authorization in this proceeding, the Postal Service respectfully moves that the Commission issue a decision to that effect in enough time before the December 20, 2008 deadline to allow for the

Postal Service to consider its options, including seeking to get those services approved before that deadline. The Postal Service believes that the procedural schedule set forth by the Commission in Order No. 50 provides enough time for additional services to be authorized pursuant to this proceeding if necessary.

Respectfully submitted,

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