

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Tony Hammond, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Nanci E. Langley

Inquiry Concerning Scope of Public
Service or Activity Cost Reporting

Docket No. PI2014-1

ORDER INTERPRETING 39 U.S.C. § 3651(b)(1)(C)

(Issued November 17, 2015)

I. INTRODUCTION

In the *Annual Report*, the Commission must include, among other things, an estimate of the Postal Service's costs incurred in providing "other public services or activities which, in the judgment of the Postal Regulatory Commission, would not otherwise have been provided by the Postal Service but for the requirements of law." 39 U.S.C. § 3651(b)(1)(C). In this Order, the Commission sets forth its interpretation of section 3651(b)(1)(C). In future *Annual Reports*, the Commission will apply this interpretation if it determines that the costs of additional public services or activities should be included under this provision.

II. BACKGROUND

Each year, the Commission issues the *Annual Report to the President and Congress (Annual Report)* in accordance with the requirements of 39 U.S.C. § 3651. The *Annual Report* contains, among other things, “an estimate of the costs incurred by the Postal Service in providing—

(A) postal services to areas of the Nation where, in the judgment of the Postal Regulatory Commission, the Postal Service either would not provide services at all or would not provide such services in accordance with the requirements of this title if the Postal Service were not required to provide prompt, reliable, and efficient services to patrons in all areas and all communities, including as required under the first sentence of section 101(b);

(B) free or reduced rates for postal services as required by this title; and

(C) other public services or activities which, in the judgment of the Postal Regulatory Commission, would not otherwise have been provided by the Postal Service but for the requirements of law.”

Id. § 3651(b)(1).

Table 1 shows the public services or activities the Commission currently evaluates in the *Annual Report* under section 3651(b)(1).

Table 1
Public Services or Activities Evaluated
in the *Annual Report* under 39 U.S.C. § 3651(b)(1)

Statutory Provision	Requirement	Public Service or Activity	Estimated Cost in FY 2013
39 U.S.C. § 3651(b)(1)(A)	Prompt, Reliable, and Efficient Postal Services to Patrons in All Areas of the Nation	<ul style="list-style-type: none"> • Maintain Small Post Offices in Rural or Remote Areas • Alaska Air Subsidy • Group E Post Office Boxes 	\$477 million
39 U.S.C. § 3651(b)(1)(B)	Free or Reduced Rates for Postal Services	<ul style="list-style-type: none"> • Discounts for Standard Mail, Periodicals, and Library Mail • Losses on Periodicals 	\$1.65 billion
39 U.S.C. § 3651(b)(1)(C)	Other Public Services or Activities	<ul style="list-style-type: none"> • 6-Day Delivery • Unzoned Rates for First-Class Mail and Media Mail/Library Mail 	\$2.39 billion
Total FY 2013 Cost:			\$4.52 billion
Source: Postal Regulatory Commission, <i>Annual Report to the President and Congress Fiscal Year 2014</i> , January 5, 2015, at 40-46 (FY 2014 <i>Annual Report</i>).			

In the FY 2013 *Annual Report*, the Commission observed that the current interpretation of section 3651(b)(1)(C) may be narrow.¹ The Commission concluded that in FY 2014, it would review the issue of cost estimate refinements under section 3651(b)(1)(C). *Id.*

¹ Postal Regulatory Commission, *Annual Report to the President and Congress Fiscal Year 2013*, January 9, 2014, at 31 (FY 2013 *Annual Report*).

In early 2014, the Commission requested that the Postal Service provide its views on the universe of “other public service or activities” that it believes the Commission should review under section 3651(b)(1)(C). In response, the Postal Service provided its view of “other public services or activities” that the Commission should include under its section 3651(b)(1)(C) cost analysis.² In the Analysis, the Postal Service takes the position that section 3651(b)(1)(C) includes “all legally-mandated services or activities.” *Id.* at 2. Based on this interpretation, the Postal Service proposes that the Commission add the costs of these additional specific services or activities in future *Annual Reports*. These include:

- Employee and retiree health benefits, federal retirement benefits, binding arbitration of labor issues, employee appeals and complaints to the Merit Systems Protection Board and Equal Employment Opportunity Commission, and federal workers’ compensation (Employee-Related Items).
- Emergency detection and response.
- Postal Inspection Service (Inspection Service).
- Postal Service Office of Inspector General (Postal Service OIG).
- Regulatory requirements (including funding the Commission, participating in Commission proceedings, and complying with Commission orders to measure service performance and file periodic reports).
- Compliance with federal purchasing requirements.
- Compliance with the Freedom of Information Act, Privacy Act, and other laws.

Id. at 4-16.

On August 20, 2014, the Commission established Docket No. PI2014-1 to invite public comment on the universe of “other public services or activities” the Commission

² Library Reference PRC-LR-PI2014-1/1, Postal Service Analysis of Additional Postal Service Activities That Could Qualify for Reporting Under 39 U.S.C. § 3651(b)(1)(C), August 22, 2014 (Analysis).

should review under section 3651(b)(1)(C).³ Specifically, the Commission sought comments on the list of services or activities provided by the Postal Service in the Analysis. *Id.* at 3. The Commission also asked commenters to identify additional “public services or activities” that should be included and to estimate their costs. *Id.* at 3-4.

III. COMMENTS

In response to Order No. 2163, the Commission received 5 sets of comments and 2 sets of reply comments. Commenters primarily discuss three topics: (1) their proposed interpretations of 39 U.S.C. § 3651(b)(1)(C), (2) whether specific services or activities should be included or excluded under that statutory provision, and (3) how to estimate the costs of included services or activities.

A. Interpretation of Section 3651(b)(1)(C)

This section summarizes commenters’ proposed interpretations of section 3651(b)(1)(C) and the Postal Service’s responses to those interpretations.

1. “[O]ther public services or activities ... provided by the Postal Service”

Proposed interpretations of “other public services or activities.” The Postal Service argues that “activities” in section 3651(b)(1)(C) refers to Postal Service operations generally because the term has a broad meaning under title 39. Analysis at 2. It contends that even if “public” modifies “activities,” any legally-mandated activity reflects Congress’s determination that the activity provides some level of direct or indirect public benefit. *Id.* Thus, the Postal Service concludes that “other public services or activities” include “all legally-mandated services or activities.” *Id.*

³ Notice Establishing Docket Concerning the Scope of Public Service or Activity Cost Reporting Under 39 U.S.C. 3651(B)(1)(C), August 20, 2014 (Order No. 2163).

By contrast, most commenters take the position that “other public services or activities” are limited to services or activities that benefit the public. The Public Representative argues that the Commission should interpret “other public services or activities” narrowly to mean “services or activities that provide some direct benefit to the public, *i.e.*, users of the mail.”⁴ He contends that “other” and “public” should be found to modify both “services” and “activities” because that interpretation is supported by both House Report No. 109-66 and the statutory structure of section 3651(b)(1)(C).⁵ He asserts that section 3651(b)(1)(C) is a “catchall” category for including public services or activities that either did not exist or could not be adequately described when Congress passed the Postal Accountability and Enhancement Act (PAEA). *Id.* He argues if “public services or activities” do not have to directly benefit the public, the Commission would need to evaluate countless Postal Service activities for inclusion under section 3651(b)(1)(C). *Id.*

Like the Public Representative, the National Association of Postmasters of the United States (NAPUS) and the National Association of Postal Supervisors (NAPS) contend that “other public services or activities” must “provid[e] a direct public good.”⁶ Also citing to House Report No. 109-66, they assert that Congress intended section 3651(b)(1) to include public service costs that provide a direct public good, such as universal service, revenue foregone, and law enforcement activities. *Id.*

Similarly, United Parcel Service (UPS) submits that the scope of section 3651(b)(1)(C) is limited to “services or activities that are provided by the Postal Service directly for the public’s benefit.”⁷ It contends that the plain language of section

⁴ Public Representative Comments Concerning the Scope of Public Service or Activity Cost Reporting Under 39 U.S.C. § 3651(b)(1)(C), September 17, 2014, at 3-5 (PR Comments).

⁵ *Id.* at 4 (citing H.R. Rep. No. 109-66, part 1, at 50 (2005)).

⁶ Comments of the National Association of Postmasters of the United States and the National Association of Postal Supervisors, September 17, 2014, at 2 (NAPUS/NAPS Comments).

⁷ Initial Comments of United Parcel Service on Scope of Public Service or Activity Cost Reporting Under 39 U.S.C. § 3651(b)(1)(C), September 17, 2014, at 5 (emphasis omitted) (UPS Comments).

3651(b)(1)(C) confirms that “other public services or activities” refers to services or activities that provide a direct benefit to the general public rather than an indirect or marginal level of public benefit. *Id.* at 4. It argues that the Postal Service’s interpretation is contrary to the plain meaning and “stretches the language of [section 3651(b)(1)(C)] beyond a reasonable reading.” *Id.* at 5.

UPS asserts that the Postal Service improperly reads “other public services or activities” in isolation. *Id.* It cites to jurisprudence of the Supreme Court of the United States finding that a residual phrase containing “other” must be controlled and defined by referring to categories enumerated before it. *Id.* It concludes that section 3651(b)(1)(C) should only include public services or activities of the same type or class enumerated in sections 3651(b)(1)(A) and (B)—namely, services provided directly to the general public. *Id.*

The National Association of Letter Carriers, AFL-CIO (NALC) contends that “other public services or activities” are “certain services that are provided by the Postal Service to the public.”⁸ It argues that the Postal Service reads “activities” in section 3651(b)(1)(C) out of context when it asserts that “activities” has “a broad meaning under title 39, and refers to Postal Service operations generally.” *Id.* at 7; see Analysis at 2. It cites to House Report No. 109-66 to support its view that the purpose of section 3651(b)(1) is to require the Commission to estimate certain public service costs, which it asserts do not include complying with statutory mandates governing employment issues. NALC Comments at 7-8.

In its reply comments, Federal Express Corporation (FedEx) agrees with the views of the Public Representative and other commenters regarding the scope of section 3651(b)(1)(C).⁹ It contends that Congress intended this provision to include additional services or activities that the Postal Service provides to the public. *Id.*

⁸ Comments of the National Association of Letter Carriers, AFL-CIO, September 17, 2014, at 6 (emphasis omitted) (NALC Comments).

⁹ Reply of Federal Express Corporation, October 1, 2014, at 1 (FedEx Reply Comments).

In its reply comments, the Postal Service critiques the “direct benefit to the public” interpretation proposed by most commenters.¹⁰ It argues that commenters focus solely on “public services” and ignore “activities” in section 3651(b)(1)(C). *Id.* at 2-3. It contends that statutory construction principles support its claim that “activities” has a broad meaning. *Id.* at 3. It asserts that House Report No. 109-66 does not explain what Congress meant when it referred both to “public services” and “activities.” *Id.* at 3-4.

The Postal Service argues that the *Annual Report* reflects a broader view of section 3651(b)(1) than would be captured by the “direct benefit to the public” interpretation. *Id.* at 4. It contends that the “direct benefit to the public” interpretation is problematic because services or activities currently reported under sections 3651(b)(1)(A) and (B)—including free or reduced rates for postal services, Group E Post Office Boxes, maintaining small Post Offices, and the Alaska Air Subsidy—would not pass a “direct benefit to the public” test. *Id.* at 4-5. It asserts that these services or activities do not directly benefit the public because each one “provides a direct benefit to only a discrete class of persons, not the public at large.” *Id.* at 5. It submits that these services or activities provide an indirect public good similar to Employee-Related Items and other legal mandates. *Id.*

Proposed interpretations of “provided by the Postal Service.” The Postal Service interprets “providing” and “provided” to mean that section 3651(b)(1)(C) cost estimates should “focus on affirmative activities that incur costs” rather than legal requirements restricting the Postal Service’s activities. Analysis at 2. Similarly, the Greeting Card Association (GCA) argues that section 3651(b)(1)(C) should not include the costs of “negative requirements”—*i.e.*, laws that prohibit the Postal Service from providing

¹⁰ United States Postal Service Reply Comments, October 1, 2014, at 4 (Postal Service Reply Comments).

services or activities.¹¹ NALC argues that “provided” in section 3651(b) clearly refers to “the cost of certain services that are provided by the Postal Service to the public.” NALC Comments at 6.

2. “[W]ould not otherwise have been provided ... but for the requirements of law.”

GCA argues that “requirements of law” means any law that imposes a requirement on the Postal Service. GCA Comments at 7. It asserts that the Commission’s role is to ascertain whether the Postal Service would continue providing a service or activity if the law did not require it. *Id.* It concludes that the Commission should report the costs of a service or activity under section 3651(b)(1)(C) if the Postal Service would not continue providing the service or activity without a legal requirement. *Id.*

Several commenters interpret the phrase “would not otherwise have been provided ... but for the requirements of law” to require comparison of the Postal Service with private businesses. UPS and NAPUS/NAPS argue that “but for the requirements of law” is intended to prevent inclusion of costs that the Postal Service would bear even if it were a private company. UPS Comments at 6-7; NAPUS/NAPS Comments at 2. UPS argues that similar costs borne by private companies indicate that the Postal Service would incur these costs even without a legal requirement to do so. UPS Comments at 2-3, 7. NAPUS/NAPS assert that section 3651(b)(1)(C) should not include services or activities that private companies also engage in or provide. NAPUS/NAPS Comments at 3. In response, the Postal Service contends that UPS and NAPUS/NAPS mischaracterize its position in stating that the Postal Service would not engage in certain activities without legal requirements to do so. Postal Service Reply

¹¹ Initial Comments of the Greeting Card Association, September 17, 2014, at 8-9 (GCA Comments).

Comments at 5. It explains its position that its legal mandates are more costly than those applicable to private companies. *Id.* at 5-7.

The Public Representative contends that benchmarking the Postal Service against the private sector is a major undertaking that Congress did not envision under section 3651(b)(1). PR Comments at 4-5. FedEx points out that the Federal Trade Commission already made private sector comparisons in its report identifying laws that apply differently to the Postal Service and to private companies providing similar products. FedEx Reply Comments at 2-3. FedEx asserts that this report shows that Congress did not expect the Commission to conduct the same type of analysis under section 3651(b)(1)(C). *Id.* at 3.

NALC contends that comparing the Postal Service's costs of certain activities with the costs of private companies would require the Commission "to engage in highly speculative analysis based on broad assumptions for which there is no hard evidence." NALC Comments at 3. It points out that estimating the costs of some Employee-Related Items would require the Commission to address controversial labor and employment issues such as wage and benefit comparability. *Id.* at 3-5. Similarly, FedEx argues that as the impartial regulator, the Commission should not weigh in on these "strongly politicized issues." FedEx Reply Comments at 2.

In response, the Postal Service contends that estimating the costs of Employee-Related Items would not be controversial because the Commission would only report cost differentials rather than evaluate whether Employee-Related Items are appropriate. Postal Service Reply Comments at 7. It asserts that the Commission already reports costs of controversial activities such as 6-day delivery and reduced rate postage, which no commenter has objected to, and notes that the *Annual Report* already includes the costs of some Employee-Related Items in the cost estimates for 6-day delivery. *Id.* at 8-9.

B. Inclusion of Specific Services or Activities Under Section 3651(b)(1)(C)

In its Analysis, the Postal Service proposes a list of services or activities it recommends including under section 3651(b)(1)(C).¹² In response, many commenters assess whether the costs of these services or activities should be included or excluded by the Commission. This section summarizes positions of the Postal Service and other commenters on whether the costs of specific services or activities should be included based on their interpretations of section 3651(b)(1)(C).

Employee-related items. The Postal Service and GCA support including the costs of Employee-Related Items.¹³ The Public Representative, NALC, NAPUS/NAPS, UPS, and FedEx oppose including these costs.¹⁴

Emergency detection and response. The Postal Service and the Public Representative support including emergency detection and response costs.¹⁵ UPS recommends excluding these costs. UPS Comments at 6.

Inspection Service. The Postal Service and GCA support including the costs of the Inspection Service.¹⁶ The Public Representative supports including the costs of law enforcement activities that provide some direct benefit to the public and are not related to the general protection of the mail. PR Comments at 5, 10. UPS supports including the costs of the Inspection Service except for security-related activities that UPS and other private companies also engage in. UPS Comments at 6 n.1, 7-8.

¹² The Postal Service also suggests the Commission include the following items under sections 3651(b)(1)(A) and (B): the costs of free residential delivery and collection as well as the costs of delivering free and reduced rate mail not reimbursed by appropriations. Analysis at 17. The Public Representative supports including the costs of delivering free and reduced rate mail not reimbursed by Congress under section 3651(b)(1)(C). PR Comments. at 10. The Commission reports the costs of delivering free and reduced rate mail in the *Annual Report* under section 3651(b)(1)(B). See, e.g., FY 2014 *Annual Report* at 42.

¹³ Analysis at 4-16; GCA Comments at 5-8.

¹⁴ PR Comments at 8; NALC Comments at 1; NAPUS/NAPS Comments at 2; UPS Comments at 4, 6; FedEx Reply Comments at 1-2.

¹⁵ Analysis at 15; PR Comments at 7, 11.

¹⁶ Analysis at 10-11; GCA Comments at 2-5.

Postal Service OIG. The Postal Service and GCA support including the costs of the Postal Service OIG. Analysis at 11; GCA Comments at 2-5. The Public Representative opposes including these costs. PR Comments at 6, 10.

Regulatory requirements. The Postal Service states that it incurs costs from regulatory requirements that include funding the Commission, participating in Commission proceedings, and complying with Commission orders to measure service performance and file periodic reports. Analysis at 14-15. The Postal Service supports including these costs. *Id.* The Public Representative recommends excluding these costs. PR Comments at 9-11. UPS suggests excluding costs associated with regulatory compliance. UPS Comments at 6.

Federal purchasing requirements. The Postal Service supports including the costs of complying with federal purchasing requirements. Analysis at 15-16. The Public Representative and UPS oppose including these costs. PR Comments at 9; UPS Comments at 6.

Freedom of Information Act, Privacy Act, and other laws. The Postal Service supports including the costs of complying with the Freedom of Information Act, the Privacy Act, and other laws. Analysis at 16. The Public Representative opposes including these costs.¹⁷

C. Cost Estimates

Several commenters discuss how costs are estimated under section 3651(b)(1)(C). GCA explains that the Commission currently estimates these costs using the profitability method. GCA Comments at 1. It explores how the Commission could apply the profitability method to estimate the costs of non-revenue producing activities such as the Inspection Service and the Postal Service OIG. *Id.* at 2-5.

¹⁷ PR Comments at 9. The Public Representative also recommends excluding the costs of the addressing system. *Id.* at 7.

NALC argues that the cost estimates of some Employee-Related Items would be highly speculative. NALC Comments at 3. UPS contends that the Postal Service's cost estimates are too imprecise for the Commission to include under section 3651(b)(1)(C). UPS Comments at 3, 8. It asserts that if the Commission expands the scope of section 3651(b)(1)(C), it should also address benefits the law confers on the Postal Service. *Id.* at 3, 9. It submits that the Commission should "identify and quantify costs that are avoided by the Postal Service that it would otherwise incur as a private entity (e.g., costs saved due to exemptions from state and local fuel and property taxes, regulations, and fines, etc.)" in addition to estimating the value of the letter and mailbox monopolies. *Id.* at 9.

In response, the Postal Service argues that it has provided reliable cost estimates. Postal Service Reply Comments at 6-7. It characterizes UPS's proposal to also report on the Postal Service's legal benefits as unsupported and beyond the scope of section 3651(b)(1)(C). *Id.* at 12-13.

IV. COMMISSION ANALYSIS

This proceeding focuses on the scope and meaning of 39 U.S.C. § 3651(b)(1)(C), which requires the Commission to include in the *Annual Report* "an estimate of the costs incurred by the Postal Service in providing ... other public services or activities which, in the judgment of the Postal Regulatory Commission, would not otherwise have been provided by the Postal Service but for the requirements of law." Section 3651(b)(1)(C) contains three key phrases the Commission must interpret:

- "other public services or activities ... provided by the Postal Service"
- "in the judgment of the Postal Regulatory Commission"
- "would not otherwise have been provided ... but for the requirements of law."

The Commission reviewed the Analysis, the comments received, and the services and activities currently included under section 3651(b)(1). In interpreting section 3651(b)(1)(C), the Commission considered section 3651 as a whole, the purpose and context of similar statutory provisions in title 39, and previous Commission

analysis of section 3651(b)(1). Based on this analysis, the Commission interprets these phrases as described below.

A. “[O]ther public services or activities ... provided by the Postal Service”

To interpret the phrase “other public services or activities ... provided by the Postal Service[,]” the Commission evaluates three key terms or phrases: (1) “other,” (2) “public,” and (3) “provided by the Postal Service.” The Commission also explains the distinction between “public services” and “public activities” and clarifies that “public services or activities” under section 3651(b)(1)(C) must relate to the universal service obligation (USO).

1. “[O]ther”

The Postal Service, Public Representative, and UPS interpret “other” in section 3651(b)(1)(C) to mean that the “public services or activities” included under section 3651(b)(1)(C) must be similar to those included under sections 3651(b)(1)(A) and (B). The Postal Service implies that services or activities currently reported under sections 3651(b)(1)(A) and (B) must also meet the definition of “other public services or activities” under section 3651(b)(1)(C) to give meaning to the word “other.” See Postal Service Reply Comments at 4-5. The Public Representative and UPS both describe section 3651(b)(1)(C) as a catchall category that is closely tied to sections 3651(b)(1)(A) and (B). PR Comments at 4; UPS Comments at 5.

The Commission finds the use of “other” links section 3651(b)(1)(C) to the sections before it, such that the items enumerated under sections 3651(b)(1)(A) and (B) are similar to the types of “public services or activities” that Congress intended for the Commission to include under section 3651(b)(1)(C). The Supreme Court of the United States reached a similar conclusion when interpreting a criminal statute with a similar

statutory structure.¹⁸ The criminal statute at issue in *Paroline v. United States* referred to “any costs incurred by the victim” for six categories of covered losses. *Id.* (citing 18 U.S.C. § 2259(b)(3)). The categories included medical services, physical and occupational therapy, and a catchall category for “any other losses suffered by the victim as a proximate result of the offense.” *Id.*

When interpreting the catchall category, the Supreme Court of the United States applied the statutory construction canon that “catchall clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated.” *Id.* at 1721. It concluded that the catchall category for “any other losses ... ” must be similar to the types of losses covered under the criminal statute. *Id.* Likewise, the Commission interprets the catchall category in section 3651(b)(1)(C) as intended to capture services or activities similar in type to those covered under sections 3651(b)(1)(A) and (B).

2. “[P]ublic”

The Postal Service and most commenters interpret “public” to mean that the service or activity must benefit the public.¹⁹ Discussing the structure of section 3651(b)(1), NALC takes a different approach and interprets “public” to mean “services that are provided by the Postal Service to the public.” NALC Comments at 6 (emphasis omitted). Similarly, the Commission interprets “public” to mean services or activities that are “public facing”—*i.e.*, directed toward the public.

As described in the Commission’s interpretation of “other” in Section IV.A.1, the services or activities included under section 3651(b)(1)(C) must be similar to those enumerated in sections 3651(b)(1)(A) and (B). Each of the services and activities currently included under section 3651(b)(1) is directed to the public. None requires the Commission to assess the value or benefit the public receives as a result of the service

¹⁸ See *Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014).

¹⁹ See Analysis at 2; PR Comments at 3-4; UPS Comments at 4; FedEx Reply Comments at 1-2; NAPUS/NAPS Comments at 2.

or activity. As such, the Commission's interpretation of "public" is consistent with the overall structure of section 3651(b)(1).

When the Postal Service provides "public facing" services and activities, it directs them outside of itself as an organization and toward the public. Consequently, services and activities the Postal Service directs toward persons within the Postal Service do not qualify as "public" because they are "inward facing" rather than "public facing." For example, Employee-Related Items are "inward facing" rather than oriented toward the public.

The Postal Service and commenters disagree over whether "public" modifies "activities" as well as "services." The Postal Service argues that "activities" refers to Postal Service operations generally and that even if "public" modifies "activities," section 3651(b)(1)(C) should include all legally-mandated services or activities. Analysis at 2; Postal Service Reply Comments at 2. By contrast, the Public Representative and UPS argue that "public" modifies both "services" and "activities." PR Comments at 4; UPS Comments at 4-5. The Public Representative and NALC point out that the Postal Service's interpretation would require the Commission to evaluate all activities undertaken by the Postal Service. PR Comments at 4; NALC Comments at 7.

The Commission finds that "public" modifies both "services" and "activities." As previously discussed, "public services or activities" under section 3651(b)(1)(C) must be similar in type to those enumerated under sections 3651(b)(1)(A) and (B). Interpreting "activities" to mean all activities required by law would render that term inconsistent with the services and activities currently included under sections 3651(b)(1)(A) and (B), which are all public facing and limited in scope.

The broad interpretation advocated by the Postal Service would expand the scope of section 3651(b)(1)(C) beyond what Congress intended.²⁰ Thus, the Commission finds that “public” in section 3651(b)(1)(C) modifies “activities” as well as “services” such that section 3651(b)(1)(C) comprises “public services” and “public activities.”²¹

3. Public Services versus Public Activities

Section 3651(b)(1)(C) comprises “public services” and “public activities.”²² These terms must have different meanings because Congress used them to create two distinct categories of costs the Commission must include in the *Annual Report*. To distinguish between “public services” and “public activities,” the Commission considered the costs of items currently included under section 3651(b)(1) and found that they fall into two distinct categories: (1) Postal Service offerings, and (2) Postal Service actions. The Commission differentiates between “public services” and “public activities” based on these categories and its interpretation of “public” as “public facing.” See Section IV.A.2, *supra*.

The Commission finds that “public services” are offerings by the Postal Service to the public. The public must avail itself of or opt in to the service to receive it. Two items currently included under section 3651(b)(1)(A) are public services. First, the Alaska Air

²⁰ Similarly, the Supreme Court of the United States applied the statutory construction canon “a word is known by the company it keeps ... to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.” See *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (citing *Gustafson v. Alloyd Company*, 513 U.S. 561, 575 (1995)).

²¹ The United States Court of Appeals for the Eighth Circuit reached a similar conclusion when interpreting an immigration statute that applied to “any person who personally advocated or assisted in the persecution of” certain persons. *United States v. Friedrich*, 402 F.3d 842, 844 (8th Cir. 2005). The court found that “personally” modified both “advocated” and “assisted.” *Id.* at 845.

²² “Public service” and “postal service” are distinct terms. In its review of nonpostal services, the Commission explained that “defining ‘service’ for the purposes of implementing section 404(e) does not affect the meaning of the term ‘postal service,’ which is defined by statute [under section 102(5)].” See Docket No. MC2008-1, Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, December 19, 2008, at 15 n.28 (Order No. 154). Likewise, defining “public service” under section 3651(b)(1)(C) does not affect the definition of “postal service” under section 102(5).

Subsidy arises from Alaska Bypass Service, a public service the Postal Service offers to businesses in Anchorage and Fairbanks allowing them to ship food and other cargo directly to Alaskan rural customers. These businesses avail themselves of Alaska Bypass Service by submitting an application to the Postal Service.²³ Second, the Postal Service offers Group E Post Office Boxes as a public service to rural customers who do not receive carrier delivery. These customers may obtain a free Post Office Box by submitting an application to the Postal Service.²⁴

Similarly, free, reduced, and unzoned rates for postal services under sections 3651(b)(1)(B) and (C) are public services because the Postal Service offers these rates to some mailers for certain market dominant products. Mailers avail themselves of the public services by sending products at the free, reduced, or unzoned rates.

By contrast, the Commission finds that “public activities” are actions performed by the Postal Service for the public. Unlike public services, the Postal Service performs public activities independent of individual opt in. For example, the Postal Service delivers mail 6 days a week and maintains small Post Offices in rural or remote areas regardless of whether the public opts in.

4. “[P]rovided by the Postal Service”

The Commission interprets “provided by the Postal Service” to mean the Postal Service must have an active role in offering, supplying, or performing “public services or activities.” “Provide” appears several times in section 3651, and throughout the provision, the statutory language illustrates that the Postal Service must actively offer, supply, or perform “public services or activities.” First, section 3651(b)(1) states the Commission must report “an estimate of the costs incurred by the Postal Service in

²³ See United States Postal Service Handbook PO-508, Intra-Alaska Mail Service by Air: Instructions for Certificated Air Carriers and Bypass Mail, March 2012, at 59.

²⁴ Mailing Standards of the United States Postal Service, Domestic Mail Manual §§ 508.4.2.1, 508.4.3.6, 508.4.5, 508.4.8, November 2, 2015.

providing” the items described in sections 3651(b)(1)(A), (B), and (C). Second, section 3651(b)(1)(A) describes the mandate that the Postal Service “provide prompt, reliable, and efficient services to patrons in all areas and all communities” Third, in section 3651(b)(1)(C), Congress uses the phrase “provided by the Postal Service” to inform which “public services or activities” are included under that provision.²⁵

The Commission finds that “provide” means the Postal Service must have an active role, which is supported by statutory provisions in title 39 that use similar language. For example, the Postal Service receives appropriated funds as reimbursement “for public service costs incurred by it in providing a maximum degree of effective and regular postal service nationwide” 39 U.S.C. § 2401(b)(1). Likewise, calculation of the assets and liabilities associated with providing competitive products must include “the capital and operating costs incurred by the Postal Service in providing such competitive products” *Id.* § 2011(h)(1)(A)(i)(I). In each case, the Postal Service incurs a cost for actively offering a public service or performing a public activity. The uses of “provide” in these title 39 provisions bolster the Commission’s conclusion that “provided by the Postal Service” in section 3651(b)(1)(C) means the Postal Service must actively offer, supply, or perform “public services or activities.”

In the context of section 3651(b)(1)(C), the Commission finds that “provided by the Postal Service” does not include more passive meanings such as paid for or funded. The statutory structure of section 3651(b)(1) illustrates that Congress intended to distinguish “costs incurred” from “other public services or activities ... provided by the Postal Service[.]” Section 3651(b)(1) requires the *Annual Report* to include “an estimate of the costs incurred by the Postal Service in providing ... other public services or activities” This distinction illustrates that merely paying for or funding a service or activity does not constitute “providing” a public service or public activity. To interpret

²⁵ Section 3651(c) also uses “provide” in requiring the Postal Service to “provide the Postal Regulatory Commission with such information” that the Commission deems necessary to prepare the *Annual Report*.

“providing” as paying for or funding fails to give “providing” a meaning distinct from “costs incurred.” It also fails to capture the active role the Postal Service must have in offering, supplying, or performing “public services or activities.”

5. Relate to the Universal Service Obligation

The Commission considers the costs reported in the *Annual Report* under section 3651(b)(1) to be the estimated cost of the USO.²⁶ The Commission provided an initial cost estimate of the USO in the USO Report.²⁷ Each year the Commission updates this estimate in the *Annual Report* by reporting the Postal Service’s costs incurred in providing public services or activities under section 3651(b)(1). Specifically, the Commission describes section 3651(b)(1)(C) as “other public services or activities related to the universal service obligation.”²⁸ The Commission continues to conclude that “public services or activities” under section 3651(b)(1)(C) must relate to the USO.

B. “[I]n the judgment of the Postal Regulatory Commission”

The *Annual Report* must include “an estimate of the costs incurred by the Postal Service... .” 39 U.S.C. § 3651(b)(1). The Commission must also “detail the basis of its estimates ... giving rise to the costs identified in [the *Annual Report*].” *Id.* § 3651(b)(2).

²⁶ See FY 2014 *Annual Report* at 40; FY 2013 *Annual Report* at 28; Postal Regulatory Commission, *Annual Report to the President and Congress Fiscal Year 2012*, January 3, 2013, at 37 (FY 2012 *Annual Report*); Postal Regulatory Commission, *Annual Report to the President and Congress Fiscal Year 2011*, December 21, 2011, at 41 (FY 2011 *Annual Report*); Postal Regulatory Commission, *Annual Report to the President and Congress Fiscal Year 2010*, December 27, 2010, at 29 (FY 2010 *Annual Report*); Postal Regulatory Commission, *Annual Report to the President and Congress Fiscal Year 2009*, January 1, 2010, at 30 (FY 2009 *Annual Report*); Postal Regulatory Commission, *Annual Report to the President and Congress Fiscal Year 2008*, December 23, 2008, at 19 (FY 2008 *Annual Report*).

²⁷ Postal Regulatory Commission, *Report on Universal Postal Service and the Postal Monopoly*, December 19, 2008, at 120 (USO Report).

²⁸ FY 2012 *Annual Report* at 37; FY 2011 *Annual Report* at 41; FY 2010 *Annual Report* at 29; FY 2009 *Annual Report* at 30; FY 2008 *Annual Report* at 20.

Uses of “estimate” and “identified” in section 3651 illustrate that evaluating costs under section 3651(b)(1) is not exact and requires exercising judgment and discretion.

Repetition of the phrase “in the judgment of the Postal Regulatory Commission” in section 3651 (including in section 3651(b)(1)(C)) demonstrates that Congress intended for the Commission to exercise its discretion when identifying and estimating section 3651(b) costs. See 39 U.S.C. §§ 3651(b)(1)(A), 3651(b)(1)(C), and 3651(c). This interpretation is supported by federal case law where courts have found that “in the judgment of” gives “broad discretion as to ... technical matters which Congress has committed to the [referenced agency].”²⁹

- C. “[W]ould not otherwise have been provided ... but for the requirements of law.”

The latter part of section 3651(b)(1)(C) states that costs should only be included for public services or activities that “would not otherwise have been provided ... but for the requirements of law.” The Postal Service contends that the Commission should report the costs of legally-mandated services or activities if the Postal Service would not otherwise perform them or would perform them differently. Analysis at 3.

UPS and NAPUS/NAPS argue that “but for the requirements of law” is intended to prevent inclusion of costs that the Postal Service would bear even if it were a private company. UPS Comments at 6-7; NAPUS/NAPS Comments at 3. In response, the Postal Service critiques UPS and NAPUS/NAPS for mischaracterizing its position and clarifies that in its view, section 3651(b)(1)(C) should include legal mandates that are more costly than the mandates applicable to private companies. Postal Service Reply Comments at 5.

The Public Representative and FedEx argue that Congress did not intend for the Commission to compare the Postal Service with private sector companies. PR

²⁹ See *National Hells Canyon Association v. Federal Power Commission*, 237 F.2d 777, 779-80 (D.C. Cir. 1956); accord *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074, 1091 (D.C. Cir. 1987).

Comments at 4-5; FedEx Reply Comments at 2-3. NALC contends that private sector comparisons are speculative and controversial. NALC Comments at 3-5. GCA argues that “would not otherwise have been provided ... but for the requirements of law” means that a law requires the Postal Service to provide a service or activity, and the Commission must determine whether the Postal Service would continue providing the service or activity absent that law. GCA Comments at 7. It contends that this phrase encompasses any legal requirement. *Id.* at 7-8.

The Commission adopts the commonly accepted meaning of “but for,” which is “in the absence of.”³⁰ Applied to section 3651(b)(1)(C), included “public services or activities” are those the Postal Service would not provide “in the absence of” legal requirements.

Although “requirements of law” in section 3651(b)(1)(C) appears broad, the Commission must interpret this phrase within the context of the rest of section 3651. In particular, section 3651(b)(2) provides more insight into what “requirements of law” means in stating that the Commission must identify “the statutory requirements giving rise to the costs identified” under section 3651. 39 U.S.C. § 3651(b)(2). This is consistent with how the Commission has previously viewed section 3651. Referring to sections 3651(b)(1)(A) and (B), the Commission previously stated that it must “estimate the costs that the Postal Service is incurring to comply with its public service mandate and the statutory preferences that are preserved in the PAEA.”³¹ This interpretation is also supported by sections 3651(b)(1)(A) and (B) themselves, which describe public

³⁰ See, e.g., “Cause,” *Black’s Law Dictionary* (10th ed. 2014); *Burrage v. United States*, 134 S. Ct. 881, 887-88 (2014); *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2525 (2013).

³¹ Docket No. RM2008-4, Order No. 104, Notice of Proposed Rulemaking Prescribing Form and Content of Periodic Reports, August 22, 2008, at 3; see Docket No. RM2008-4, Order No. 203, Notice of Final Rule Prescribing Form and Content of Periodic Reports, April 16, 2009.

services or activities required by statute.³² For this reason, “other public services or activities” under section 3651(b)(1)(C) must be required by statute.

The phrase “giving rise to” in section 3651(b)(2) indicates that Congress intended for section 3651(b)(1) costs to be grounded in statutory requirements, but not so strict as to require the statute to explicitly require that the Postal Service engage in the public service or public activity. For example, public services or activities may be included if required by regulations based on statutory requirements. They may also include public services or activities the Commission requires the Postal Service to provide if the requirement is based on the Commission’s interpretation of a statute.

In summary, the phrase “would not otherwise have been provided ... but for the requirements of law” means that the Postal Service would not provide “public services or activities” in the absence of statutory requirements. To determine whether the Postal Service would provide “public services or activities” in the absence of a statutory requirement, the Commission applies the profitability approach described in the USO Report by analyzing what a hypothetical profit-maximizing Postal Service would do.³³ If a hypothetical profit-maximizing Postal Service would not provide a public service or public activity without a statutory requirement to do so, the Commission would report the full cost of the public service or public activity under section 3651(b)(1)(C). By contrast, if a hypothetical profit-maximizing Postal Service would provide all or part of a public service or public activity without a statutory requirement to do so, the Commission would assess what parts of the public service or public activity the Postal Service would provide without a statutory requirement. In that case, the Commission would then conduct a separate cost analysis to determine how much of the Postal Service’s costs (if any) should be reported under section 3651(b)(1)(C).

³² Costs estimated under section 3651(b)(1)(A) arise from section 101(b). Costs estimated under section 3651(b)(1)(B) arise from the requirements of title 39.

³³ The Commission stated that the USO should include the cost of activities “that a profit-maximizing Postal Service would not undertake if there were no legal requirement (express or reasonably implied) to do so.” USO Report at 135.

D. Summary and Application

In summary, the Commission interprets “public services or activities” in section 3651(b)(1)(C) to comprise statutorily-required offerings and actions by the Postal Service that are “public facing.” They must also relate to the USO and be similar in type to the services or activities enumerated under sections 3651(b)(1)(A) and (B). The Postal Service must have an active role in offering, supplying, or performing “public services or activities.” For each public service or public activity, the Commission must determine whether a hypothetical profit-maximizing Postal Service would provide it absent statutory requirements.

In future *Annual Reports*, the Commission will apply this interpretation if it determines that the costs of additional public services or activities should be included under section 3651(b)(1)(C).

V. ORDERING PARAGRAPH

It is ordered:

The Commission interprets 39 U.S.C. § 3651(b)(1)(C) as described in the body of this Order.

By the Commission.

Stacy L. Ruble
Secretary

Commissioner Goldway, abstaining.