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

REVIEW OF NONPOSTAL SERVICES	Docket No. MC2008-1

INITIAL BRIEF OF THE UNITED STATES POSTAL SERVICE

UNITED STATES POSTAL SERVICE

By its attorneys:

R. Andrew German
Managing Counsel

Richard T. Cooper
Chief Counsel, Business & Finance Law

Eric P. Koetting
Nan K. McKenzie
William J. Trumpbour.
Joseph F. Wackerman
Keith E. Weidner

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2993

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INTRODUCTION AND SUMMARY

The procedural history, discussed below, reveals the many layers of complexity underlying this review of "nonpostal services." The Postal Service's initial filings may have failed to fully delineate the task at hand, thus depriving the Commission of a clear articulation of the Postal Service's positions. Fortunately, as the Commission made clear in Order No. 77 in response to a motion for clarification, no final determinations have yet been made, and the opportunity remains for the Postal Service to clarify its position. The Postal Service welcomes this opportunity to provide a comprehensive discussion of the myriad important issues raised by this review of nonpostal matters and hopes to dispel any confusion that may have arisen from its previous pleadings.

As a preliminary matter, the Postal Service wishes to address briefly two sources of apparent confusion. First, the occasional imprecise use of the term "nonpostal services" in Postal Service filings appears to undercut a core tenet underlying its proffered interpretation of the term. As discussed in detail below, the Postal Service believes that the term "nonpostal services" as used in the Postal Accountability and Enhancement Act (PAEA) properly should be interpreted to mean certain services that were previously authorized in one section of title 39, specifically, section 404(a)(6). This former provision authorized the Postal Service "to provide, establish, change, or abolish special nonpostal or similar services." However the term "nonpostal" has historically been used by many in the postal community to refer to activities far beyond its one appearance in title 39.

Prior to the passage of the PAEA, the Postal Service, the Commission and others used the term "nonpostal" as a vernacular for revenue derived from sources other than the revenue accruing from products and services classified in the Domestic Mail Classification Schedule. In other words, "nonpostal" became an easy short-hand for services or revenue that were not regulated by the Commission. For example, in rate cases, the Postal Service would report "nonpostal" revenue from fees for passport applications or payments received for use of post office lobbies to distribute advertising materials, even though these were authorized under provisions of the PRA other than former 404(a)(6). See sections 411 and 404(a)(5), respectively.[1]

Admittedly, the Postal Service's filings in this docket have occasionally used the term "nonpostal" in its generic sense to refer to services and activities that have not been previously classified regardless of their statutory authority. But this use may have been the source of some of the confusion about the Postal Service's position on the scope of the term "nonpostal services." From this point forward, the Postal Service will endeavor to use the term "nonpostal" or "nonpostal services" only to refer to those services authorized by former section

[1] As noted in Order No. 74, the Postal Service's regulations use the term "nonpostal" when referring to certain services performed by its personnel for government agencies. Order No. 74 at 10, fn 19. *See* 39 C.F.R.§ 259.1. This usage shows that generic application of the word "nonpostal" has existed for a long time: that section of the Code of Federal Regulations was last amended in the late 1970s. In CFR section 259, the term is used to distinguish between postal services, such as when agencies mail forms, notices, or checks to citizens, and nonpostal services, which do not involve the mail. For postal services, agencies pay the rates and fees established for all mailers; for nonpostal services, CFR section 259 indicates how appropriate reimbursement charges should be determined. This historical use of the term "nonpostal" is not determinative as to its meaning under the PAEA.

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404(a)(6), as opposed to other activities or services authorized by other statutory provisions.

A second point of clarification also seems warranted. Although the Postal Service respectfully takes issue with the concept that every revenue source must appear on either the market dominant, competitive, or experimental product list, we did not mean to imply that the Postal Service's unclassified revenue and related costs can or should somehow "fly below the radar screen" of the Commission. Providing for the appropriate accounting of all revenue received by the Postal Service is an important role of the Commission in promoting transparency under the PAEA. All revenues of the Postal Service must be assigned to one of two funds: the Postal Service Fund or the Competitive Products Fund. The Commission has the authority to ensure that the financial reports for these two funds properly reflect all revenue received by the Postal Service. Although the Postal Service maintains that these revenues and related activities remain outside the rate and classification authority of the Commission, it believes that the Commission has the power to prescribe the accounting and reporting rules to meet the transparency objectives of the Act.

To achieve this transparency, the Commission has a variety of tools at its disposal. Section 3654 requires the Postal Service to file with the Commission reports with the content required by the Securities and Exchange Commission for quarterly, annual, and periodic reports; in addition, beginning in 2010 the content of the internal control reports must comply with sections of the Sarbanes-Oxley Act of 2002. The Commission can revise the reporting requirements under

section 3654(e). Section 2011 empowers the Commission to issue the accounting principles and rules and to provide for the rules for the Postal Service's submission of annual and periodic reports "as the Commission may require." Also, under section 504, the Commission has subpoena authority "with respect to any proceeding conducted by the Commission under [title 39] or to obtain information to be used to prepare a report under [title 39]."

Summary of Argument

The Postal Service submits that there are two tasks at hand in this proceeding. The first task is identification of the intended scope of the review process established by Congress in section 404(e): which activities did Congress intend the Commission to review and, based on the standards articulated in subsection 404(e)(3), determine should either be terminated, or continued and regulated as market dominant, competitive, or experimental? The second task, once those activities are identified, is to apply the standards of 404(e)(3) and make the requisite determinations, or, alternatively, to reclassify appropriate activities as postal services, to be regulated on that basis. Section I of this brief (pages 14-73) addresses the first task, Sections II and III (pages 73-108) address the second task.

Specifically, the appropriate conclusion to be drawn from the first task is that Congress intended review pursuant to section 404(e) to be limited to "nonpostal services" initiated by the Postal Service under previous section 404(a)(6), and to exclude activities initiated under other statutory grants of authority. There are very strong practical reasons supporting this conclusion.

Why would Congress have wanted the Commission to evaluate the public need for the Postal Service to engage in activities which Congress elsewhere in the law continued to authorize the Postal Service to pursue? Why would Congress have wanted the Commission to evaluate the private sector's ability to fully satisfy the public need in contexts in which, because of the nature of the activity involved (*e.g.*, disposition of postal property, access to postal records, etc.), there is no possibility of the private sector supplanting the involvement of the Postal Service? Why would Congress have wanted the Commission to attempt to regulate activities (*e.g.*, one-time transactions such as sale of a building, imposition of civil forfeitures, creative structuring of a procurement contract, etc.) which so drastically diverge in nature from the typical provision of postal services as to preclude meaningful application of either the market-dominant or competitive regulatory schemes? Stated most fundamentally, why would Congress have wanted the Commission to interfere in necessary and routine activities conducted by the Postal Service in furtherance of the efficient and economical management of its basic mission, particularly when assertion of Commission jurisdiction over such current activities in the instant proceeding risks precluding initiation of similar new activities in the future? As discussed in detail below (pages 59-71), examination of these types of questions shows why reading section 404(e) to apply only to activities previously authorized by former section 404(a)(6) best meets the practical policy objectives of this portion of the PAEA.

There are very strong legal grounds compelling that conclusion as well. The structure of PAEA section 102, which first repeals the authority contained in former section 404(a)(6) to initiate “nonpostal” services, and then directs the Commission to review existing “nonpostal” services in order to determine whether they should continue, manifests the critical linkage between former section 404(a)(6) and new section 404(e). Section 404(e) must also be harmonized with the statute as a whole (see pages 19-25), precluding an interpretation of section 404(e) that conflicts with other sections which provide unconditional independent authority to the Postal Service to engage in specific revenue-generating activities. The legislative history (discussed in detail on pages 29-43) reveals a consistent intent over nearly a decade of postal reform to eliminate the “nonpostal” authority granted by former section 404(a)(6), with debate essentially limited to whether existing services offered pursuant to that authority should be grandfathered or not. Moreover, “nonpostal services” cannot be equated with all revenue-generating activities that are not “postal services,” when language in other provisions of the statute (discussed at pages 43-53) clearly distinguishes “services” (and revenues relating thereto) from other revenue-generating activities (and revenues relating thereto), including revenue-generating activities associated with property. In addition, potential constitutional issues arise if section 404(e) were interpreted to delegate to the Commission the authority to repeal legal authorities granted to the Postal Service in other statutory provisions (as discussed at pages 25-29). These issues arise whether or not the Commission exercises its purported authority to repeal.

Lastly, the deliberate exclusion by Congress of certain postal activities from Commission oversight via its complaint authority (as discussed at pages 53-59) cannot properly be circumvented by an unwarranted enlargement of the scope of section 404(e). A fair appraisal of all of the relevant factors, both practical and legal, compels the conclusion that the intended scope of review under section 404(e) is limited to "nonpostal services" previously offered pursuant to repealed former section 404(a)(6).

Moving from the first task to the second, the Postal Service in its prior submissions in this proceeding has identified those previously unregulated services which it seeks to have grandfathered under the standards of section 404(e)(3), and which it seeks to have reclassified as "postal services." Sections II and III of this brief summarize the support for such actions. With respect to the six services which the Postal Service seeks to have grandfathered, there is ample evidence that each such offering by the Postal Service meets a public need and does not unduly interfere with private sector interests (see pages 74-89). Electronic Postmark (EPM) is the only "nonpostal service" for which any opposition to grandfathering has been suggested, and (as discussed at pages 85-89) that opposition does not withstand critical scrutiny. The Commission should determine that each of these six services should be continued, and each should be regulated under the product category suggested by the Postal Service.

As requested by the Postal Service in June, five previously unregulated services should be reclassified as "postal services" and added to the list of either Market Dominant or Competitive Products (see pages 91-108). These five

services meet the new statutory definition of "postal services," and should thus be classified in accordance with the criteria of section 3642. By treating these activities as "postal services," rather than as grandfathered "nonpostal services," the Commission will be affirming the ability of the Postal Service to apply to add similar new offerings in the future to the list of postal services, pursuant to section 3642.

PROCEDURAL HISTORY

On December 20, 2007, the Commission issued Order No. 50, which initiated this docket to review "nonpostal services" as required by the PAEA. Order No. 50 noted that the PAEA, among other things, limits the Postal Service's authority to provide "nonpostal services" to those it offered as of January 1, 2006.[2] The Act provides for Commission review to determine which "nonpostal services" can, in effect, be "grandfathered," i.e. allowed to continue, and which must be terminated. In furtherance of these responsibilities, the Commission directed the Postal Service to provide, by March 19, 2008, a sworn statement that identified and completely described each "nonpostal service" offered by the Postal Service on the date of enactment of the PAEA.[3] Moreover, for each service the Postal Service wished to continue, the sworn statement was to address its current status, the appropriate classification in the Mail

[2] Order No. 50 at 1.
[3] *Id.* at 2-3. Order No. 50 recognized that the section 404(e) has a potential inconsistency on the operative date for nonpostal services that may continue by virtue of Commission review and decision. Section 404(e)(2) provides that only nonpostal services in effect as of January 1, 2006 are candidates to be "grandfathered" by the Commission, while paragraph (3) provides the procedures for review of all products in effect at the time of enactment, December 20, 2006. In Order No. 50, the Commission requested that the Postal Service identify any services that might be affected by this inconsistency.

Classification Schedule (i.e. market-dominant, competitive, or experimental), and the public need for the service and the private sector's ability to meet that need.[4] Order No. 50 also set a timetable for parties to file sworn statements addressing the private sector's ability to meet the public need, in order to oppose the Postal Service's continued offering of the service, and for parties to file sworn statements in reply. The Commission also set a schedule for initial and reply briefs.

On March 19, 2008, the Postal Service filed the sworn statement of Tina Lance which identified, described, and justified the following nonpostal services that the Postal Service wanted to continue: Passport Photo Service, Photocopying Service, Notary Public Service, Stored Value Cards, and Officially Licensed Retail Products (OLRP). The statement also identified the appropriate classification for each product.[5] Also on that date, the Postal Service presented its preliminary discussion of a number of core issues.[6] Specifically, the March 19 Notice identified a number of services not previously regulated by the Commission that appeared to meet the new definition of "postal services" in the PAEA, including address management services, envelopes and packaging supplies (*i.e.*, ReadyPost), and International Money Transfer Service. The Postal

[4] *Id.* at 3. *See* section 404(e)(3), which states that the Commission, in determining whether that nonpostal service shall continue, shall take into account: `(A) the public need for the service; and (B) the ability of the private sector to meet the public need for the service." *See also* section 404(e)(5): "If the Postal Regulatory Commission authorizes the Postal Service to continue a nonpostal service under this subsection, the Postal Regulatory Commission shall designate whether the service shall be regulated under this title as a market dominant product, a competitive product, or an experimental product."
[5] See Sworn Statement of Tina Lance (March 19, 2008).
[6] See United States Postal Service Notice of Submission of Sworn Statement on "Nonpostal Services" Pursuant to 39 U.S.C. § 404(e) ("March 19 Notice").

Service indicated that it would take action to add these services to the Mail Classification Schedule (MCS).

The March 19 Notice then addressed a suite of activities and programs that fall outside either the definition of "postal services" or services that were authorized under former section 404(a)(6). It provided a lengthy discussion of the legal basis for the Postal Service's position that these separately authorized services fall outside the scope of section 404(e) and should not be classified in the MCS.

On March 25, 2008, the Public Representative filed a motion to compel the Postal Service to file a complete list of the nonpostal services.[7] The Public Representative did not take a position on the Postal Service's legal arguments regarding the meaning of the term "nonpostal services" or whether there are activities that are outside the pricing and classification authority of the Commission. It requested the Commission to enter an order compelling the Postal Service file sworn statements regarding all of its offerings so that the Commission could properly assess them.

On April 1, 2008, the Postal Service filed a response in which it attempted to clarify its earlier position and provided further information about services and activities that fall into the three categories: the two categories that would be classified and subject to chapter 36 regulations--grandfathered nonpostal services and postal services—and a third category that should not be classified.

[7] *See* Public Representative Motion to Compel United States Postal Service to File Complete List of Nonpostal Services.

On April 29, 2008, the Commission issued Order No. 74. The Postal Service subsequently moved for clarification[8] and, in response, the Commission issued Order No. 77, which clarified several key aspects of Order No. 74. Taken together, Order No. 74, as clarified, presented the Commission's preliminary views on the issues raised in this proceeding. Order No. 74 requested a complete list and description of all existing agreements and information on revenue-generating activities in order to determine which activities of the Postal Service are services that are subject to review under section 404(e).[9] It directed the Postal Service to file sworn statements addressing the public need for each activity and requested that the total annual revenues for the activities for FY06 and FY07.[10]

The Commission explicitly stated that it has not reached definitive conclusions regarding the jurisdictional nature of any of the activities undertaken by the Postal Service.[11] Instead, it stated that it would review all relevant information from the Postal Service and other parties before reaching conclusions on the proper categorization about any of the specific activities.[12] Order No. 74 did, however, present the Commission's tentative views on whether the law allows the Postal Service to engage in revenue-generating activities or arrangements that are not regulated as "postal services" or "nonpostal services,"

[8] *See* Motion of the United States Postal Service for Clarification of Order No. 74, filed May 12, 2008.
[9] Order No. 74 at 14; Order No. 77 at 1-2.
[10] Order No. 74 at 14.
[11] Order No. 77 at 2.
[12] *Id.*

and whether the Commission's complaint jurisdiction extends to the "nonpostal services" that it determines may continue.

Regarding services that the Postal Service now wishes to have classified as "postal services," Order No. 74 directed the Postal Service to file by June 9, 2008 a list of such services accompanied by a sworn statement by a knowledgeable person (or persons) in support of and justifying the proposal. Order No. 74 also issued a revised procedural schedule which directed that by July 16, 2008, any interested person could file a sworn statement in response to the Postal Service's sworn statement. By July 30, 2008, parties wishing to reply were to file sworn statements. A briefing schedule also was set.

On June 9, 2008, the Postal Service filed its initial response to Order No. 74, in which it provided a comprehensive listing and description of other-than-postal sources of revenue for FY06 and FY07. The Postal Service chose as its starting point the Cost Revenue Analysis (CRA) reports for these years which lists all sources of revenue. The filing focused on the "Miscellaneous Items" row, which is the only available slot for reporting revenue other than that generated by postal products or "Appropriations" and "Investment income".

The Postal Service requested and received an extension of time to file the sworn statements sought by Order No. 74. On June 23, 2008, the Postal Service filed the sworn statements of Deputy Postmaster General Patrick Donahoe, Alice Vangorder, Thomas Foti, Margot Myers, and Pranab Shah. In this filing the Postal Service indicated that upon further review, it changed the designation of

two items: Customized Postage was redesignated as a “postal service” and the Postal Service sought to continue EPM as a grandfathered “nonpostal service.”

On July 30, 2008, four parties filed documents of which three were in support of the Postal Service’s products. Stamps.com filed in support of the customized postage product but advocated that it was not within the purview of this proceeding and should remain unclassified. It also supported the continuation of EPM and noted the benefits of a variety of other activities including the management of real and personal property. Adam Grossman filed a witness statement on behalf of Epostmarks, Inc. in support of the Postal Service’s ability to continue offering EPM. Charles P. Naumoff filed a witness statement in support of OLRP stamped art. Richard Borges filed a witness statement in opposition to the Postal Service’s continued offering of EPM.

On August 20, 2008, Richard Borges and Adam Grossman filed statements in reply for and against EPM, respectively. Also on August 20, 2009, Maxim Lesur filed reply comments on behalf of Microsoft, Inc. in support of EPM.

I. THE SCOPE OF SECTION 404(e) MUST BE INTERPRETED IN ACCORD WITH CONGRESSIONAL INTENT TO ADDRESS CONCERNS REGARDING FORMER SECTION 404(A)(6), AND NOT INTERPRETED TO ENCUMBER AUTHORITY GRANTED TO THE POSTAL SERVICE BY OTHER STATUTORY PROVISIONS

This proceeding is being conducted by the Commission in accordance with changes in postal law brought about by section 102 of the PAEA.[13] Specifically, having repealed former section 404(a)(6) in the first subsection of PAEA section 102(a), Congress in the second subsection added new language to section 404 of title 39, directing the Commission to review "nonpostal services" previously offered by the Postal Service, and determine whether each shall continue or be terminated. Such review is the purpose of this proceeding.[14] A threshold issue that must be addressed, therefore, is the scope of the "nonpostal services" Congress intended to be reviewed in this proceeding. The Postal Service submits that the totality of factors applicable to statutory construction require that the review proceeding contemplated under new section 404(e) be interpreted to apply solely to the "nonpostal services" which had previously been authorized by the power granted under former section 404(a)(6) ("to provide, establish, change, or abolish special nonpostal or similar services"), which has now been repealed. An alternative interpretation suggested by Order No. 74, however, conceivably would extend the scope of "nonpostal services" to be evaluated in this proceeding to include all revenue-generating activities of the Postal Service that are not "postal services" within the statutory meaning of that

[13] For the convenience of the Commission, a copy of PAEA section 102 is appended to this brief as Attachment A.
[14] *See* Order No. 50.

term, regardless of the existence of independent grants of authority to conduct those activities which were not repealed by Congress in the PAEA. Such an interpretation diverges from any realistic meaning of the statute.

Interpreting the scope of section 404(e) to encompass all revenue-generating activities that are not "postal services" would be erroneous in numerous respects:

- It would conflict with the overall structure and intent of PAEA section 102 which, in response to concerns regarding Postal Service incursions into commercial nonpostal services that competed with the private sector, repealed the previous authority of section 404(a)(6) to offer "nonpostal" services, but created a process by which nonpostal services no longer authorized by 404(a)(6) could potentially be continued.

    - PAEA section 102 did not amend other portions of the law authorizing other revenue-generating activities, and there are no indications that Congress found those other activities to be troubling or otherwise in need of review. Unlike the clear intent of section 102, there is no Congressional intent to eliminate the Postal Service's authority contained in other provisions of the law, such as the authority to dispose of property, work with other government agencies, etc. In fact, Congress expanded such authority, by adding a new provision empowering the Postal Service to levy civil penalties for violations of hazardous materials regulations.

    - Courts require that statutory provisions not be read in isolation, and that language in specific sections of a bill be interpreted to harmonize that language with the statutory scheme as a whole. Here, consideration of the entire statutory scheme precludes overreliance on a literal and isolated reading of section 404(e).

    - The standards Congress provided in section 404(e) to be applied by the Commission when potentially grandfathering nonpostal services are generally inapplicable to the activities authorized by portions of the statute other than former section 404(a)(6).

- It would improperly conflate all revenue-generating activities with "services"

- Title 39 makes a clear distinction between “services” and “property” (see sections 401(5), 401(7), 411). This accords with the common sense understanding, for example, that the sale of property, such as an excess building or an excess vehicle, is not a “service.”

- Title 39 makes clear that there are revenue generating activities that are neither “postal services” under section 101(5) nor “nonpostal services” under section 404(e). Numerous provisions of title 39, such as sections 401(5), 401(7), 411, 2003, and 2011, explicitly distinguish between “services” and other activities, and between revenues from “services” and revenues from other activities.

- It would disregard plain language of the statute and consistent legislative history which indicate that section 404(e) was intended to be limited in scope.

  - The language of section 404(e)(2) expressly limits the effects of section 404(e) to “this section,” which is section 404.

  - Both the House and the Senate, for example, were explicit in their intent not to include agreements with other government agencies under section 411 within the scope of section 404(e).

- It would raise Constitutional concerns under the nondelegation principle because it would enable the Commission implicitly to repeal other statutory grants of authority, beyond the one provision which Congress explicitly did repeal. The Constitutional concern, moreover, exists even if the Commission in practice is unlikely to exercise any alleged discretion to terminate activities authorized by statutory powers other than repealed former section 404(a)(6).

- It would negate the deliberate intent of Congress to exclude exercise of the Postal Service’s authority under certain statutory provisions, such as 401(3), 401(5), and 411, from review by the Commission in section 3662 complaint proceedings.

- It would unnecessarily interfere with the Postal Service’s ability to conduct its operations by requiring classification and regulation of activities (*e.g.*, disposal of excess property) that by their nature are inherently incompatible with the regulatory process established by the PAEA for “products,” or for which other pricing procedures are already established by other statutory provisions (*e.g.*, sections 411 and 3010 of title 39, and sections 552 and 552a of title 5).

- It would designate as “nonpostal services” within the meaning of section 404(e), and thereby place under section 404(e)’s absolute prohibition against *new* “nonpostal services,” broad types of activities to which Congress never intended that prohibition to apply, and in which the Postal Service is likely to need to be able to engage in the future in order to be able to respond to challenges and circumstances which cannot presently be predicted. Once a specific activity is deemed to be a “nonpostal service,” initiation of future activities of the same or similar type is barred, regardless of how willing the Commission might be to “grandfather” each of the current specific activities of that type.

On the other hand, interpreting the scope of section 404(e) to be limited to those nonpostal services initiated under the now-repealed authority of former section 404(a)(6) fully meets the intentions of the PAEA in the following respects:

- It allows the problem identified by Congress—the offering of commercial nonpostal services in potential competition with the private sector—to be comprehensively addressed and resolved.

- It allows the Postal Service to continue, without encumbrance, necessary revenue-generating activities and necessary business procedures which have been successfully conducted for years (or in many instances, decades) without controversy.

- It does not interfere with the Commission’s ability to maintain complete transparency by requiring financial reporting regarding all revenue-generating activities.

- It reduces unnecessary regulatory burden by appropriately leaving certain routine types of activities outside of a regulatory scheme that is simply not designed to encompass them.

- It leaves intact jurisdictional limitations intended by Congress, by not extending complaint jurisdiction to activities conducted pursuant to statutory provisions intentionally omitted from section 3662.

- It follows the rule of construction that, when faced with a potentially unconstititutional delegation of authority, a more narrow reading of that statute, which avoids the Constitutional concerns, is appropriate.

The following pages fully demonstrate that appropriate consideration of these and similar factors requires the conclusion that Congress intended a narrow review proceeding under section 404(e), limited to those "nonpostal services" previously offered under the grant of authority Congress expressly repealed.

A. The Structure and History of PAEA Section 102 Cannot be Reconciled with an Interpretation of Section 404(e) That Would Broadly Empower the Commission to Review and Terminate Nonpostal Activities Authorized Elsewhere in Title 39 or by Other Provisions of Federal Law

As discussed below, starting with the structure of PAEA section 102, and proceeding to the history of its provisions and their relationship to the rest of title 39, careful review leads to the ineluctable conclusion that Congress was attempting to address a fairly limited set of concerns in repealing former section 404(a)(6) and adding new section 404(e). Such an analysis cannot be reconciled with any suggestion that Congress, merely by enacting PAEA section 102, intended to delegate to the Commission a new role in the Postal Service's decision-making process on all of its revenue-generating activities, or the ultimate authority to prohibit the Postal Service from continuing to engage in necessary and uncontroversial revenue-generating activities that are authorized by portions of the law which the PAEA did not change.

1. The structure of PAEA section 102 suggests natural limits on the scope of section 404(e)

Section 102 of the PAEA essentially accomplished two things. First, section 102(a)(1) repealed a provision of title 39, section 404(a)(6), that gave the Postal Service the authority to offer "special nonpostal or similar services." Immediately following this repeal of statutory authority to offer "nonpostal

services" under former section 404(a)(6), section 102(b) inserted a provision, section 404(e), allowing the Postal Service to continue offering "nonpostal services" subject to the "grandfathering" procedures set forth in that provision. This structure provides a clear indication of the limited scope of section 404(e): "nonpostal services" whose enabling authority was repealed in PAEA section 102(a)(1) can nonetheless be continued following review and approval by the Commission under the procedures specified in PAEA section 102(a)(2).[15] Thus, the structure of PAEA section 102 clearly suggests that section 404(e) only applies to those "services" which were previously assumed to be authorized as "nonpostal services" under former section 404(a)(6).

2. It is necessary to harmonize section 404(e) with provisions of title 39 that were not amended

Strongly reinforcing the limited scope of section 404(e) is the fact that PAEA section 102, although expressly repealing previous section 404(a)(6), made no changes in other provisions of the law granting the Postal Service other general and specific powers under which many revenue-generating activities have historically been (and currently are) conducted, including several provisions authorizing the Postal Service to provide discrete types of "services." The Commission should 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

[15] The ability of the Postal Service to offer "special services" was, of course, unaffected by the repeal of former section 404(a)(6) because those services have long been considered "postal." The phrase "similar services," meanwhile, has never been understood to provide an independent grant of authority to provide a set of services distinct from "special" or "nonpostal" services. Thus, over the relevant period, the only operative effect of former section 404(a)(6) was considered to be to authorize "nonpostal" services.

other parts of the law untouched, as it did with respect to title 39 in the PAEA, "the normal assumption" is that the revised and unrevised portions of the law are "designed to function as parts of an integrated whole."[16] 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.[17] In particular, all provisions of the law must be given effect, so that no provision is rendered "inoperative or superfluous, void or insignificant."[18]

Order No. 74 tentatively suggested that the definition of "nonpostal service" set forth in section 404(e)(1) seems "straightforward."[19] However, the Postal Service submits that a comprehensive reading of the entire statute and its history indicates that the definition is <u>not</u> straightforward. In *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), the Supreme Court noted that, "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole."[20] Furthermore, a statute is considered ambiguous "when it is

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

[17] *See, e.g., FDA v. Brown and Williamson Tobacco Corp.*, 529 US 120, 132-33 (2000)("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).

[18] *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.

[19] Order No. 74 at 8-9.

[20] In that case, the Court construed a term that "at first blush" would have required a result for the respondents as in fact supporting the interpretation advanced by the petitioner because that "initial impression [did] not withstand scrutiny" in light of those factors. *See also Dolan v. United States Postal Service*, 546 US 481, 486 (2006) ("The definition of words in isolation, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the

capable of being understood by reasonably well informed persons in two or more different senses."[21] Taking the factors identified by the *Robinson* Court into account, there are several aspects of section 404(e)(1) that must be read carefully in order to determine its meaning.

For instance, even if the definition of "nonpostal service" is read in complete isolation from the rest of the statute, a threshold question is the following: "what is a *service*"? Order No. 74, perhaps taking extreme care to ensure that the record of this proceeding is sufficiently complete, broadly defined the term "service" as "every revenue generating arrangement executed by the Postal Service," such that "there no provision for a third category of services which is neither 'not postal' nor 'not nonpostal,' or, as the Postal Service would have it, not services at all but merely sources of revenue."[22] However, this answer is certainly not compelled by the term "service," which is capable of a variety of different meanings.

Nor is it the most logical reading of the term, based on the language of section 404(e), again even if read completely in isolation. Section 404(e)(1) indicates that section 404(e) applies to those "services" that are not "postal services" within the meaning of section 102(5). This, in turn, suggests some degree of comparability between the activities that are "postal services" and the activities that are "nonpostal services," given that they are both "services" under the statute. This is especially true considering that "nonpostal services" are to be

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outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

[21] SUTHERLAND STATUTORY CONSTRUCTION § 46.04.

[22] Order No. 74 at 7.

regulated as "products" under the provisions of chapter 36.[23] Thus, it would seem that "nonpostal services" should have characteristics such that they are similar to the "products" offered by the Postal Service: specifically, that they are commercial products offered by the Postal Service to the public, for which rates are charged, and that, furthermore, such rates are established by the Postal Service. Thus, the language of section 404(e)(1), by itself, without considering the rest of the statute, would seem to exclude those revenue-generating activities in which revenue is raised through mechanisms other than through rates that the Postal Service sets.

More broadly, however, examining title 39 as a whole also shows that there are a number of provisions that were untouched by the PAEA, and that authorize the Postal Service to perform certain types of activities without limitation, including activities that title 39 characterizes as "services" (in particular, philatelic services under section 404(a)(5) and government services under section 411).[24] In the PAEA, Congress did not see fit to move beyond its explicit repeal of previous section 404(a)(6) to amend any of these other statutory grants of authority. How these provisions interact with section 404(e), which gives the

[23] *See* 39 USC 404(e)(5). Note, however, that the provision of section 404(e)(5) indicating that grandfathered "nonpostal" services are to be regulated as "products" itself negates any possibility of the "straightforward" interpretation of section 404 postulated by Order No. 74 at pages 8-9. The explicit definition of "product" in section 102 is limited to postal services, yet section 404(e)(5) implicitly requires expansion of the definition of "product" to include nonpostal services. Such inconsistency underscores the need to avoid reliance on notions of superficial clarity when attempting to interpret these portions of the PAEA.

[24] Other activities which probably are fairly characterized as "services" (whether that term is explicitly used or not), but which are directly authorized by other statutory provisions include FOIA copying fees (5 USC § 552), Privacy Act copying fees (5 USC § 552A), and Sexually Oriented Advertising (SOA) list access fees (39 USC § 3010).

Commission authority to order the Postal Service to stop providing "nonpostal services," is not addressed by the bare language of section 404(e).

The question therefore becomes: does the definition of "nonpostal service" in section 404(e)(1) include those "services" that the Postal Service is authorized elsewhere in title 39 to continue without limitation? There are very strong reasons to doubt this result. First, as discussed below, it is completely contrary to the legislative history of section 102, and the purposes behind the inclusion of that provision in the postal reform legislation. Second, such a reading would also presume that the Commission has the ultimate authority to repeal those provisions, by ordering the Postal Service to terminate activities that have long been, and continue to be, authorized by provisions other than the now-repealed section 404(a)(6).

a. Well-established canons of statutory construction require harmonization between all components of a statutory scheme

Consistent with the understanding that statutory provisions cannot be read in isolation, courts will often read implicit limits into statutory language that is broadly worded in a literal sense, in order to harmonize that language with the statutory scheme as a whole. To do so simply reflects the requirement that legislative schemes should be interpreted so that they are internally consistent. This is the case even where the statutory provision at issue includes superficially expansive language, as does section 404(e)(1) where it indicates that "nonpostal service" means "*any* service that is not a postal service." As has been discussed repeatedly by the courts, 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,[25] and with legislative intent.[26] For instance, in *Bell Atlantic*, the D.C. Circuit upheld application of a "qualifying phrase not expressed within the language of" a statutory provision using the term "any" in order to avoid a contradiction between that provision and another provision of the statute.[27] In this instance, "a qualifying phrase not expressed within the language of the statute" could be, for example, the phrase "offered by the Postal Service pursuant to its authority under former section 404(a)(6) of this title," such that section 404(e)(1) would be interpreted as if it read "In this subsection, the term 'nonpostal service' means any service offered by the Postal Service pursuant to its authority under former section 404(a)(6) of this title that is not a postal service

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[25] *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"].).

[26] *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.).

[27] *Bell Atlantic*, 131 F.3d at 1049.

defined under section 102(5)." The insertion of such a qualifying phrase would be fully consistent with the approach endorsed in the *Bell Atlantic* case.

Courts will also limit broad language contained in a later enacted statute in order to render that language consistent with the language of an earlier enacted statute, in order to avoid holding that the later enacted statute impliedly repealed the earlier enacted statute.[28] Title 39 is, of course, primarily a product of two statutes: the Postal Reorganization Act of 1970 (PRA), and the PAEA. Here, Order No. 74 initially postulated Commission authority to order the Postal Service to discontinue activities that were authorized by the PRA, even though those provisions were not amended by the PAEA. However, these independent statutory provisions and section 404(e)(1) are certainly capable of co-existence through a reasonably narrow construction of section 404(e)(1). Moreover, applying such a limiting construction to section 404(e)(1) would still give that provision real and substantial effect, because it would apply, as it should, to those existing services previously justified under former section 404(a)(6).

b. Appropriate recognition of the nondelegation principle of Constitutional law requires restraint in determining the intended scope of section 404(e)

The Commission's early suggestion that section 404(e) allows it to revoke the Postal Service's authority to undertake activities expressly and continuously authorized by title 39 is tantamount to a suggestion that Congress has delegated to the Commission the power to repeal previously granted sources of statutory authority. Thus, for example, the codified law might appear to continue to

[28] *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976).

authorize the Postal Service to charge a service fee for access to the Sexually Oriented Advertising (SOA) list pursuant to section 3010, but the Commission, it has been suggested, could revoke that authority by administrative action pursuant to section 404(e). Under this view, therefore, the express provisions of section 3010(b) regarding the SOA fee could thus implicitly be repealed by the Commission.

Such a broad-ranging construction of section 404(e) is untenable. The power to repeal prior laws "exists as a necessary part and increment of the legislative power and function," and "[t]he constitutional authority to repeal statute law resides exclusively with the legislatures."[29] As a legislative function, therefore, the power to repeal laws can no more be delegated than the power to enact new legislation. Article I, Section 1 of the Constitution provides that all "legislative Powers herein granted shall be vested in a Congress of the United States." The Supreme Court has long insisted that "'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch."[30] This principle has come to be known as the nondelegation doctrine.

In recent years, the Supreme Court's application of the nondelegation doctrine has principally been in the form of "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[31] Thus, when choosing between competing interpretations of a statute, the courts apply the nondelegation doctrine to favor the construction consistent with an

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[29] SUTHERLAND STATUTORY CONSTRUCTION § 23.3.
[30] *Mistretta v. US*, 488 U.S. 361, 371-72 (1989) (*quoting Field v Clark*, 143 U.S. 649, 692 (1892)).
[31] *Mistretta,* 488 U.S. at 373 n.7.

intent to avoid an unconstitutional delegation of legislative authority.[32] The courts apply the doctrine to reach narrow constructions of delegations by looking at other statutory provisions surrounding the delegation, by rejecting overly broad interpretations of certain words, and by reviewing the statute's overriding purpose.[33]

Such an application of the nondelegation doctrine is entirely warranted in the current circumstances. A narrow construction of section 404(e), concluding that the Commission's authority to order the termination of revenue-generating activity is limited to those "nonpostal services" previously authorized solely by now-repealed section 404(a)(6), fits comfortably within the acceptable bounds of the nondelegation doctrine, and with the purpose and legislative history of section 102 of the PAEA as a whole. On the other hand, a broad construction of section 404(e), suggesting that the Commission's review and termination powers additionally extend even to revenue-generating activities still expressly authorized by other portions of the previous law untouched by the PAEA, necessarily runs afoul of the nondelegation doctrine. Thus, even minimal consideration of the nondelegation doctrine reveals the constitutional flaw in the analytic framework upon which Order No. 74 appears to have been premised.

One may speculate, of course, that the Commission would likely not be inclined to terminate, for example, the above-discussed Postal Service authority

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[32] *See, e.g., International Union, UAW v. OSHA*, 938 F.2d 1310, 1316-17 (D.C. Cir. 1991).
[33] *See Michigan Gambling Opposition v. Kempthorne,* 525 F.3d 23, 33 (D.C. Cir. 2008); *South Dakota v. US Dept of* Interior, 423 F.3d 790, 795 (8th Cir. 2005). For purposes of applying the nondelegation doctrine, therefore, the courts not surprisingly use the very same tools of statutory analysis as they use more generally when seeking to harmonize all of the components of a statute, as outlined in the cases discussed above.

to charge a fee for access to the SOA list pursuant to section 3010(b). Practically speaking, it is difficult to see why the Commission would have much incentive to interfere with that, or with many of the other routine revenue-generating activities. Indeed, the Commission suggests in its Order that it would not exercise its authority to terminate any agreements reached by the Postal Service with other federal agencies.[34] Nonetheless, the Supreme Court has made it clear that an agency cannot obscure a nondelegation issue by interpreting the statute broadly, but at the same time disclaiming any intent to actually exercise the authority that it claims to have:

> The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which power to exercise … would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing on the answer.[35]

Furthermore, the suggestion that the Commission would not exercise its authority to order the Postal Service to terminate its activities with other federal agencies pursuant to section 411 because the Postal Service could "represent that the agencies involved believe that there is a public need for those services that can best be meet by the Postal Service" (Order No. 74 at 10) begs the question of why Congress would have delegated that authority to the Commission in the first place. If the public need for continuance of an activity can be shown simply by the fact that a section 411 agreement exists (or, for example, by the fact that provisions in other parts of the U.S. Code authorize the

[34] Order No. 74 at 10.
[35] *Whitman v American Trucking Association*, 531 U.S. 457, 472-73 (2001).

Postal Service to receive revenue from other governmental functions, such as Consumer Fraud Fund activities by the Inspection Service, or FOIA copying fees), any section 404(e)(3) review would be meaningless. This result does not seem to be a logical reading of the statute.

Moreover, the same can be said of those revenue-generating activities of the Postal Service that are clearly necessary for the rational, business-like conduct of postal business. It seems difficult to contemplate, for example, that the Commission would seek to repeal the Postal Service's authority to sell a building for which it no longer has any use, thereby requiring that asset to go to waste. However, if the continuance of such activities is self-evidently necessary, then the Congress would have had no reason to authorize the Commission to potentially order discontinuance of those activities in the first place.

3. The legislative history of PAEA section 102 makes clear that review proceedings under section 404(e) were intended to be limited to "nonpostal services" offered pursuant to statutory authority explicitly repealed by Congress

In addition to the structure of PAEA section 102 itself, the legislative history of that provision clearly indicates that Congress was motivated by a desire to eliminate the Postal Service's authority to offer commercial, nonpostal services pursuant to the ambiguous grant of authority found in former section 404(a)(6).[36] In the 1990s, the Postal Service's use of that provision to justify a

[36] *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 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"),

variety of commercial ventures that some saw as being outside of its core mission gave rise to considerable controversy. This controversy was reflected by a 1998 GAO Report issued at the request of Rep. McHugh which examined, in part, the Postal Service's then-recent "nonpostal" offerings.[37] 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 commercial, nonpostal activities.[38] Further GAO Reports were issued in 2000 and 2001 at the request of Congress, reviewing the Postal Service's electronic commerce initiatives.[39] In 2003, the President's Commission also specifically discussed the issue, noting that, based on former section 404(a)(6), "which permits the Postal Service to 'provide, establish, change or abolish special **non-postal** or similar services,'" the Postal Service had engaged in "some dubious new business ventures…far afield of its basic function [of] delivering the mail," in which the Postal Service had entered into "competitive markets."[40]

The situation was captured quite accurately by the Postal Rate Commission in 2004, which discussed how, for most of the period following the passage of the PRA, the offering of services other than "postal services" by the

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§ 46.07 (a court must look to reasons for the enactment of the statute and the purposes to be gained by it and construe the statute in a manner consistent with such purpose").

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

[38] *See id.* at 1, 5.

[39] 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).

[40] *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) (emphasis added in original).

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.[41] However, the Commission noted that as the Postal Service engaged in more far-reaching commercial, nonpostal ventures in the 1990s, its provision of services other than "postal services" became contentious.[42]

In 1998, the same year that GAO issued, at his request, its first report on the Postal Service's "nonpostal activities," Rep. McHugh included the first "nonpostal" provision in his postal reform bill (known at that time as the Postal Modernization Act of 1998). This provision was carried forward into the Postal Modernization Act of 1999, introduced by Rep. McHugh in the 106th Congress.[43] 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 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

[41] *See* PRC Order No. 1394 at 4. The Commission's use of the term "nonpostal" in that context was presumably in the generic sense of services considered not to be subject to its jurisdiction.
[42] *Id.*
[43] 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.

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."[44] The phrase "special nonpostal or similar services" tracked the language of the repealed section 404(a)(6). 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."[45] Thus, in both instances, the language used by the "nonpostal" provisions in these bills was 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 nonpostal or similar services."[46] 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

[44] H.R. 4970, 107th Cong. § 102 (2002).
[45] H.R. 4341, 108th Cong. § 102 (2004).
[46] S. 1285, 108th Cong. § 102 (2003); S. 2468, 108th Cong. § 102 (2004).

permit or require that the Postal Service provide any special nonpostal or similar services."[47]

The Senate Report accompanying S.2468 identified the "nonpostal" concerns that the Senate bill was intended to address:

> By focusing on the business of processing, transporting and delivering physical mail pieces, the Postal Service will avoid the distractions and the associated financial costs that have arisen when the Postal Service has ventured away from its core business. To further this focus on core mail products, the Postal Service will not be permitted to offer nonpostal products except in cooperation with other government agencies, for example, sale of federal migratory bird hunting and conservation stamps or acceptance of passport applications.[48]

The only mechanism by which S. 2468 compelled the Postal Service to achieve the stated objective of remaining focused on its core business, however, was the repeal of previous section 404(a)(6). Read in conjunction with the provisions of the Senate bill, the Senate Report thus makes clear that repeal of former section 404(a)(6) was viewed as sufficient to prohibit the "nonpostal" activities which were perceived to be outside the Postal Service's "core" functions. It would defy credulity to suggest that the Senate had any notion that activities conducted under other statutory provisions that S. 2468 left unchanged, such as, for example, disposal of real or personal property under the authority of section 401(5), would in any way be affected by the restriction on "nonpostal" products contained within the proposed Senate bill.

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

[47] This reference to section 411, which continued in the Senate bills up until the PAEA itself, is discussed further below.
[48] S. REP. NO. 108-318 at 5-6 (July 22, 2004).

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."[49] 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."[50] When the Senate passed S. 662, styled as an amendment to H.R. 22, it maintained this language.[51]

Thus, over the course of four Congresses and eight years, the postal reform legislation was consistently 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 *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.[52] 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

[49] H.R. 22, 109th Cong. § 102 (2005) (as passed by the House).
[50] S. 662, 109th Cong. § 102 (2005).
[51] H.R. 22, 109th Cong. § 102 (2006) (as passed by Senate).
[52] 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.

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.[53]

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 industry pursuant to former section 404(a)(6). This in turn suggests that the ambiguities inherent in the fact that title 39 continues to allow the Postal Service to engage in other revenue-generating activities, including certain discrete and non-controversial "services" such as philatelic services and government services, should be resolved by concluding that those activities fall outside the scope of section 404(e). This conclusion is underscored when one considers the stark consequences, under the Senate approach, of considering an activity to be "nonpostal." Without a grandfathering clause, if disposal of real or personal property, for example, were considered within the realm of "nonpostal," the Postal Service would have been categorically and permanently barred from engaging in these activities, despite the explicit preservation of such authority in

[53] 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).

section 401(5). There is nothing in the legislative history providing even a scintilla of evidence to suggest Congress intended that result at any stage of the postal reform process. Instead, the legislative history shows that "nonpostal" services were simply those authorized by former section 404(a)(6).

Order No. 74 was dismissive of this history, claiming that it "fails to demonstrate that Congress intended something different than what it expressly adopted in section 102 of the PAEA."[54] Order No. 74 first rejected the Postal Service's view that the PAEA represents a compromise between the Senate and House versions of H.R. 22 in the 109th Congress on the basis that "[t]he introduction of the wholly new concept of Commission review and authorization (or termination) of each nonpostal service is in no sense a compromise between competing provisions...." This viewpoint is puzzling. Compromises often lead to the "introduction of [a] wholly new concept" in order to bridge the differences between two competing points of view. Moreover, it does not seem far-fetched to conclude that the Commission review process introduced by the PAEA represents a compromise between the position of the House, which wanted to allow all "grandfathered" nonpostal services to be continued without limitation, and of the Senate, which on the other hand wanted to eliminate all nonpostal services without limitation. A natural middle ground between the two positions was to allow the "grandfathered" nonpostal services to continue, but only so long as an independent review confirmed that there is a public need for the Postal Service to offer those services. The House bill grandfathered <u>all</u>, the Senate bill

[54] Order No. 74 at 8.

grandfathered none, and the compromise put into effect a process that could eventually grandfather some, all, or none.

Ultimately, Order No. 74's rejection of the legislative history seems to stem from an unnecessarily literal reading of the language of section 404(e)(1), which "makes no exceptions to the scope of the review and specifically defines the term 'nonpostal service' to mean '*any* service that is not a postal service defined under section 102(5)."[55] As noted in detail above, however, the Commission's initial view can, and should, be modified at this stage of the proceeding, once section 404(e)(1) is read in the broader context of both the entire statutory scheme, and the legislative history of the PAEA, which clearly is relevant as an interpretative guide.[56] In the end, the statements in Order No. 74 suggest a preliminary and, ultimately, incorrect view that Congress, after eight years of considering section 102, and invariably limiting the scope of that provision to those services previously offered under section 404(a)(6), intended at the very last minute to exponentially increase its scope, without expressing any intention to do so,[57] and doing so in such a way as to partially negate its decision to limit the Commission's complaint authority (as discussed below).

With respect to section 411, Order No. 74 also pointed to the fact that the Senate version of H.R. 22 expressly exempted section 411 from the scope of this provision, but that the ultimate language of the PAEA did not, as evidence that

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[55] *See* Order No. 74 at 8-9.

[56] "When a statute contains latent ambiguities despite its superficial clarity, the court may turn to the legislative history or other aids for guidance." SUTHERLAND STATUTORY CONSTRUCTION § 46.04.

[57] There is no conference report on the PAEA, and a review of the floor statements made at the time of the passage of the PAEA in both the House and the Senate reveals no discussion suggesting any expansion in the intended scope of section 404(e), relative to the same section in previous versions of the bill. 152 CONG. REC. H9179-82, S11821-22 (Dec. 8, 2006).

"affirms that such services fall within the purview of section 404(e)."[58] Certainly, if this was the only fact discernable from the legislative history, it would support the position that Order No. 74 postulates. It seems odd, however, to find this portion of the legislative history relevant, while ignoring what is the overwhelming conclusion that can be drawn from that history: that Congress intended only to implicate those services previously offered under section 404(a)(6).

This history is particularly evident with respect to section 411, which both the Senate and House took pains to exclude from the scope of the "nonpostal" provision throughout the history of the postal reform deliberations: the Senate by expressly exempting section 411 in the language of its bill, and the House by emphasizing in Report language that the "nonpostal" provision should not call into question the Postal Service's authority to provide government services to the public under section 411.[59] In fact, the Congress took pains to do so even though the language of the reform bills, which were limited to eliminating the Postal Service's authority to offer "special nonpostal or similar services," was most reasonably interpreted as *not* affecting the Postal Service's independent authority to provide services under section 411 (a provision which no reform bill ever proposed to amend).

Congress was likely 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

[58] Order No. 74 at 10.
[59] H.R. REP. NO. 109-66, pt 1, at 45; H.R. REP. NO. 108-672, pt 1, at 5 (2004).

dicta that speculated that the reference to "nonpostal" in former section 404(a)(6) "likely" was a reference to such government services.[60] The Postal Rate Commission itself had also discussed the possibility that "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."[61]

At all times, therefore, Congress expressed a clear intention that the ability of the Postal Service to furnish government services to the public under section 411 should *not* be questioned by the elimination of section 404(a)(6). Order No. 74 implicitly suggested that Congress changed its mind at the last second, and by enacting the PAEA, decided that the continued ability of the Postal Service to provide such services should be subject to review and possible repeal by the Commission. Furthermore, as discussed above, it is no answer for the Commission to say that it will not actually require the Postal Service to stop providing any such services. This interpretation—that the Commission has the power to repeal the Postal Service's authority, but would not actually exercise

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[60] 405 F Supp 1109, 1117 n.3 (D.D.C. 1975).

[61] *See* Order No. 1394 (March 5, 2004) 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 (Nov. 12, 2004) at 13-20.

As discussed by the Postal Service in its filing in this docket on March 19, this possible "distinction" noted by the Commission has no basis 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. *See* March 19 Notice at 25-27.

that authority since there is self-evidently a public need for any section 411 agreement that the Postal Service enters into (by the mere fact that another agency agrees to enter into such an agreement with the Postal Service)—simply begs the question of why Congress would have made section 411 services a part of this proceeding in the first place.

4. The specific language and legislative history of section 404(e)(2) further require a limited reading of the intended scope of section 404(e)

Finally, even if one chooses to disregard the clear legislative history exempting section 411 services from the scope of section 404(e), an additional basis for excluding those services is found in the plain language of section 404(e)(2). That provision 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."[62] This provision indicates that section 404(e) does not implicate the Postal Service's authority to conduct "services" authorized by provisions other than section 404, including those offered pursuant to section 411.

Equally importantly, the "nothing in this *section*" language enacted into law replaced earlier language (discussed above) which read "nothing in this *title*." Thus, when Order No. 74 (at page 10) refers to earlier versions of the bill which specifically exempted section 411 from the scope of section 404(e), points to the fact that the enacted law contains no such exemption, and then claims that this

[62] Emphasis added.

legislative history "affirms that [section 411] services fall within the purview of section 404(e)," the Order is glossing over the corresponding fact that substitution in 404(e)(2) of the word "section" for the word "title" negated any need for such an exemption. Once the effect of section 404(e) was limited to section 404, it was no longer necessary to counter any possible effect on portions of the law beyond section 404, such as section 411. The preliminary analysis set forth in Order No. 74 appears to be premised on the notion that the only relevant change to section 404(e)(2) was the deletion of the section 411 exemption. That premise is incorrect. The substitution of the word "section" for the word "title" manifests an intent to limit the scope of section 404(e). Order No. 74, however, ignores this portion of both the plain language of the statute, and the legislative history.

To be balanced, however, it is necessary to acknowledge that, while the reference in section 404(e)(2) to "this section" necessarily moves activities conducted under other sections such as section 411 outside the scope of section 404(e) review, it does not have the same effect on activities relating to "philatelic services." Provision of philatelic services is authorized by subsection 404(a)(5), which, obviously, is within section 404. Thus, from a strictly literal reading of section 404(e), one might conclude that the Commission has the authority to terminate the Postal Service's offering of philatelic services.

Such an interpretation, however, would render section 404(a)(5) a nullity, contrary to the principle that all statutory provisions should be given effect if

possible.[63] When enacting the PAEA, 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."[64] Perhaps more 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 above, 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.

That section 404(e) was not intended to extend to philatelic services becomes quite clear upon consideration of the standards articulated for the review process established by that section. By the terms of section 404(e)(3), when conducting such review, the Commission shall take account of the public need for the service, and the ability of the private sector to meet that public need. First, as Congress in section 404(a)(5) expressly authorizes philatelic services, the issue of public need seems to be moot. Second, the nature of philatelic services is such that the private sector cannot meet that need. A first-day

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[63] Or, to make the same point from a somewhat different perspective, if the provisions of new section 404(e), added by PAEA subsection 102(a)(2), were interpreted to mandate the same treatment for philatelic services previously and currently authorized by subsection 404(a)(5) as for nonpostal services previously authorized by former subsection 404(a)(6), the effect of this interpretation would be to render the repeal of subsection 404(a)(6) by PAEA subsection 102(a)(1) superfluous. Since the repeal of former subsection 404(a)(6) was the only purpose for PAEA subsection 102(a)(1), it makes no sense to suggest that philatelic services should be treated no differently from nonpostal services, as that would suggest that Congress needn't have bothered with PAEA subsection 102(a)(1) at all.

[64] *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)).

cancellation requires specific activity by the Postal Service, not by the private sector. Maintaining a coherent regulatory scheme requires restricting the scope of section 404(e) to those Postal Service activities which its provisions were intended to remedy, and to which meaningful application of its standards is possible. The activities meeting such criteria are those previously authorized by section 404(a)(6), and philatelic services are not among them.

B. Because Not All Postal Service Sources of Revenue Can be Considered a "Service" Within the Statutory Meaning of the Term, Nonpostal "Services" Cannot Be Equated with Nonpostal "Revenue-Generating Activities"

In an earlier filing with the Commission in this docket, the Postal Service expressed the view that section 404(e) does not apply to Postal Service activities that generate revenue but are not "services" within the statutory meaning of that term. In rejecting this position, Order No. 74 broadly asserted that:

> under the PAEA, the Postal Service is limited to offering only postal services or nonpostal services. There is no provision for a third category of services which is neither "not postal" nor "not nonpostal," or, as the Postal Service would have it, not services at all but merely sources of revenue.[65]

Order No. 74 went on to assert that:

> Every revenue generating arrangement executed by the Postal Service entails either a postal service or nonpostal service. Regarding the latter, each such agreement necessarily involves a *quid pro quo* by the Postal Service. It agrees to provide a product or a service to a third party in return for a fee, the opportunity to earn revenues, or perhaps some other benefit. It is providing a service regardless whether, for example, it makes lobby space or its brand available.[66]

[65] Order No. 74 at 7.
[66] *Id.* at 11.

The claim, however, that all revenue comes from either a “postal service” or a “nonpostal service” cannot be squared with the plain language of title 39. Rather, title 39 clearly indicates that the Postal Service accrues revenue through a variety of means that are distinct from the provision of “postal services” and “nonpostal services.”

As discussed in the statement of Patrick Donahoe, the Postal Service derives revenues from a large number of sources in the normal course of operating a nationwide hardcopy distribution network on a judicious, business-like basis. Many of these activities necessarily generate revenue, such as when the Postal Service sells or leases excess real property, equipment, or vehicles. The Postal Service also receives incidental revenues in the normal course of business, reflecting its size and ubiquity, including from commercial agreements to procure goods or services necessary for the Postal Service to fulfill its postal functions, successful lawsuits, the management of the Postal Service’s financial portfolio (such as interest income), unclaimed monies found in letters and parcels at Mail Recovery Centers, unclaimed meter deposits, and fees from parking. In addition, Mr. Donahoe also noted that the Postal Service receives incidental revenues due to its status as a government agency, including through judicial decisions or settlements related to the Postal Service’s law enforcement activities.

As quoted above, Order No. 74 claimed that these activities fall within the scope of this proceeding because, as sources of revenue for the Postal Service, they are “services” within the meaning of section 404(e)(1). This interpretation is

predicated on the notion that there is no category of revenue-producing activities outside of the postal service/nonpostal service dichotomy that the Commission believes is established by the PAEA.

This interpretation is, however, clearly inconsistent with the language of title 39. Section 404(e) defines "nonpostal service" as "any *service* that is not a postal service defined under section 102(5)."[67] The Order's claim that all revenue-generating activities that do not constitute "postal services" are "nonpostal services" subject to this proceeding requires two interrelated conclusions: first, that all revenue that accrues to the Postal Service comes from either a "postal *service*" or a "nonpostal *service*," and, as a logical corollary, that all revenue-generating activities are "*services*" within the statutory meaning of that term. As discussed below, neither of these conclusions square with the language of title 39, which instead demonstrates that the Postal Service is authorized to receive revenues from sources other than "postal services" and "nonpostal services."

1. Sections 2003 and 2011 Establish That There Are Sources of Revenue Beyond Postal and Nonpostal Services

First, the notion that all Postal Service revenue comes from either "postal services" or "nonpostal services" is inconsistent with sections 2003 and 2011 of title 39, which establish the Postal Service Fund and the Competitive Products Fund, respectively. These provisions clearly indicate that "postal services" and "nonpostal services" are *not* the only sources of revenue for the Postal Service.

[67] Emphasis added.

Section 2003, which establishes the Postal Service Fund, states the following in subsection (b):

> (b) Except as otherwise provided in section 2011 [establishing the Competitive Products Fund], there shall be deposited in the Fund, subject to withdrawal by check by the Postal Service—
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> (1) revenues from postal and nonpostal services rendered by the Postal Service;
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> (2) amounts received from obligations issued by the Postal Service;
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> (3) amounts appropriated for the use of the Postal Service;
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> (4) interest which may be earned on investments of the Fund;
>
> (5) any other receipts of the Postal Service;
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> (6) the balance in the Post Office Department Fund established under former section 2202 of title 39 as of the commencement of operations of the Postal Service;
>
> (7) amounts (including proceeds from the sale of forfeited items) from any civil forfeiture conducted by the Postal Service;
>
> (8) any transfers from the Secretary of the Treasury from the Department of the Treasury Forfeiture Fund which shall be available to the Postmaster General only for Federal law enforcement related purposes; and
>
> (9) any amounts collected under section 3018.

Section 2003(b) distinguishes between "revenues from postal and nonpostal services rendered by the Postal Service" in (b)(1) and other sources of revenue to be deposited in the Postal Service Fund. Therefore, to conclude, as Order No. 74 tentatively did, that "all revenue generating arrangements entail either a postal service or a nonpostal service" would render much of the language of the subsection after (b)(1) completely redundant and superfluous, because there would be no reason to enumerate those revenue sources separately if they were subsumed within subsection (b)(1). Thus, the interpretation set forth by Order No. 74

contravenes the rule that statutes are not to be interpreted in a manner that renders some words of the statute "altogether redundant."[68]

Similarly, section 2011, which establishes the Competitive Products Fund, states the following in its subsection (b):

> (b) There shall be deposited in the Competitive Products Fund, subject to withdrawal by the Postal Service—
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> (1) revenues from competitive products;
>
> (2) amounts received from obligations issued by Postal Service under subsection (e);
>
> (3) interest and dividends earned on investments of the Competitive Products Fund; and
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> (4) any other receipts of the Postal Service (including from the sale of assets), to the extent allocable to competitive products.

Section 2011, parallel to section 2003, plainly distinguishes between "revenues from competitive products" and other sources of revenue that are allocable to the Competitive Products Fund. The phrase "competitive products" encompasses both the "postal services" assigned by the Commission to the competitive side under section 3642, and the "nonpostal services" assigned by the Commission to the competitive side under section 404(e)(5). This is because section 404(e)(5) requires that all "nonpostal services" that the Commission authorizes to continue must "be regulated under [title 39] as either a market dominant product, a competitive product, or an experimental product." Any "nonpostal service" that is designated as "competitive" is a "competitive product" for purposes of the statute. Thus, if all revenue allocable to the competitive side

[68] *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995); *National Association of Recycling Industries, Inc. v. ICC,* 660 F.2d 795, 799 (D.C.Cir.1981) (improper to read a statute in a way that renders any provision "inoperative or superfluous, void or insignificant."). *See generally* SUTHERLAND STATUTORY CONSTRUCTION § 46.06.

comes from the provision of a "service," then it would have been unnecessary for section 2011 to separately identify the revenue sources set forth in subsections (b)(2)-(4).

Together, these provisions clearly demonstrate that there are sources of revenue for the Postal Service independent of "postal" and "nonpostal" services. These include "revenue generating arrangements executed by the Postal Service" such as 1) amounts received from obligations issued by the Postal Service pursuant to sections 2005 and 2011(e);[69] 2) interest earned on the investment by the Postal Service of excess amounts in the respective Funds pursuant to sections 2003(c) and 2011(c)-(d);[70] 3) amounts, including proceeds from the sale of forfeited items, from any civil forfeiture conducted by the Postal Service;[71] and 4) amounts collected under the hazardous material provision of section 3018.[72]

Furthermore, sections 2003(b) and 2011(b) sections both distinguish between revenues from competitive and market-dominant postal and nonpostal services (*i.e.*, "products"), and "any other receipts of the Postal Service." Section 2011 clarifies that the phrase "any other receipts" includes, but is not limited to,[73] revenue "from the sale of assets." Because "assets" are any item or resource of

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[69] *See* 2003(b)(2) and 2011(b)(2).
[70] *See* 2003(b)(4) and 2011(b)(3).
[71] *See* 2003(b)(7).
[72] *See* 2003(b)(9). The mere establishment by the PAEA of the new provisions of section 3018 allowing the Postal Service to collect and retain revenue from hazardous material violations is, by itself, diametrically opposing evidence to the apparent suggestion of Order No. 74 that such revenue-generating activities are within the intended scope of the "nonpostal services" for which Congress intended to withdraw authority by the enactment of section 404(e) within the same legislation.
[73] *See, e.g.*, *Alarm Industry Communications Committee v. F.C.C.,* 131 F.3d 1066, 1070 (D.C. Cir. 1997) ("[T]he word "includes" is a term of enlargement, not of limitation.") (citing *American Fed'n of Television & Radio Artists v. NLRB,* 462 F.2d 887, 890 (D.C.Cir.1972)).

economic value owned or controlled by the enterprise, "assets" plainly include real and personal property, and revenue from the sale of such assets must be considered as "other receipts." Moreover, there is no logical reason to conclude that the phrase "any other receipts" applies to the *sale* of Postal Service "assets," but does not apply equally to other dispositions of those assets such as *leases*.[74] It specifically follows from this statutory language, therefore, that the sale of real or personal property cannot be equated with a "nonpostal service" subject to this proceeding. More broadly, it shows that "service" within the meaning of the statute is not, as Order No. 74 suggests, synonymous with all "revenue generating arrangements" that involve a *quid pro quo* between the Postal Service and a third party.

2. Other Provisions of the Statute Quite Explicitly Distinguish Between "Services" and Activities Relating to "Property"

Several other provisions of title 39 further demonstrate that when the Postal Service furnishes *property* to a third party, it is not engaging in a "service" within the statutory meaning of the term. The first is section 411, which clearly distinguishes between the provision of "real and personal property" by the Postal Service to other federal agencies, and the provision by the Postal Service of "personal and nonpersonal services" to those agencies:

> Executive agencies within the meaning of section 105 of title 5 and the Government Printing Office are authorized to furnish *property*, both real and personal, and personal and nonpersonal *services* to the Postal Service, and the Postal Service is authorized to furnish

[74] Thus, when money from the Competitive Products Fund is used to acquire a building, just as the revenue generated by the subsequent sale of the building would go back into the Competitive Products Funds, so would the revenue generated by leasing of any excess space in that building should likewise end up in the Competitive Products Fund, under the terms of section 2011.

> *property* and *services* to them. The furnishing of *property* and *services* under this section shall be under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.[75]

This shows that when, for example, the Postal Service leases space in a Postal Service-owned building to a federal agency, or sells surplus equipment to a federal agency, it is not providing a "service" to the agency.[76]

Section 401, which sets forth the general powers of the Postal Service, also clearly distinguishes between the furnishing of property, and the provision of a "service." Specifically, Section 401(5) distinguishes between the Postal Service's sale, lease, or disposal of its real and personal property, and the Postal Service's provision of "services" in connection with that property:

> Subject to the provisions of section 404a, the Postal Service shall have the following general powers:
>
> ***
>
> (5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor;

Section 401(7) also distinguishes between "services" and "property" when describing the authority of the Postal Service to accept gifts or donations:

> Subject to the provisions of section 404a, the Postal Service shall have the following general powers:
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> ***
>
> (7) to accept gifts or donations of services or property, real or personal, as it deems, necessary or convenient in the transaction of its business

[75] 39 U.S.C. § 411 (emphases added).

[76] Thus, even if the Commission erroneously were to conclude that section 411 "services" like passport acceptance services and selective service registration were part of this proceeding, there would still be no basis for it also to conclude that the provision of "property" by the Postal Service to a federal agency pursuant to section 411 falls within the scope of this proceeding.

While section 401(7) does not deal with the furnishing of property or services by the Postal Service to a third party like sections 411 and 401(5), it provides yet another indication of the distinction that title 39 draws between revenue derived from "property," and revenue derived from "services." It also provides further indication that the tentative premise of Order No. 74—"there is no provision for a third category of services which [are] not services at all but merely sources of revenue"—cannot be squared with the language of title 39. Gifts or donations are certainly sources of revenue, but cannot be characterized as a "service" performed by the Postal Service, since by definition a "gift" or "donation" is not given in compensation for any activity performed by the Postal Service.

Overall, there are a number of provisions in title 39 which demonstrate that not all revenue-generating activities of the Postal Service can be considered a "postal service" or a "nonpostal service," contrary to the assertion of Order No. 74. In particular, several statutory provisions draw a clear distinction between "property" and "services." First, sections 2003 and 2011 show, among other things, that the sale of property does not constitute revenue from the provision of postal or nonpostal services. Furthermore, sections 411 and 401(5) clearly distinguish between the furnishing of "property" by the Postal Service, and the furnishing of "services," a distinction that is also drawn by section 401(7). Thus, it is clear that the revenue-generating activities that entail the sale, lease, or disposal of the Postal Service's real and personal property are not "services" within the meaning of section 404(e)(1), and are thus not implicated by this proceeding. It is also clear from the language of sections 2003 and 2011 that

other sources of revenue, enumerated separately from section 2003(b)(1) and 2011(b)(1), are also not implicated by this proceeding.

In the end, the dichotomy that Order No. 74 sought to find in the PAEA (*i.e.*, that all revenue comes from a "service" which either is postal or nonpostal, such that there "is no provision for a third category of services which [are] merely sources of revenue") simply does not exist. Rather, a dichotomy that *does* exist in the PAEA is that all Postal Service revenue must be placed into either the Postal Service Fund, or the Competitive Products Fund.[77] As demonstrated above, however, the revenue flowing into those funds does not come entirely from the provision of postal and nonpostal products. Independent sources of revenues identified by the statute include interest income from investments of the monies in those Funds, and income from the sale of Postal Service assets, such as its real and personal property.

In other words, the language of title 39 clearly demonstrates that not all sources of revenue for the Postal Service are to be placed in the "product lists" mandated by chapter 36. Rather, those "product lists," and the revenues associated with the products thereon, are subsets of the two funds created by the PAEA: the Postal Service Fund and the Competitive Products Fund. The other revenue sources of the Postal Service will similarly be placed into one of those two Funds, depending on whether they are allocable to the provision of competitive products. For example, if the Postal Service earns investment income on money in the Competitive Products Fund, section 2011 requires that

[77] As discussed below, this fact, coupled with the Commission's authority to set forth the contents of the Postal Service's financial reports under 39 U.S.C. 3654, ensures that the transparency cited by the Commission can be achieved.

such revenue be assigned to the Competitive Products Fund. That does not mean, however, that this income comes through the provision of a "product." By and large, most of the revenues generated by sources other than "postal" and "nonpostal" services would reasonably flow into the Postal Service Fund. But title 39 clearly establishes that "nonpostal services" is not a catch-all term, applicable to all revenue-generating activities of the Postal Service that are not "postal services" within the meaning of section 102(5).

C. The Intended Scope of Section 404(e) Should Be Interpreted Narrowly to Produce Results Consistent with Congressional Limitations on Complaint Authority

Over the course of the evolution of the legislation that became the PAEA, Congress deliberately chose to exclude certain portions of the Postal Service's statutory authority from complaint oversight by the Commission. Thus, activities conducted by the Postal Service pursuant to some particular grants of authority were not intended by Congress to be subject to complaints to the Commission. If those activities were nonetheless now postulated to be within the intended scope of activities encompassed by the instant section 404(e) proceeding, however, the result would be to subject them to some amount of review via the section 3662 complaint process (assuming they were allowed to continue). Because such a result would indirectly negate the clearly-expressed intent of Congress with respect to complaint jurisdiction, a more narrow reading of the intended scope of section 404(e) is required.

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, except for subsection 401(2) (regarding the Postal Service's "rules and regulations"), the Commission does not have the authority to review the exercise of the Postal Service's general powers under section 401, such as its power under subsection 401(5) to sell, lease, or otherwise dispose of its real and personal property. The Commission 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 agreements.

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)."[78] Complaints could therefore have been filed challenging any Postal Service action as being inconsistent with the general policies of title 39, or with the Postal Service's general and specific powers. Under this version of the proposed reform legislation, the Commission's complaint jurisdiction would have significantly expanded relative to the scope of its complaint authority under the PRA, which was limited to rate and service complaints.

[78] *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.

Instead, the PAEA followed the Senate version of H.R. 22 by constraining the Commission's complaint jurisdiction to certain specific provisions in title 39.[79] That the deliberate intent of the Senate version ultimately adopted was to scale back the proposed PAEA complaint provisions to the same type of rate and service challenges allowed under the PRA complaint provision is confirmed by a colloquy between Senators Bond and Collins reported at 152 CONG. REC. S767 (Feb. 7, 2006). So, while Congress certainly wished to enhance the Commission's general regulatory authority under the PAEA, relative to what it had been under the PRA, by for example giving the Commission the power to compel remedial action on the part of the Postal Service, it also deliberately confined the Commission's complaint authority within certain well-defined bounds.

If, however, the scope of the "grandfathering" provisions of section 404(e) is erroneously interpreted to encompass all revenue-generating activities that are not "postal services," regardless of the statutory source of the authority under which they are conducted, the result would be frustration of the clear Congressional intent to limit the Commission's complaint authority. In Order No. 74, the Commission itself explained the reasoning by which this is so:

> Under Section 404(e), the Commission is required to review each nonpostal service and, based on the public need for the service and the private sector's ability to satisfy that need, direct the Postal Service to terminate the service or authorize it to continue. Those authorized to continue are to "be regulated under this title as a market dominant product, a competitive product, or an experimental product." Section 404(e)(5). The requirement that continuing nonpostal services be regulated under title 39 and be designated as market dominant, competitive, or experimental subjects such

[79] *See* H.R. 22, 109th Cong. § 205 (as passed by Senate).

> services to chapter 36 of title 39, which is one of the enumerated provisions in section 3662. Thus, continuing nonpostal services are subject to the Commission's complaint jurisdiction.[80]

The linchpin identified by the Commission is the requirement, at the conclusion of the section 404(e) proceeding, to classify each reviewed service allowed to continue as market-dominant, competitive, or experimental. Since such classification is governed by the provisions of chapter 36, and since chapter 36 is included within the enumerated portions of title 39 regarding which an alleged violation may trigger a complaint pursuant to section 3662, nonpostal activities so classified would be subject to some amount of Commission review via the complaint process. And yet, as demonstrated above, Congress affirmatively rejected proposals to establish broad-based complaint jurisdiction intended to sweep in all activities authorized by, for example, chapter 4 of title 39. The proper way to reconcile the classification requirement of section 404(e)(5) with the carefully limited range of complaint jurisdiction in section 3662 is to interpret section 404(e), in harmony with the totality of section 102 of the PAEA from which section 404(e) originated, as applying exclusively to existing nonpostal services authorized only by former subsection 404(a)(6), which section 102 of the PAEA repealed.

In contrast, activities authorized by other portions of the statute that were untouched by section 102 of the PAEA, such as subsection 401(5), fall outside of the intended scope of section 404(e) and, therefore, the instant proceeding. In the context of complaint authority, however, one additional point regarding such

[80] Order No. 74 at 13-14 (footnote omitted).

activities bears mention. In discussing activities under 401(5), Order No. 74 included the following passage:

> [S]ection 401(5) does not authorize revenue generating activities that are not outgrowths of "its business" — providing postal services to the nation. For example, purchasing an apartment building for the purpose of leasing residential property would appear to be outside the scope of section 401(5). To assure compliance, Congress wanted an independent review of all of the Postal Service's nonpostal activities, and an evaluation of whether there was public need for continuing Postal Service participation in that market.[81]

Of course, Congress made no mention of nonpostal "activities," only nonpostal "services." And, as highlighted earlier in this brief, since leasing real property does not constitute provision of a "service," it is therefore entirely outside the scope of section 404(e). But, momentarily putting that aside, to the extent that the "independent review" mentioned is intended to refer to the one-time review opportunity afforded by section 404(e), the last clause of this passage provides an adequate restatement of the standards enunciated in 404(e)(3). But after the Commission completes its review under section 404(e), or, in other words, once it completes this proceeding, those standards sunset. The specific provisions of title 39 with which the Commission is authorized under section 3662 to review conformance do not include subsection 404(e). It is unclear from Order No. 74 how much (if any) of the stated enthusiasm for Commission oversight of section 401(5) activities is mistakenly premised on an erroneous assumption that section 3662 complaint jurisdiction would provide an ongoing vehicle to review individual 401(5) transactions in the future against a standard of public need for Postal Service participation in the market.

[81] *Id.* at 12.

Contrary to what appears to be suggested in Order No. 74 at page 11, however, the Postal Service is not claiming that activities authorized by statutory provisions other than those enumerated in section 3662, and likewise not within the intended scope of this 404(e) proceeding, are not otherwise subject to the objectives of transparency and accountability. Regarding transparency, the Commission is authorized by section 3654 to specify the format and content of financial reports. That is, all revenue must be assigned to either the Postal Service Fund or the Competitive Products Fund, and would be reflected in the financial reports for these two funds. Such financial reporting will continue to include information regarding all sources of revenue generation, including activities conducted pursuant to sections 401(5) and 411. In this manner, the goal of transparency is met with respect to these activities.

Accountability, on the other hand, is provided for through the numerous levels of oversight applicable to the Postal Service, including Congress, the GAO, and the OIG. Such oversight is far from hypothetical. For example, the GAO has included the Postal Service in its reviews of various agencies' handling of their real property inventories.[82] Clearly, though, if Congress had felt that additional future accountability *to the Commission* with respect to these activities was of fundamental importance, it presumably *would* have imposed explicit standards for continuing (rather than one-time) review with respect to revenue-generating activities that are not "postal services," and it certainly *would not* have circumscribed the Commission's complaint authority during the legislative

[82] *See, e.g., Federal Real Property,* GAO-07-349 (April, 2007). Moreover, as indicated by DPMG Donahoe, GAO's review of the Postal Service's management of its real property interests was favorable. Statement of Patrick R. Donahoe (June 23, 2008) at 6-7.

process to remove general reference to chapters 1 and 4. Thus, the repeated claims in Order No. 74 that an expansive interpretation of the scope of section 404(e) is necessary to effectuate Congress' desire for an independent review of all "nonpostal activities" cannot be squared with Congress' decision to expressly *limit* the Commission's complaint authority over such activities. The scope of section 404(e) must be interpreted narrowly to give full effect to the determinations of Congress reflected in those choices.

D. Expanding the Scope of Section 404(e) to Activities Beyond Those Previously Conducted Pursuant to Former Section 404(a)(6) Would Subject Routine Postal Service Activities to Unnecessary Review and Regulation, or Possible Termination

In Order No. 77, the Commission stated that it had not reached any definitive conclusions about the jurisdictional nature of any of the Postal Service's activities, including the ones that the Postal Service had cited as possibly outside the rate and classification authority of the Commission.[83] In his sworn statement Deputy Postmaster General Patrick Donahoe describes the activities that the Postal Service submits are neither "postal services" nor "nonpostal services" and therefore should not be classified.[84] Almost all of these disputed activities cannot be classified or regulated by the Commission in a manner consistent with the statutory scheme.[85] The Postal Service is genuinely concerned that applying the pricing and classification scheme to many of these activities would add unprecedented and unnecessary complexities to many activities and would

[83] Order No. 77 at 1-2.
[84] *See generally* Donahoe Statement.
[85] The one clear exception is philatelic services. The threshold inquiry is whether Congress intended to eliminate philatelic services and allow only those pending services to continue. As argued above, Congress did not remove the authority to offer philatelic services and, therefore, they should remain outside the scope of section 404(e).

impede the ability of the Postal Service to fulfill its statutory mandate to operate in an efficient and business-like manner. Many of these activities simply are not amenable to the pricing and classification regulatory framework. Still others would require needless expenditure of resources to disaggregate costs at an activity level for the sole purpose of compliance with the statutory standards. Finally, the designation of the disputed activities as nonpostal services requiring grandfathering and regulation as if they were postal services would subject these necessary activities to possible termination and would have a detrimental impact on the Postal Service's ability to conduct new and necessary types of activities in the future. The inapplicability of the regulatory scheme further sustains the Postal Service's argument that Congress did not intend these services to fall within the scope of section 404(e).

For many of the activities, money is not generated by a "rate" or a "price" that the Postal Service charges. Examples include but are not limited to: revenues from fines, forfeiture, restitution and other law enforcement activities;[86] unclaimed funds found in the mail recovery center;[87] insurance payouts;[88] recoveries in civil lawsuits or as a result of debt collection;[89] appropriations; and earned interest. In all of these activities, there is no "rate" to regulate.

Other activities may involve fees or rates paid to the Postal Service, but the rates and fees are set through other statutory mechanisms. As a government agency, the Postal Service is required to respond to requests for information

[86] Donahoe Statement at 19-20.
[87] *Id*. at 18.
[88] *Id*. at 6.
[89] *Id*. at 20.

under the Freedom of Information Act, the Privacy Act, and section 3010 regarding a list of those who have requested not to receive sexually-oriented advertising (SOA). Generally the fees that may be charged are statutorily limited to the general direct allowable costs.[90] Only the Postal Service can provide the information and it is compelled to do so. There is no indication that Congress intended the chapter 36 product regulations to supplant or overlay the statutory fee limitations of other statutes.

The Postal Service processes passport applications under an agreement with the United States Department of State, pursuant to section 411. At first glance, passport application fees may appear to be suitable for classification. However, the Postal Service does not set the passport application fee. It is established through another statutory mechanism: the procedures, regulations, and fees for processing passport applications are set by the State Department.[91] In fact, the fee is the same whether the application is processed directly by the State Department, or by one of the other acceptance facilities which include many Federal, state and probate courts, post offices, or county and municipal offices.[92] At the end of the day, the only leverage the Postal Service could have with respect to this fee is the ability to decline to enter into a section 411

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[90] The Freedom of Information Act limits fees to the reasonable standard charges (5 U.S.C. 552(a)(4)(A)(ii)) and must conform to fee regulations set by the Office of Management and Budget. 5 U.S.C. 552(a)(4)(A)(i). OMB guidelines stated that the fees must be based on the direct costs of providing FOIA services. 52 FR 10012, 10018, Mar. 27, 1987. Section 3010 sets the fees for SOA to those "necessary to defray the cost of compiling and maintaining the [SOA] list and making it available".

In fact, the Postal Service's regulations under the Privacy Act do not charge for the first 100 pages, and no fee is charged to individuals for the process of retrieving, reviewing, or amending a record pertaining to that individual. 39 C.F.R. § 266.8.

[91] *See* 22 U.S.C. 214.

[92] *See* http://iafdb.travel.state.gov/

agreement with the State Department. The statutory scheme established by the PAEA is not suitable for regulating the rates set by other agencies.

Mr. Donahoe gave examples of the types of agreements with other agencies that the Postal Service enters into under section 411, which states:

> Executive agencies . . . and the Government Printing Office are authorized to furnish property, both real and personal, and personal and nonpersonal services to the Postal Service, and the Postal Service is authorized to furnish property and services to them. The furnishing of property and services shall be under such terms and condition, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.

In many cases, the Postal Service and a federal agency negotiate the payments each will receive for the property or service at issue. Congress showed no intention of interjecting a third agency into that process. In fact, as shown above at pages 37-40, Congress consistently expressed its intent to exclude section 411 from the purview of section 404(e) review.[93]

Other activities would face unprecedented complexities if they were classified and therefore regulated as a market-dominant, competitive, or experimental product. Under the statutory scheme, the Postal Service cannot offer a product or establish a new price for product until it has undergone *ex ante* review by the Commission. For any grandfathered activities classified as competitive, the statutory provisions of sections 3632 and 3633 would appear to apply. Section 3632 sets forth the procedural requirements for the changes in competitive rates and classes and includes the requirement that the Governors issue a written decision to support changes in rates and classes. It also

[93] In addition, it is obvious that some 411 agreements, such as providing postal resources to FEMA in the wake of national disasters, could not possibly be brought for review beforehand.

establishes the procedural timeline: for rates of general applicability, the Governors' Decision must be published in the Federal Register at least 30 days before the effective date, and for rates not of general applicability, the decision must be filed with the Commission 15 days before the effective date.[94]

For grandfathered services added to the market dominant product list, it appears that the price cap would apply. Section 3622(d)(2)(A) states that the "[price cap limitation] shall apply to a class of mail, as defined in the Domestic Mail Classification Schedule as in effect on the date of enactment of the [Act]." Although this could be interpreted to provide the Commission the ability to regulate prices of previously unclassified service by means other than a price cap, the Commission has interpreted this section narrowly. In Order No. 43 in Docket No. RM2007-1, which issued the regulations governing the ratemaking system, the Commission determined that even though international mail had not been previously classified in the DMCS, the most appropriate interpretation is that newly classified market dominant products, such as International mail, are not exempted from the price cap limitation.[95]

Finally, for experimental products, the Postal Service must file with the Commission 30 days before initiating a market test.

The sale or disposal of the Postal Service's property illuminates the concerns regarding application of *ex ante* procedures. The Postal Service has

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[94] The Postal Service notes that section 3632 could be read to apply only to mail: "The Governors . . . shall establish rates and classes for products in the competitive category of *mail*." 39 U.S.C. § 3632(a)(Emphasis added.) One could argue that the grandfather products are not "mail." However, section 404(e) states that nonpostal services are to be regulated as "competitive product[s]" and section 3632 is the only statutory provision that specifies the procedural requirements for these products. It appears that Governors' Decisions will be required for grandfathered nonpostal products.

[95] *See* Order No. 43 at 88.

extensive property holdings to support its vast retail and processing network, and the ability to efficiently manage such assets and dispose of excess property is a key factor in providing postal services in an economical and efficient matter.[96] Currently, the Postal Service has over 900 properties that it leases to others; some for as little as one dollar if it meets other operational needs.[97] The prospect that the sale, lease, or other disposal of real property would now be subject to *ex ante* review and potentially Governors' Decisions is not only daunting, it will have a detrimental effect on the Postal Service's ability to promptly dispose of the property. It will interject uncertainty about the effective date of a lease, which will undoubtedly impede the ability to promptly market an excess property[98] and presumably have an adverse impact on the price as well.

Just given the practical implications of classifying the sale, lease, or other disposal of real property, the question immediately arises whether such regulatory treatment is required or even contemplated by the Act. It is worth noting that the Postal Service would be the only government agency subject to direct oversight of its leases by another government agency. In 2007, the GAO issued a report on federal realty asset management of the agencies that manage over 93 percent of the federal government's assets. The report, GAO-07-439, assesses the statutory authority and real estate practices of these agencies and noted with favor that the Postal Service was one of three agencies with relatively low levels of excess property.[99] It further found that an important tool to

[96] Donahoe Statement at 7.
[97] *Id*. .
[98] *Id.* at 5.
[99] GAO-07-439 at 6.

effectively manage federal realty assets is flexibility.[100] A review of the statutory authority of agencies to lease such assets shows that the Postal Service currently has the broadest authority with the least restriction on the use of the proceeds. Moreover, no agency's real property asset disposal practices are subject to the regulatory oversight of another agency. It is inexplicable that Congress would add an unprecedented level of oversight on an agency with a superior realty asset management record without explicitly indicating its intent to do so.[101]

Application of *ex ante* procedures to the sale or disposal of personal property presents some of the same issues. The Postal Service has innumerable types of excess property, such as obsolete or unusable vehicles or equipment, postal antiques and unclaimed merchandise that it sells or auctions.[102] The Postal Service does not acquire these articles with the intent to sell them, as it does, for example, with Officially Licensed Retail Products (OLRP). The disposal of these items is on an as-needed basis and, therefore, unpredictable. There is no nationwide price list, for example, for unclaimed merchandise. The Postal Service needs to dispose of these items, and does so in a way that allows it to realize the maximum value still remaining in the property.[103] Application of the market-dominant, competitive, or experimental product rules would interpose complexities that would impede this goal.

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[100] *Id*. at 6-7.
[101] The GAO report illustrates the type of vigilant oversight that agencies' disposal policies and decisions receive.
[102] Donahoe Statement at 9.
[103] The revenue is booked in the General Ledger as "disposal of miscellaneous property."

The Postal Service also enters into purchasing agreements for goods and services that, as a by-product, generate revenue. Examples of revenue received include fuel rebates, reimbursement for warranty repairs and the sale of items arising out of the NASCAR sponsorship.[104] In each, the existence of the revenue in no way reverses the net flow of funds from the Postal Service to the vendor. Since the fundamental purpose of each of these arrangements is to purchase goods or services as economically as possible, not to generate revenue, the Commission should determine that these fall outside the scope of section 404(e).

Even if these specific agreements are grandfathered (i.e. fuel rebates, warranty repair, and sponsorship-related sales), then the Postal Service could arguably be foreclosed in the future from receiving revenue from other creative purchasing arrangements which will arise in the ordinary course of business. To avoid this result, section 404(e) properly should be interpreted to exclude these types of activities. More specifically, an activity which generates revenue merely as a by-product of a legitimate purchasing contract cannot be equated with a "nonpostal service" offered to the public in potential competition with private sector enterprises, of the type with which Congress expressed concern throughout the reform process.

The complexities that classification would add to the Postal Services' operational activities would also hinder the ability to provide needed government-related services on behalf of other federal agencies if those activities were also classified. In the immediate aftermath of Hurricane Katrina, the Postal Service assisted the Federal Emergency Management Agency with the distribution of

[104] Donahoe Statement at 13-16.

relief information and the Postal Service was reimbursed for its costs. If this type of arrangement were classified as market dominant or competitive, the *ex ante* review would cause an untenable delay and effectively prohibit the Postal Service from providing the information within the needed time frame.

Application of the rate and classification framework to the Imagitas alliance would greatly complicate the operation of the change-of-address program which is a vital and necessary part of maintaining postal service to the public.[105] Approximately 46 million change-of-address orders are submitted to the Postal Service each year by postal patrons requesting mail forwarding. To provide a high quality, effective, and secure address change process, the Postal Service provides PS Form 3575 – Change of Address Order with a variety of move-related information. The Postal Service also provides a Move Validation Letter (MVL) and a Customer Notification Letter (CNL).[106]

The costs associated with managing the Change of Address program are significant. In 1997 it was estimated that the annual costs of managing the program were approximately fifteen million dollars, exclusive of postage.[107] The Postal Service has entered into a recognized, innovative, and successful alliance with Imagitas that uses move-related advertising to defray those costs, and which is vital the continued operation of the change of address system. Under the alliance agreement, Imagitas, which is now wholly owned by Pitney Bowes, is responsible for soliciting move related advertising that is included in the change of address information sent to customers. The advertising revenue is used to

[105] VanGorder Statement at 6.
[106] *Id.*
[107] *Id.*

defray the printing, production, postage and administrative costs of the alliance, as well as the system wide costs for updating the change of address system. The Postal Service and Imagitas share in any net revenue that is generated.

The move-related advertising which supports the Mover'sSource program is not subject to direct postal control or administration, other than postal advertising guidelines. The advertising arrangements between Pitney Bowes and advertisers are not suitable for regulation under the regulatory framework. There are no uniform prices for advertising categories, since they are done on a competitive basis by advertising category. The fees for the advertising that support the change of address program are not paid by postal patrons who are moving, but by advertisers. The program therefore does not appear to fit into any category of postal or non-postal service. It should be allowed to continue without classification.

The classification of the disputed activities as either market dominant or competitive would also require that the Postal Service track the cost of each activity to meet various statutory requirements for regulated products. Each competitive product must be priced higher than its attributable costs.[108] The Annual Compliance Report requires that costs be reported for all market dominant and competitive products. While the Postal Service has costs for some of these arrangements (e.g. where the payments reimburse postal costs), it has no current operational or regulatory need to track the costs of most of the activities. For example, the Postal Service does not track the cost of its sale of

[108] See section 3633(a)(2).

unclaimed merchandise, antiquated computer equipment, or excess supplies. It does not have the "costs" associated with obtaining fuel rebates.

Tracking the cost of property that the Postal Service leases to others highlights the complexities that would be encountered merely to meet the regulatory requirements. Many of the leases involve unused space in facilities the Postal Service continues to use for retail, processing, administrative, or other purposes, where the total building space was in excess of that needed. The Postal Service's general ledger/accounting system relates costs to finance numbers, which sometimes cover the costs of more than one facility. The system does not maintain separate costs for postal use space and leased space. To track the lease costs, it appears that new cost methodology and accounting system would be a necessary consequence of classifying leases as "products."

For competitive products, knowledge of the "attributable costs" will in some cases lead to results that are incompatible with the statutory framework. In towns with currently depressed property prices, renting out space at current depressed market rental rates, while helping to defray the Postal Service's cost that would have otherwise been incurred, might be insufficient to cover "attributable costs," if the Postal Service pays a rental rate for the property that was established prior to the decline in real estate values. The right business decision may be to sell the property at a loss or even to lease it for very low rent, but the price obtained may also not cover attributable costs.[109] Of course, it must be acknowledged that how "attributable costs" for an activity such as leasing would be defined is something of an open question, but, more importantly, it is a

[109] Donahoe Statement. at 7.

question which can be entirely avoided with an appropriately narrow interpretation of section 404(e).

Needless to say, if the Commission were to order the termination of any of these necessary and beneficial activities, the result would be very troubling. What may not be so apparent, however, is the major detrimental effect that follows merely from adoption of an incorrect statutory construction that erroneously places these activities within the scope of the Commission's 404(e) authority to retain or terminate. The dual function of section 404(e) is to preclude the Postal Service from engaging in any new "nonpostal services" of the type previously initiated under repealed statutory authority, but also to allow the Commission to review and possibly continue current "nonpostal services" so initiated. Unfortunately, if the current activities in question are deemed to fall within the scope of this review authority, then the Postal Service is necessarily precluded in the future from engaging in any new activities of the same or similar type. Even if the Commission allows the current activities to continue, its assertion of jurisdiction over such activities is tantamount to a prohibition of adoption by the Postal Service of similar strategies in the future in response to as yet unknown future challenges. For activities deemed to be "nonpostal services" under section 404(e), neither that section, nor any other provision of title 39, empowers the Commission in the future to review similar activities in order to evaluate whether they are generally (or entirely) beneficial and could be sustained under the standards articulated in section 404(e). Instead, those types of activities would simply be prohibited. This aspect of the dual structure of

section 404(e) requires a narrow interpretation of the scope of section 404(e) that is strictly limited to those types of "nonpostal services" which Congress intended be addressed.

E. The Postal Service Appreciates the Desire for Comprehensive Consideration of Sources of Nonpostal Revenue in Order to Identify the More Limited "Nonpostal Services" Which Fall Within the Intended Scope of Section 404(e)

In Order No. 74, the Commission directed the Postal Service to file information regarding all sources of revenue that are not "postal services," regardless of the statutory authority claimed to justify such activities.[110] Perhaps, in its determination to ensure that the scope of this proceeding was not prematurely constrained before the Commission had sufficient information and time in which to finally determine the proper scope of its review, the Commission erred in the direction of over-inclusiveness. In any event, the Commission clarified its intent in Order No. 77:

> Order No. 74 represents the Commission's preliminary views on the issues raised in this proceeding to fulfill its responsibilities under section 404(e). 39 U.S.C. § 404(e). By requesting a complete list and description of all existing agreements,[2] the Commission seeks to obtain the information needed to determine which activities of the Postal Service are services that are subject to review under section 404(e). The Commission has not reached definitive conclusions regarding the jurisdictional nature of any of the activities undertaken by the Postal Service.
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> The second request for clarification raises questions about specific activities which, absent the information to be provided, are premature to address. After the full details of each revenue-generating arrangement are provided by the Postal Service, the Commission will evaluate the list to determine the proper categorization of these activities. The Commission will receive all of the relevant information from the Postal Service and other

[110] Order No. 74 at 14.

> interested persons before reaching conclusions about specific services.[111]

Given uncertainty regarding the universe of potential revenue-generating activities and the statutory bases upon which the Postal Service would perhaps be claiming the authority to engage in some of those activities, to say nothing of uncertainty regarding the appropriate interpretation of the intended scope of this proceeding, the Postal Service acknowledges the benefits to the Commission of that course of action. After compilation of an extensive record in this case, however, including comprehensive information about all of the Postal Service's revenue producing activities, and after benefiting from a more full and comprehensive argument regarding the statutory scheme and its historical origins, the Postal Service believes that the Commission should reassess its preliminary conclusions, and appropriately limit its review to those "nonpostal services" initiated by the Postal Service pursuant to former section 404(a)(6). As demonstrated in this section of the brief, properly analyzed, the intended scope of section 404(e) is not amenable to any broader interpretation.

Moreover, the Postal Service submits that, within the universe of revenue-generating activities identified by the Postal Service in June in response to Order No. 74, the only ones which fall within the properly-defined scope of this proceeding are those for which the Postal Service has requested treatment as "postal services," or for which grandfather status has been requested under the standards of section 404(e). The remaining activities are those offered under statutory authority other than that of the now-repealed authority of former section

[111] Order No. 77 at 1-2.

404(a)(6). As support for this view, the Postal Service has identified in Attachment B to this brief the statutory provision(s) which it posits authorize the remaining revenue-generating activities, for which no further treatment has been requested. On the basis that they are authorized by other statutory provisions that were not changed by the PAEA, the Postal Service views each of those revenue-generating activities as beyond the intended scope of this proceeding.[112] The next portion of this brief presents the Postal Service's views regarding appropriate treatment for those activities which were intended to fall within the scope of this proceeding.

[112] As the Postal Service noted in its June 23 Further Response to Order No. 74, however, the Postal Service recognizes that the Commission may reach different conclusions with respect to some of these activities, and may determine that some are subject to section 404(e). As noted in June, the Postal Service currently intends to continue to engage in all of the activities identified in its June 9 filing. If the Commission finds that the sworn statements provided by the Postal Service (along with any sworn statements subsequently submitted by other parties) constitute adequate justification pursuant to section 404(e) for continuing certain activities in addition to those for which the Postal Service has expressly requested such a finding, it may be beneficial for the Commission to note those conclusions. For each individual activity regarding which such a conclusion is stated, it could at least resolve the threshold issue of whether or not the Postal Service's authority to continue to engage in that activity after December 20, 2008 would still be open to question. Unresolved, of course, might be the conditions under which those activities could be offered (e.g., administered as under current procedures or regulated by the Commission). Nevertheless, there would be value in knowing, on the one hand, those activities which the Commission concluded were sufficiently justified to continue and, on the other hand, those activities regarding which the Commission had reached the opposite conclusion. There is sufficient information in, for example, the Donahoe statement, to conclude that the activities described meet a public need (to enhance the efficiency of postal operations), and that the private sector cannot meet that need.

II. THE COMMISSION SHOULD AUTHORIZE SIX NONPOSTAL SERVICES TO BE CONTINUED PURSUANT TO SECTION 404(e)

A. The Record Demonstrates that After Taking Into Account the Statutory Elements of Section 404(e)(3) Regarding Public Need, the Commission Should Continue Six Nonpostal Services

In the course of this proceeding, the Postal Service has requested that a number of currently unregulated services that it provides to the public, or allows to be provided to the public, be grandfathered and allowed to continue in the future. The evidence provided in support of these requests has raised little controversy, and has gone unrebutted on the record. As summarized below, the Postal Service's requests should be granted.

1. Passport Photo Service

Passport application acceptance services are offered in many post offices pursuant to the procedures, regulations, and fees set by the United States State Department.[113] The Postal Service currently offers passport application acceptance services on behalf of the State Department at more than 6,000 post offices.[114] At more than 5000 of these post offices, the Postal Service offers a related service, specifically, passport photo service.[115] Obviously, with the changes to United States security procedures, the number of such photo transactions has increased in recent years, but the service was widely available

[113] 22 U.S.C. 214.
[114] Lance Statement at 2. Passport application acceptance is undertaken as a cooperative effort with the Department of State under authority granted by 39 U.S.C. 411, and thus is not the subject of a Postal Service request that it be "grandfathered."
[115] *Id.* at 3.

before January 1, 2006.[116] This photo service is provided as a convenience to citizens who, often for the first time, are required to obtain passports.

Passport photo service benefits citizens, often in communities where there may be few options to obtain the photo required by the State Department.[117] In addition, the service makes the passport application process easier for applicants who may find it intimidating and time-consuming.

Ms. Lance in her statement described the use of "convenience pricing" for passport photo services.[118] As she stated, the price, set nationwide at $15, is set "at a reasonable level in order to reflect the convenience provided to postal patrons who can engage in several related transactions at the post office."[119] Ms. Lance testified that the price for passport photo service intentionally is designed not to compete directly on price with other providers. For example, she identifies prices at $8 at major national drug chains, $10 at The UPS Store, $13.50 at FedEx Kinkos, and, in a high cost area, $15.50 at Ritz Camera.[120] The Postal Service intentionally offers this service at a price which, while reasonable for customers with no other easy alternatives, does not place private sector suppliers at a price disadvantage.

In FY 07 revenue for passport photos was $64.8 million, meaning that nearly four and a half million Americans availed themselves of the service.[121] The Opinion Research Corporation data provided with her Statement shows that

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[116] *Id.*
[117] *Id.* at 3-4.
[118] *Id.*
[119] *Id.* Obviously the most important related transaction is the passport application itself.
[120] *Id.* at 3.
[121] *Id.* at 4.

81 percent of residential customers and 78 percent of small business customers found that it is very or somewhat appropriate for the Postal Service to offer the service.

The record in this proceeding shows, without dispute, that the Postal Service's passport photo service is a useful and popular adjunct to the passport application process and that it meets an otherwise unmet public need. This service should be grandfathered as a non-postal service.

2. Photocopying Services

The Postal Service has traditionally offered photocopying as a convenience to postal customers to support their postal and other business needs. In rural areas, the post office may sometimes be the only place available for postal patrons to use photocopying equipments.[122]

Over the years, the Postal Service has used local contracts for offering coin-operated photocopiers in post offices. These are offered through machines which are placed there by vendors.[123] Beginning in 2005, the Postal Service's Information Technology (IT) organization installed multi-function printer/copier/fax machines in facilities with postal business needs for these machines. In addition to the local coin-operated photocopier contracts mentioned above, some postal locations have instituted their own photocopying service using these IT-provided copiers.[124] Based on a survey of postal districts nationwide, 3951 Post Offices

[122] *Id.* at 4.
[123] *Id.* at 4-5.
[124] *Id.* at 5.

reported offering photocopying service on postal owned equipment with estimated revenue in FY07 of $548,215.[125]

In May 2003, Supply Management established a program to improve, streamline and simplify the process for obtaining and maintaining coin-operated copiers. Coin-operated photocopiers in post offices are operated under local contracts with commercial firms which are selected on a competitive basis. In FY07, the Postal Service's share of revenue from coin-operated photocopier contracts was $1,766,894.[126] Prices for coin-operated copiers are locally negotiated, and while Ms. Lance could not provide comprehensive information on pricing at each location, she stated that on a national level the Postal Service calls for a minimum per-page fee of 15 cents. She pointed out that this is another example of "convenience pricing" intended to avoid price competition because she concluded from web sites and direct phone calls that UPS Stores charge 12 cents, and FedEx/Kinkos charges 10 cents per page.[127]

The Postal Service has long offered photocopying services for the convenience of customers who need to make copies of documents before putting them in the mail. Having photocopying service available at a post office makes sense for customers who do not wish to make multiple stops to accomplish their tasks or in smaller communities where there are limited places to have copies made. Photocopy service is helpful to postal patrons mailing tax returns, or bills, or who want a record of any other transaction.[128]

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[125] *Id.*
[126] *Id.* at 5.
[127] *Id.*
[128] *Id.* at 5-6.

Survey results support this conclusion. In the Opinion Research Corporation study, 74 percent of residential customers and 68 percent of small business customers surveyed said that it is very or somewhat appropriate for the Postal Service to offer photocopying service.[129] Continuation of this useful and convenient service should be authorized by the Commission. No party in this proceeding has disagreed.

3. Notarial Services

The Postal Service has long permitted notarial services to be available in some post offices.[130] Furthermore, the Postal Service has requested that such services be grandfathered and allowed to continue in the future. Given that fundamental position, however, it must be recognized that notarial services have unique characteristics, and that it is not clear that these unusual activities conform well with the grandfathering provisions of the PAEA.

First, notarial services are not, strictly speaking, Postal Service programs. In fact, they are not even provided pursuant to a federal program. They are actually State programs. Notaries public are public officials appointed under the authority of the various states, districts, territories or commonwealths with the power, among other things, to administer oaths, certify affidavits, take acknowledgments, take depositions, perpetuate testimony, and protest negotiable instruments.[131] The procedures for performing notarial acts vary among jurisdictions. They are not appointed under Federal law even in Alaska, where all postmasters act as notaries public. They do so pursuant to a provision

[129] *Id.* at 6.
[130] *Id.*
[131] Anderson's Manual for Notaries Public, §1.1 (2nd Ed. 1991).

of the Alaska state Constitution, Alaska Stat. § 09.63.010, as well as federal regulation, 39 C.F.R. § 226(d). In the past, some states have even prohibited notaries public, as state officials, from concurrently exercising a federal office.[132] Current postal regulations similarly provide that postal employees who are notaries public may not receive compensation for notarial services for any person during the hours of the postal employee's services to the Government, including the lunch period.[133]

Thus, notarial services are offered by postal employees who have been certified as notaries by States, and are allowed to perform that function in locations where there is a public need for the service, and usually where there is no other convenient alternative.[134] These services provide significant convenience for postal customers. Documents may be copied, notarized, and mailed all in one stop, saving customers from having to go to one place for copies, another for notarization, and a third for mailing.[135]

Ms. Lance's Statement shows that only 192 post offices outside of Alaska allowed postal employees, at no charge, to offer notarial services to the public. She also showed that over 70 percent of residential customers and small business customers surveyed said it was very or somewhat appropriate for the Postal Service to make these services available.[136]

Because of the value and importance of notarial services provided by Postal Service employees to a small but significant portion of the American

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[132] Lance Statement at 7.
[133] 39 C.F.R. § 226(e).
[134] Lance Statement at 7.
[135] *Id.*
[136] *Id*.

public, the Postal Service contends that they should be allowed to make such services available in appropriate circumstances in the future. Despite the fact that such services are not provided under a federal program, or for a fee, the Postal Service, in an abundance of caution, chose to include these services among those requested to be grandfathered as an indication of the Postal Service's intent to continue allowing its employees to engage in this activity. Consistent with this request for grandfathering, and with the fact that there are few alternatives where such services are offered, the Postal Service submits that the most appropriate classification, if grandfathered, would be as market dominant.[137]

It might be that after further review, and in light of the fact that such services are provided under State authority and, under Postal Service regulations, without a fee, the Commission may conclude that notarial services are not of the type that requires use of the grandfathering provisions of the statute. But regardless of whether these services are formally grandfathered, or are deemed to be state-based services that do not require formal regulatory treatment under the PAEA, the Postal Service believes that they should continue.

4. Stored Value Cards

Stored value cards are similar to credit cards, except that instead of accessing revolving credit they are sold at retail outlets with a fixed value that can

[137] The Postal Service recognizes that earlier in this proceeding it was suggested that such services might be classified as competitive. This suggestion was plausible given the fact that the Postal Service does not have any postal rights to provide such services, and numerous notaries public can be found in most American cities. However, after further review, and given consideration of the actual circumstances under which the Postal Service allows such services to be provided by its employees, we now believe that a market-dominant classification would be more appropriate if these services are grandfathered.

be used at a future date. The Postal Service has offered a variety of stored value cards for many years as a convenience to customers. In 1996 the Postal Service began its Stored Value Card program with the issuance of the Liberty Cash Card. The Liberty Cash Card was a re-loadable stored value card for the purchase of Postal Service products and services.[138] The card, valued from $5 to $300, was sold at 2,700 locations, and marketed primarily to small business customers. Initial activations and reloads for Liberty Cash Card indicated that customer loyalty was apparently a major factor in the use of the cards.[139]

The Postal Service offered another stored value card, the FirstClass PhoneCard, through an alliance with AT&T from December, 1997 until October, 2006. Cards were sold in set denominations with both domestic and international versions.[140]

In the modern retail environment, postal customers need convenient access to payment alternatives that support their shipping and business needs. Stored value cards, such as phone cards, gift cards, and prepaid debit cards, offer that convenience.[141]

In addition, it appears that some postal customers prefer the use of postal-branded stored value cards over other similar cards. Some customers even collected Postal Service phone cards, treating them as a philatelic item. For

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[138] Lance Statement at 8.
[139] *Id.*
[140] *Id.*
[141] *Id.*

others it is simply a convenience while they are transacting their shipping business with the Postal Service.[142]

Stored value cards are in increasingly important feature of all retail transactions. The number of transactions made with stored value cards and the dollar value of those transactions is expected to grow from $5 billion in 2008 to $7 billion in 2010.[143]

Many retailers offer store-specific stored value cards, such as Home Depot, Macy's, Borders Books.[144] It makes sense for the Postal Service to offer the same vehicle for postal patrons.

The study conducted by Opinion Research Corporation confirmed the interest in this product. They reported that 54 percent of residential customers and 54 percent of small business customers surveyed said that it is very or somewhat appropriate for the Postal Service to offer stored value cards.[145]

Stored value cards also seem to meet the needs of those who are traditionally under-served by the banking community, much as postal money orders are used. Minority postal patrons were significantly more supportive of the appropriateness of buying stored value cards at the post office in the Opinion Research Corporation study.[146]

The Postal Service is a well-established provider of financial instruments such as Postal Service Money Orders and Sure Money electronic funds transfer service. Stored value cards provide this same value in the modern economy. The

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[142] *Id.*
[143] *Id.* at 9.
[144] *Id.*
[145] *Id.*
[146] *Id.*

Stored Value Card offers greater flexibility for our customers to transact business at retail outlets and online with greater speed than offered by a hardcopy money order.[147]

Stored value cards provide a convenience to postal patrons using other postal services, as well as a way to leverage the postal brand.[148] Postal patrons will benefit from this service, and have shown an interest in using it. It should be authorized by the Commission as a non-postal service.

5. Official Licensed Retail Products

The Postal Service has long had an extensive program to sell official licensed retail products (OLRP) in post offices, certainly before January 1, 2006.[149] These products are unique and sold only in post offices, or in some cases through usps.com or at off-site special events such as the National Postal Forum.[150] Some of these products are designed to support customer mailing needs (*e.g.,* scales) or relate to other services provided at postal facilities (*e.g.,* passport holders). Other items (*e.g.,* note cards) are designed to offer customers the convenience of being able to select an item, perhaps as a last minute gift, which can then be mailed using ReadyPost or other Postal Service packaging.[151] Still other items are produced by postal licensees for sale in non-postal commercial retail outlets. All OLRP items bear postal branding, trademarks, or other intellectual property, and according to Ms. Lance roughly fall into two categories:

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[147] *Id.* at 10.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 11.
[151] *Id.*

a) Ancillary Services**.** The Postal Service offers a variety of postal-branded items that are ancillary to services offered in post offices. These include scales, stamp dispensers, passport holders, etc.

b) Brand Management. The Postal Service also traditionally has offered a number of other items, such as teddy bears, pens, key chains, etc, bearing a postal theme.[152] Some items can be characterized as philatelic items, such as framed art work including first day covers. Companies such as ASC have made significant investments to produce high quality stamp art sold through the OLRP program.[153]

As demonstrated by Ms. Lance, OLRP items are a significant source of postal revenue,[154] and leverage both core postal activities as well as special events. They promote stamp collecting as well as related sales of philatelic products.[155] Not only commercial organizations, but other governmental agencies routinely offer such items, including the National Park Service, NASA, and the United States Mint.[156] It would be unreasonable to deny the Postal Service the opportunity to engage in transactions routinely undertaken by other federal agencies. These activities should be authorized by the Commission. OLRP fills a need that can not be met by the private sector because postal retail facilities provide a unique outlet for OLRP items,[157] and some OLRP items, such as postal scales, are closely connected with the core business of the Postal

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[152] *Id.*
[153] Naumoff Statement at 1.
[154] In FY07, OLRP sales accounted for $30.7 million in revenue. Lance Statement at 10-11.
[155] Naumoff Statement at 3.
[156] Lance Statement at 10.
[157] Naumoff Statement at 5.

Service. In addition, because only the Postal Service can license its own intellectual property, postal retail outlets should be available for sale of that intellectual property. The Commission should authorize the Postal Service to be able to continue to offer these products.

6. The USPS Electronic Postmark Service (EPM)

During the course of this proceeding, the Postal Service requested that Electronic Postmark service be added to the list of those services for which grandfathering was requested. As shown below, that request should be granted.

a. Description of the service

The Postal Service first began exploring the offering of a value-added service for digital content files in 1991 and created, through patents and other intellectual property, the term "electronic postmark."[158] This helped lay the groundwork for the evolving time-date stamping industry.[159] By 1995, the Postal Service began testing the concept and provided the service commercially until 2001, when the Postal Service decided to continue the service under a different structure.[160] From 2001 to 2007, an authorized EPM company provided the service to Postal Service customers.

In late 2006, the Postal Service published a Request for Information (RFI) to engage the time-date industry in restructuring the way EPM service was provided.[161] Fifteen information technology organizations participated and provided feedback in helping the Postal Service to determine its role in the time-

[158] Foti Statement at 2.
[159] *Id.*
[160] *Id.* at 2-3.
[161] *Id.* at 3.

date industry.[162] By August 2007, the Postal Service was continuing to offer EPMs under a licensing model that enabled the time-date industry to utilize its intellectual property and aid in creating a trusted environment for industry users and consumers of Electronic Postmarks.[163] The Postal Service now enables certified, approved, EPM providers to retain customers as their own with specific limitations on how the EPM may be applied.[164] Currently there is one provider of USPS EPMs. The Postal Service is currently considering applications for new providers.[165]

Users of the Electronic Postmark service obtain Postal Service-authorized timestamps that also substantiate at a later period in time that the original form of the electronic information presented for time-stamping has not been altered.[166] The EPMs are available from companies approved by the Postal Service under a certification process, then authorized to use Postal Service licensed technology, intellectual property and patents.[167]

Postal Service-approved time-date stamp providers are required to meet certified standards prior to receiving a USPS license for creating a secured environment for the auditable time stamps, digital signatures, and hash codes.[168] The Postal Service receives on a regular basis and maintains information from

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[162] *Id.* at 3, Grossman Statement at 13.
[163] Foti Statement at 3, Grossman Statement at 2 ("The Electronic Postmark (EPM) Platform is a standards-based non-repudiation platform designed to accommodate varying applications.").
[164] Foti Statement at 2.
[165] *Id.* at 3.
[166] *Id.* at 2.
[167] *Id.*
[168] *Id.*

any licensee that could be used to build a backup verification service for EPMs in the event that licensee no longer performs that service.[169]

b. The Record in this Proceeding clearly establishes there is a Public Need for EPM service that is not adequately served by the Private Sector

The record in this proceeding demonstrates that the USPS EPM is a potentially important service for American commerce which meets a public need that can not be adequately served by the private sector, and should be authorized by the Commission as a nonpostal service. During 2007, the time-date industry was instrumental in providing the Postal Service with guidance and a current customer view of the public that made a convincing plea for our continued participation in this industry.[170] Mr. Foti stated that:

> Key public need factors were a) the continued existence of a trusted-third party to whom consumers could hold to a higher criterion for legal support against fraud; b) for a certification process that places all licensed providers on a higher but equal technology footing; and c) a rational fee structure that was not burdensome on fledging industry providers and their unique specialties and offerings.[171]

State legislatures concur. Delaware, South Carolina, Nebraska, and Maryland all have amended their Uniform Electronic Transactions Acts to allow use of the Postal Service EPM service.[172] Delegate Jeannie Haddaway-Riccio, of Maryland, in her comments to the Commission of August 26, 2008, states that: "…my constituents need a trusted way to do business electronically and to complete electronic transactions with fear of financial risk." The Delegate also

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[169] *Id.*
[170] *Id.* at 3.
[171] *Id.*
[172] Grossman Statement at 12, paragraph 35 (*citing* Maryland Commercial Law Code §§ 21-107(d)(2), 21-118.1; Nebraska Rev. Stat. §§ 86-644; South Carolina Code Ann. §§ 26-6-20(18), 26-6-190(C)(3) and 4, 26-6-195.).

states Postal Service provision of the EPM helps her constituents by providing a "trusted way to do electronic business."[173]

Delegate Haddaway-Ricco makes an important additional point. The Delegate states that "It is my belief that neither USPS nor the private sector alone can meet these needs; however a public private partnership using the USPS EPM can."

The USPS EPM, despite the criticism of its lone critic in this proceeding, DigiStamp, is designed as an enabling service to meet the Postal Service's commitment to support "the correspondence of the people,"[174] while providing a platform for a variety of electronic communication applications. The Postal Service, through the use of the EPM, provides an important public service as an impartial third-party witness to the event.[175]

In his rebuttal comments, Mr. Maxim Lesur from Microsoft Corporation makes a similar point. He requests the Postal Regulatory to encourage the Postal Service to continue the EPM program as a "critical building block of the Postal Service of the future."[176] He states that "the Electronic Postmark (EPM) is a key component of the Post of the future just like the actual stamp, timestamp, and envelope are important to the physical mail flow."[177]

Mr. Foti also made the point well:

> In this increasingly digital age, there is both a public need for a USPS EPM to authenticate digital records, and a unique role for the

[173] Comments of Jeannie Haddaway-Ricco.
[174] 39 USC 101(a).
[175] Foti Declaration at 2, Comments of Jeannie Haddaway-Riccio.
[176] Reply Comments of Maxim Lesur, Worldwide Postal Industry Managing Director for Microsoft Corporation. (August 20, 2008).
[177] *Id.*

> Postal Service as a disinterested third party. It is for this reason that the Universal Postal Union (UPU) and a number of national posts have adopted standards for such optional services and now offer them. The Postal Service and the American public would be at an extreme disadvantage to member UPU posts in this evolving digital age to be without the capabilities of the USPS EPM and those key industry providers who are enabled to provide this trusted service.[178]

The Commission should allow this service to continue as a grandfathered non-postal service.

B. Since Section 404(e) Limits "Nonpostal Postal Services" to Those That the Commission Allows To Continue and Prohibits the Postal Service from Providing New Nonpostal Services, the Commission Should Broadly Define the Grandfathered Products

Section 404(e) provides that if the Commission authorizes a nonpostal product to continue (i.e. be "grandfathered"), the Commission shall also designate whether the service shall be regulated as a market-dominant, competitive, or experimental product. In Order No. 50, the Commission acknowledged that, as a result of this proceeding, it will add nonpostal services to the product list and include those services in the MCS.[179]

The Postal Service also anticipates that in its final order in this proceeding the Commission will address not only whether a service is authorized, but also the parameters of that authorization. The MCS, of course, also can be expected to provide guidance as to the scope of the permitted service. As the Commission stated during the inaugural rulemakings establishing the rules for market dominant and competitive products, the explanatory information contained in the

[178] Foti Statement at 3.
[179] Order No. 50 at 2 n.1.

MCS will "inform the participants in Commission proceedings of the nature and scope of Postal Service products and must be sufficiently detailed to allow the Commission to verify that the rates and categorization of products are in compliance with the PAEA."[180] It is unclear, however, whether the Commission intends in its final order to include classification language and a price list for the newly classified products. Once the Commission determines whether these services will be grandfathered, the Postal Service would be willing to provide, at the direction of the Commission, and at a time deemed appropriate by the Commission, draft MCS language for any such services for which classification now is needed.

The Postal Service respectfully submits that any MCS language for grandfathered products should be carefully drawn in order to avoid needless battles about what exactly had been grandfathered. In addition, since the statutory opportunity for grandfathering occurs only once, it should be recognized that any product descriptions for such grandfathered products which may emerge from this proceeding will carry forward well into the future, and should be broad and flexible enough to permit reasonable variations and innovations, and meet future changes in circumstances. For example, if the Commission were to grandfather Officially Licensed Retail Products, the Postal Service respectfully requests that the product description for such products not be limited to exactly the specific individual products offered today, but permit such licensed merchandise that may be appropriate in the future.

[180] Order No. 26 at 85; Order No. 43 at 101.

III. FIVE PREVIOUSLY UNREGULATED SERVICES ARE "POSTAL SERVICES" THAT SHOULD BE ADDED TO THE PRODUCT LIST PURSUANT TO SECTION 3642

A. Previously Unregulated Services Meet the New Definition of "Postal Services"

In this proceeding the Postal Service has identified five previously unclassified services that it seeks to have classified as "postal services." The PAEA added a definition for "postal services" which had not previously been defined in title 39. The Postal Service believes that each of the services meets the new definition of "postal services" which states: "[P]ostal services refers to the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation or other activities ancillary thereto." The Postal Service seeks to add these products to the product list in this proceeding pursuant to section 3642.[181] The Postal Service requests that these products not be added as "grandfathered products" because that designation raises issues about whether the Postal Service can offer new activities. Below, the Postal Service discusses how each product meets the definition and its appropriate classification: market-dominant or competitive. For the market-dominant products, the Postal Service also recommends the "class" assignment, which is necessary for the calculation of the cap.

[181] The Postal Service intends to file proposed MCS language for these postal services shortly.

B. The Following Postal Services Should Be Added to the Product Lists

1. Address Management Services

One of the functions needed to support the core mission of the Postal Service is maintaining Address Management services. To this end, the Postal Service makes available two types of address offerings. First, Address Quality and Support offerings are designed to improve address quality and reduce Postal Service and mailer costs associated with undeliverable-as-addressed (UAA) mail due to errors in the physical address. Second, the Move Update program enables business to maintain up-to-date address lists and reduce the amount of UAA due to a change of address.

a. Address Quality and Support Services

The Postal Service delivers mail to more than 300 million people at 148 million homes, businesses and Post Office boxes in the United States, and in Puerto Rico, Guam, the American Virgin Islands and American Samoa. The Postal Service adds over 1.8 million new addresses each year to its delivery network — equivalent to the number of addresses in a city the size of Chicago.[182] It would clearly be impossible to maintain such a system without support services to provide business mailers with the tools to standardize and validate delivery point and ZIP Code® information, as well as the information to make informed decisions for the proper preparation of their mailings.[183] In addition, when mailers deposit mail with improved address quality, they assist the Postal Service

[182] VanGorder Statement at 3.
[183] *Id.*

in maximizing its ability to deliver mail quickly and efficiently, and reduce the volume of mail that cannot be delivered.[184]

The Postal Service receives over 1.2 billion pieces of mail annually that are undeliverable as addressed because of bad address situations (without reference to the addressee), and incurs an additional handling cost of $158.3 million to return the mailpieces to the sender, or treat them as waste. The primary services provided by Address Management Services for Address Qualtiy and Support are directed at providing correct and properly formatted address information, without reference to the individuals or businesses associated with the address. Other services help mailers use the mail more efficiently and enhance their mailing results. Some services also are required to help mailers prepare mailings for entry into the mailstream at discounted rates approved by the Commission.[185]

The Postal Service provides the following services within the Address Quality and Support services which enable mailers to obtain detailed address information to enhance the address quality of their mailing lists: AIS (Address Information System) Viewer, AMS API (Address Management System Application Program Interface), Carrier Route File, City State File, Delivery Statistics File, Delivery Type File, Five Digit File, LACSLINK® (Locatable Address Conversion System) File, RDI™ (Residential Delivery Indicator) File, SUITELINK™, and the ZIP + 4® File.[186]

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[184] *Id.*
[185] *Id.* at 3-4.
[186] *Id.* at 4.

The following additional services provide mailers with the means to identify and/or correct inaccurate, incomplete, or outdated addresses: AEC (Address Element Correction), AEC II®, DPV® (Delivery Point Validation) File, Z4Change File, and the ZIPMove File.[187]

In addition, the Address Quality and Support services supply mailers with the capability to sequence their addresses for proper mail preparation and to facilitate speedier carrier delivery: CDS (Computerized Delivery Sequence), DSF2™ (Delivery Sequence File), EAS (Electronic Address Sequence), and the eLOT® (Enhanced Line of Travel) File.[188]

Finally, the following services provide mailers with the capacity to explore new mailing markets by ZIP Code® and determine postal zones for use in mail preparation: TIGER/ZIP + 4 (Topological Integrated Geographic Encoding and Referencing) File, and the National Zone Charts.[189] The following services provide mailers with the ability to assure the quality of commercial vendor products used within their mail preparation process: CASS™ (Coding Accuracy Support System) Certification Program, MASS™ (Multi-Line Optical Character Reader Accuracy Support System) Certification Program, and POSTNET™ Barcode Certification.[190]

The FY2006 revenue from the foregoing was $8,050,723; for FY2007 it was $8,577,525.[191]

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[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*

b. Move Update Program

The Move Update program is similar to the Address Quality and Support function in the sense that it is a vital adjunct to the core postal mission of moving the mail. Over 44 million Americans change their addresses annually, creating formidable challenges for business mailers to maintain high-quality mailing lists that are up to date. In fact, the Postal Service receives over 7.5 billion pieces of mail annually that are undeliverable as addressed because of customer change-of-address (COA) situations, and incurs an additional handling cost of $1.2 billion to either forward the mailpieces to the recipients' new addresses, return them to the sender, or treat them as waste.[192]

The Postal Service response to this challenge is detailed in Ms. VanGorder's Statement, at 5-6. The programs include: NCOALINK® (National Change of Address) service, FASTfoward® MLOCR, ANKLink (Addressee Not Known), and Alternative Move Update Methods, a service that certifies mailers' processes by which they obtain COA information directly from their customers.

The Move Update offerings provide business mailers the versatility to choose the appropriate offering that best suits their operations so that they can avoid mailing to the old address if the recipient has filed a change-of-address order with the Postal Service. By avoiding delays in the delivery of the mail to recipients, mailers can be confident that their mail will reach the intended recipient by the target delivery date. As a result, the Postal Service mitigates

[192] *Id.* at 5.

potential move-related undeliverable-as-addressed (UAA) mail handling and cost.[193]

The FY2006 revenue from the foregoing was $8,862,673; for FY2007 it was $10,068,312.[194] Prices are set to recover the administrative costs for this service.

The record of this proceeding is clear, and uncontroverted, that the Address Management Services support the delivery of mail through the provision of accurate and up-to-date information about the address. Were they not available, postal and mailer costs would rise significantly, and delivery efficiency would be reduced. These services are vital to the core postal function of delivering the mail; they should be classified as postal services. With three exceptions, the Postal Services requests that all of the individual services be added to the market dominant product list in the special services class. These services are closely linked to the Postal Service's Universal Service obligations, and pursuant to 39 U.S.C. 3642(b) clearly should be considered market dominant.

The Postal Service further requests that three programs, AEC Service, AMS API, and TIGER/ZIP + 4 File, be added to the competitive product list. Each service competes with similar products offered by other vendors, or vendors have the ability to offer a similar product. AEC Service competes with other address cleansing products in the market. AMS API directly competes with both other address API's offered by other companies. Tiger/ZIP + 4 combines

[193] *Id.* at 6.
[194] *Id.*

address information with the U.S. Census information, which other companies have the capacity to provide as well.

2. ReadyPost Program

The Postal Service offers customers at approximately 32,000 postal retail locations a USPS-branded line of shipping supplies designed for sale in postal retail locations to support mailing needs of our customers. They were introduced in 2000 under the USPS ReadyPost Registered trademark. The generic product line offers a selection of standard mailing cartons, specialty boxes, mailing tubes, mailing envelopes and a variety of packaging tapes and other shipping accessories. The decorative product line consists of mailing cartons, bubble mailers, mailing labels and licensed image shipping products.[195] Each item depicts the ReadyPost brand and the USPS Corporate logo.[196] The program is supported by a contract with Hallmark Custom Marketing, Inc. Revenue is booked in GL account 42101.093, and was $121.793 million in FY07, and $115.955 million in FY06.[197]

The ReadyPost product is key to the Postal Service's mission of "binding the Nation together through the correspondence of the people."[198] It is convenient for millions of postal patrons to have access to mailing supplies when they are in a post office mailing things. Survey research supports this. An online survey showed that 71% of recent shipping supplies purchases were for single use as compared to retail stores where shipping supplies purchases tend to be

[195] Myers Statement at 3.
[196] *Id.*
[197] *Id.*
[198] 39 USC 101.

for multiple uses. Most USPS customers thus appear to be buying supplies for an item that will be sent at the time of the visit to the USPS lobby.[199]

This research supports the assertion that the majority of ReadyPost items purchased are used for mailing purposes, but it also accords with common sense, and the experience of most postal patrons. Ms. Myers speaks for most of us when she states:

> In many visits I have made to Post Offices while working in Retail Marketing, I have observed customer behavior related to ReadyPost products. My experience is consistent with the findings of the Hallmark research. A customer will walk in with an item he needs to mail, peruse the ReadyPost display, select a carton or bag that is the appropriate size, assemble his package, and take it to the counter to mail it.[200]

Few things are more integral to mailing items than the containers and supplies used to mail them. The ReadyPost items are ancillary to the delivery of mail and therefore meet the statutory definition of "postal service."[201] ReadyPost should be classified as a postal service in the competitive product category. The Postal Service does not control the market of shipping supplies by any means, they are ready available in many other locations, and should therefore be considered competitive.

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[199] Myers Statement at 3-4.
[200] *Id.* at 4.
[201] The Pack & Send proceedings, in which the Commission decided that the sale of packaging materials in connection with a packaging service was not a "postal service" under the PRA is inapposite. In Docket No. C96-1 the Commission focused exclusively on whether the Pack & Send service was "postal" or "non-postal" in character. It did not assess the merits of the Pack & Send service in light of substantive statutory policies and factors. *See* Order No. 1145, (Dec. 16, 1996); Order No 1156, (Feb. 3, 1997). The subsequent proceeding, Docket No MC97-5, dealt with the creation of a separate special service for packaging services. Not only has the PAEA changed the regulatory landscape in significant ways since that time, but the key element of Pack and Send proceedings was postal provision of packaging services, not the related offering of packaging materials.

3. Greeting Card Program

Like ReadyPost, Greeting Cards are obviously integral to supporting the correspondence of the people. The Postal Service long has recognized that. The Postal Service offered greeting cards and other stationery items at least as early as 1997, when a relationship with American Greetings was formed to offer products featuring The World of Dinosaurs stamp issue.[202] Note cards, greeting cards, and other stationery items sold in Post Offices have since featured stamp designs and other postal intellectual property.[203] Some Greeting Cards were also sold as philatelic items (discussed above) and others were part of the Official Licensed Retail Product (OLRP) program (discussed above). Not all such cards, however, necessarily featured Postal Service intellectual property, although most of them do.[204]

In FY07, known revenue from the sale of greeting cards was approximately $27,300, and in FY06, was approximately $35,900. These amounts reflect only sales through POS terminals, but that would be the large majority of greeting card sales.[205]

Ms. Myers makes clear that although the Postal Service has no plan to offer a full line of greeting cards in its retail lobbies, for obvious reasons cards and stationery remain an important part of the retail product mix.[206] She describes the integrated retail promotion featuring the Frank Sinatra

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[202] Myers Statement at 2.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*

commemorative stamp, along with various products are being offered in targeted Post Offices and online. These include two Sinatra-themed song cards (greeting cards with a musical chip). In the first three weeks of the promotion, more than 12,000 of the song cards were sold at $5.95 each.[207] This was obviously a popular program with postal patrons.

The majority of these items are intended to be to be entered into the mailstream. Ms. Myers makes the observation that if a person is buying note cards and matching stamps, it is likely that they are planning to mail them.[208] Perhaps her most telling example is how the Postal Service has offered thank you cards with the Wedding stamp image and matching Wedding stamps as a stationery kit, which from common experience would suggest a convenience to postal patrons dealing with the chore of responding to wedding gifts. This is not the sort of item that would be hand-delivered.[209] Overall, the majority of greeting cards, from all sources, are mailed, according to the Greeting Card Association.[210]

The provision of Greeting Cards in postal lobbies is a popular use of postal intellectual property, particularly philatelic property, which is popular with, and convenient for, postal patrons. It is intimately associated with the use of the mails and meets the definition of a postal service. It should be classified as a postal service and placed in the competitive product category. The Postal

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[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.* at 3.

Service has no control over the availability of greeting cards, which are widely available at numerous locations from numerous vendors.

4. Customized Postage

As part of its core functions,[211] the Postal Service has the authority to specify the means for the prepayment of postage. One way in which it does so is through allowing private companies to provide Customized Postage, a program launched in 2004.[212] Customized Postage allows customers of a postal-authorized Customized Postage vendor to obtain Postal Service-authorized postage consisting of customer-specific, customer-supplied images aligned with Postal Service-approved indicia of postage payment.[213] Customized Postage is not a postage stamp; it is produced by private companies authorized by the Postal Service using PC Postage technology. The design of Customized Postage includes a customer-supplied image and a state-of-the-art secure barcode that helps ensure protection of Postal Service revenue.[214]

Like postage meters, which have provided this option for generations, and PC Postage, the indicia design consists of two elements: a postage block and a distinctly separate block typically called an "ad plate."[215] The historical use of ad plates has always consisted of printed advertising messages authorized, enabled, and controlled by the private postage meter or PC Postage provider. Customized Postage utilizes the "ad plate" area to print the graphic image supplied by the customer of the Customized Postage provider. Id.

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[211] 39 U.S.C. 101, DMCS § 3040.
[212] Foti Statement at 4.
[213] *Id.*
[214] *Id.*
[215] *Id.*

To become an authorized provider of Customized Postage, the company must be an authorized PC Postage provider, authorized postage meter manufacturer or distributor, or a company affiliated with an authorized postage provider under conditions respecting postage revenue security approved by the Postal Service in accordance with 39 CFR part 501.1 and subject to all procedures and regulations set forth throughout 39 CFR Chapter 501. The program is simply an extension of a long-standing regulatory scheme. The current providers: Stamps.com, Endicia, Pitney Bowes, and Zazzle.com -- the latter offering the customized postage product utilizing a postage indicia provided by Pitney Bowes (Foti Statement at 4) -- are the heirs of a long line of meter providers. Postal Service participation is minimal, although vital. As a condition for the providers to participate in the program, the Postal Service issues content guidelines for submitted images; these guidelines are incorporated into the authorization letter granting authority entered into with each provider.[216]

As for revenue, the only revenue the Postal Service receives are payments from each of the providers in the form of a participation fee which enables the Postal Service to monitor compliance with the Agreement, including policing of image control and review, inspection of the provider's printing locations, and Postal Service trademark usage.[217] This is in keeping with long-standing pricing regimes for such important ancillary activities as meter regulation and address management. To the extent Customized Postage

[216] *Id.*
[217] *Id.* at 4-5.

providers charge an additional fee over the authorized rate of postage, that fee goes to the provider, not the Postal Service.[218]

The Customized Postage program is ancillary to the delivery of mail, and terms under which it is offered are set by postal regulation. Only the Postal Service can authorize participation in the program. Therefore, it should be classified as a market dominant product pursuant to 39 U.S.C. § 3642 and it should be assigned to the special services class.

5. International Money Transfer Services (IMTS)

International Money Transfer Services (IMTS) should be classified within the competitive category as a "postal service." Since the passage of the PAEA, the Postal Service has consistently maintained in submissions before the Commission that both electronic and hardcopy IMTS should be treated collectively as part of a single family of "postal" services. Specifically, in response to the Postal Regulatory Commission's Order Nos. 26 and 43 concerning the establishment of an initial MCS, the Postal Service proposed IMTS to be listed in the MCS as a competitive postal product. The Postal Service defined the product to include hardcopy money orders and electronic money transfers, which are offered in cooperation with foreign posts, banks, and other money-transfer operators. The Commission has not explicitly addressed the combination of both electronic and hardcopy IMTS in a single product grouping in the MCS; however, in product lists issued under Order No. 43, the Commission created a placeholder for IMTS in the competitive postal product list. Based on the evidence furnished in this docket, the Postal Service invites the

[218] *Id.* at 5.

Commission to determine the nature and scope of that product grouping, so as to include both electronic and hardcopy IMTS within the competitive category of postal services.

Mr. Pranab M. Shah's statement on behalf of the Postal Service provides the underlying rationale for categorization of both hardcopy and electronic IMTS as a "postal" service within the meaning of 39 USC § 102(5). As outlined in Mr. Shah's statement, IMTS includes several different types of services. These include:

- Hardcopy international money orders, which function much the same as domestic money orders but are paid out in foreign currency in countries which have a bilateral agreement with the Postal Service;
- Dinero Seguro, an electronic money transfer service offered since 1997 in combination with Bancomer and now expanded to cover money transfers to ten Latin American countries; and
- New Services that may be offered under the Universal Postal Union (UPU) International Financial System (IFS) platform or through other partnerships and ventures with postal or private operators.

As explained in Mr. Shah's statement, IMTS complements USPS offerings, benefits from existing core competencies, and fits within the existing product portfolio. Mr. Shah's statement explains that the Postal Service has gained in-house operational expertise as well as regulatory compliance associated with money transfers through nearly 140 years of experience offering hardcopy IMTS, as well as over a decade of experience with electronic transfers

offered through Dinero Seguro service. Postal Service retail associates have been trained to provide IMTS, both electronically and through hardcopy transactions. In addition, he explains that the Postal Service's retail architecture contains the necessary and already existing network infrastructure to provide electronic IMTS.

As Mr. Shah's testimony demonstrates, electronic IMTS can also promote traditional mailing activities. For instance, inbound electronic money transfers can be structured to be paid out in traditional domestic paper money orders, which could, in turn, be mailed by customers. In addition, Mr. Shah explains that electronic IMTS facilitates transactions between customers and businesses, and such purchased items can be sent by traditional mail services to the payor. This observation is directly supported by the catalog and fulfillment industry. Specifically, in correspondence to the Postal Service, the Direct Marketing Association (DMA) has expressed support for the creation of a robust network for money transfers. DMA notes that existing cross-border payment services are inadequate. New services offered by posts thus could offer customers an economically efficient means to pay vendors, and thereby promote commerce by increasing parcel volume as well as subsequent follow-up solicitations. Hence, electronic IMTS complements existing cross-border traditional postal services. Not only does IMTS fit within existing core competencies, but provision of IMTS also serves important public policy objectives. Mr. Shah's statement explains that IMTS enables the Postal Service to provide services to customers that are presently underserved by the traditional banking industry. Mr. Shah further

points out that the Postal Service's provision of IMTS can contribute significantly to global economic and social development, which in turn has the capability of contributing to improvements in worldwide living standards. Through electronic IMTS, the Postal Service provides enhanced access and options for citizens throughout the world to remit funds safely, conveniently, and efficiently through the wide reach of the global postal infrastructure.

These observations are consistent with and directly supported by several submissions provided in support of Mr. Shah's testimony. Each is briefly summarized below.

- In correspondence to the Postal Service, DMA expresses its conviction that in previously unbanked economies, the provision of IMTS through postal networks will enable small businesses to expand their operations and reach within their own developing economies.
- In correspondence to the Postal Service, Purificación Carpinteyro, Director General, Servicio Postale de Mexico (Sepomex), advises that one of Sepomex's top priorities is to further develop its IMTS, and provide high-quality, low cost service with extensive coverage to meet the needs of Mexican citizens, "regardless of their geographic location." She advises that Sepomex's is particularly well-suited to fight poverty and promote social development by virtue of the broad reach of Sepomex's retail network. In particular, she states that Sepomex's broad network will enable recipients of remittances to receive payments closer to their homes or villages rather than having to travel to faraway cities for service. This,

in turn, will lower recipient's travel costs and promote convenience. She observes that the social impact of the development of a money transfer product with the Postal Service will be significant: in her view, such a service will make a "real difference in this market and … have a greater impact in the lives of millions of people."

- In correspondence to the Postal Service, Edouard Dayan, Director General of the International Bureau of the Universal Postal Union, observes that the postal network is especially well suited to provide money transfer services to unbanked and migrant populations, and to provide service to rural populations. Reliable, transparent and affordable postal money orders offered by postal operators further key policy objectives of achieving development goals and poverty reduction. Further, postal provision of money transfer services provides a reasonable alternative to existing services in some less developed rural areas, where alternatives are few, commissions are high, and exchange rates are not reasonable.

As demonstrated above, IMTS offered through postal networks is ancillary to hardcopy postal services within the meaning of 39 USC § 102(5) and also achieves important social policy and development objectives. The provision of both hardcopy and electronic IMTS is also authorized by an independent statutory grant of authority under 39 USC § 408. Section 408 serves as supplemental authority to provide IMTS as part of the Postal Service's suite of service offerings. Section 408 provides:

> The Postal Service may make arrangements with other governments, with which postal conventions are or may be

> concluded, for the exchange of sums of money by means of postal orders. It shall fix limitation on the amount which may be so exchanged and the rates of exchange.

This independent grant of statutory authority authorizes the Postal Service to participate in exchanges of money with other foreign governments by means of "postal orders". The plain text of the statute is technologically neutral; it is in no way limited to hardcopy services. As Mr. Shah explains, some posts are migrating entirely to electronic platforms to provide their money transfers. Hence, the sole means by which the Postal Service may ultimately offer money transfer products with posts in countries that are migrating to a completely electronic platform would be through electronic transfers. In sum, in the Postal Service's view, section 408 serves an independent statutory authority permitting the Postal Service to offer both electronic and hardcopy IMTS.

For the above reasons, the Postal Service respectfully requests the inclusion of IMTS as a competitive postal service in the Mail Classification Schedule as presented to the Commission in the Postal Service's suggested initial Mail Classification Schedule in response to Order Nos. 26 and 43 of RM2007-1.

CONCLUSION

For the reasons explained above, the scope of section 404(e) is limited to those activities previously initiated by the Postal Service pursuant to its authority under former section 404(a)(6), now repealed. The Postal Service has identified six services which it seeks to continue under section 404(e). It has also identified five services that now meet the new PAEA definition of "postal services" and should be added to the product lists. As explained above, the Postal Service respectfully urges the Commission to these eleven services be classified in accordance with the Postal Service's proposal.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

R. Andrew German
Managing Counsel

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Richard T. Cooper
Chief Counsel, Business & Finance Law

Eric P. Koetting
Nan K. McKenzie
William J. Trumpbour.
Joseph F. Wackerman
Keith E. Weidner

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260–1137
(202) 268-2993, FAX: -5402
September 10, 2008

SEC. 102. POSTAL SERVICES.

(a) IN GENERAL.—Section 404 of title 39, United States Code, is amended—

(1) in subsection (a), by striking paragraph (6) and by redesignating paragraphs (7) through (9) as paragraphs (6) through (8), respectively; and

(2) by adding at the end the following:

"(c)(1) In this subsection, the term 'nonpostal service' means any service that is not a postal service defined under section 102(5).

"(2) 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.

Deadline.

"(3) Not later than 2 years after the date of enactment of the Postal Accountability and Enhancement Act, the Postal Regulatory Commission shall review each nonpostal service offered by the Postal Service on the date of enactment of that Act and determine whether that nonpostal service shall continue, taking into account—

"(A) the public need for the service; and

"(B) the ability of the private sector to meet the public need for the service.

"(4) Any nonpostal service not determined to be continued by the Postal Regulatory Commission under paragraph (3) shall terminate.

"(5) If the Postal Regulatory Commission authorizes the Postal Service to continue a nonpostal service under this subsection, the Postal Regulatory Commission shall designate whether the service shall be regulated under this title as a market dominant product, a competitive product, or an experimental product.".

(b) CONFORMING AMENDMENTS.—Section 1402(b)(1)(B)(ii) of the Victims of Crime Act of 1984 (98 Stat. 2170; 42 U.S.C. 10601(b)(1)(B)(ii)) is amended by striking "404(a)(8)" and inserting "404(a)(7)".

TITLE II—MODERN RATE REGULATION

SEC. 201. PROVISIONS RELATING TO MARKET-DOMINANT PRODUCTS.

(a) IN GENERAL.—Chapter 36 of title 39, United States Code, is amended by striking sections 3621 and 3622 and inserting the following:

"§ 3621. Applicability; definitions

"(a) APPLICABILITY.—This subchapter shall apply with respect to—

"(1) first-class mail letters and sealed parcels;
"(2) first-class mail cards;
"(3) periodicals;
"(4) standard mail;
"(5) single-piece parcel post;
"(6) media mail;
"(7) bound printed matter;
"(8) library mail;
"(9) special services; and
"(10) single-piece international mail,

ATTACHMENT B

Activity	Authority
ASSET FORFEITURE FUND	**18 USC 981-82, 39 USC 2003(b)(7-8)**
INSPECTION SERVICE REIMBURSEMENTS FROM OTHER LAW ENFORCEMENT AGENCIES	**39 USC 411**
PARKING FEES	**39 USC 401(5)**
REAL PROPERTY SALES	**39 USC 401(5)**
NON-SALE LEASES AND DISPOSAL OF REAL PROPERTY	**39 USC 401(5)**
VEHICLE SUPPLIES AND SERVICES TO GOV'T AGENCIES	**39 USC 411**
STAMP FULFILLMENT SERVICES SHIPPING AND HANDLING CHARGES	**39 USC 404(a)(5)**
PHILATELIC SALES	**39 USC 404(a)(5)**
MIGRATORY BIRD STAMPS	**39 USC 411**
PASSPORT APPLICATION ACCEPTANCE	**39 USC 411**
FEDEX DROPBOXES	**39 USC 401(5)**
METER MANUFACTURERS MARKETING PROGRAM	**39 USC 401(5)**
TRAINING FACILITIES	**39 USC 401(5), 404(a)(3)**
LICENSING PROGRAMS	**39 USC 401(5)**
EEO PROCESSING	**39 USC 411**
CONSUMER FRAUD FUND	**39 USC 2003(b)(8), 2601(a)(2)**
SERVICE WIDE COSTS	**39 USC 401(10)**
CMC TRANSPORTATION ASSET MANAGEMENT	**39 USC 401(3)**
IMAGITAS (MOVERSOURCE)	**39 USC 401(1)**
SEXUALLY ORIENTED ADVERTISING (SOA) LIST	**39 USC 3010**
PRIVACY ACT COPYING FEES	**5 USC 552a**
FOIA COPYING FEES	**5 USC 552**

ATTACHMENT B

Activity	Authority
WARRANTY REPAIRS	**39 USC 401(3)**
AFFILIATES / WEB LINKING AGREEMENTS	**39 USC 401(5)**
NASCAR	**39 USC 401(3)**
DISPOSAL OF PERSONAL PROPERTY	**39 USC 401(5)**

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 and Procedure.

_____
Richard T. Cooper

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260–1137
(202) 268-2993, FAX: -5402
September 10, 2008