

(v) *Effective date*. [Reserved]. See § 1.954-2(a)(5)(v).

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

**Eric Solomon,**

*Acting Deputy Assistant Secretary of the Treasury (Tax Policy).*

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**DEPARTMENT OF VETERANS AFFAIRS**

**38 CFR Part 17**

RIN 2900-AM11

**Elimination of Copayment for Smoking Cessation Counseling**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This rule adopts as final, without change, the interim final rule published in the **Federal Register** (70 FR 22595) on May 2, 2005. The Department of Veterans Affairs (VA) is publishing this final rule to designate smoking cessation counseling (individual and group sessions) as a service that is not subject to copayment requirements.

**DATES:** *Effective Date:* January 17, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Eileen P. Downey, Program Analyst, Policy Development, Chief Business Office (16), (202) 254-0347 or Dr. Kim Hamlet-Berry, Director, Public Health National Prevention Program, Veterans Health Administration, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-8929. (These are not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** An interim final rule amending VA's medical regulations to set forth a rule designating smoking cessation counseling (individual and group sessions) as a service that is not subject to copayment requirements was published in the **Federal Register** on May 2, 2005 (70 FR 22595).

We provided a 60-day comment period that ended July 1, 2005. Twelve comments were received and all supported the rule. Based on the rationale set forth in the interim final rule, we now adopt the interim final rule as a final rule.

**Administrative Procedure Act**

In the May 2, 2005, **Federal Register** notice, we determined that there was a basis under the Administrative Procedure Act for issuing the interim

final rule with immediate effect. We invited and received public comment on the interim final rule. This document merely affirms the interim final rule as a final rule without change.

**Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

**Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

**Regulatory Flexibility Act**

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule will not directly affect any small entities. Only individuals could be directly affected. Accordingly, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

**Catalog of Federal Domestic Assistance Numbers**

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

**List of Subjects in 38 CFR Part 17**

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug

abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: November 22, 2005

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

**PART 17—MEDICAL**

Accordingly, the interim final rule amending 38 CFR part 17, which was published at 70 FR 22595 on May 2, 2005, is adopted as a final rule without change.

[FR Doc. 06-373 Filed 1-13-06; 8:45 am]

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**POSTAL RATE COMMISSION**

**39 CFR Part 3001**

[Docket No. RM2004-1; Order No. 1449]

**Definition of Postal Service**

**AGENCY:** Postal Rate Commission.

**ACTION:** Final rule.

**SUMMARY:** This document addresses adding a definition of the term "postal service" to the rules of practice. This change is prompted by the Postal Service's action with respect to nonpostal initiatives. There is often controversy and uncertainty regarding the postal character of the services provided under those initiatives. The definition provides guidance to the Postal Service and the general public concerning services that are subject to sections 3622 and 3623 of the Postal Reorganization Act.

**DATES:**

1. *Effective Date:* February 16, 2006.
2. Deadline for (optional) Postal Service motion to dismiss Docket No. C2004-1: January 17, 2006.
3. Deadline for (optional) Postal Service update on 14 services identified in Consumer Action petition: February 17, 2006.
4. Deadline for Postal Service updates on postal and nonpostal services: June 1, 2006.

**ADDRESSES:** File all documents referred to in this order electronically via the Commission's Filing Online system at <http://www.prc.gov>.

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, 202-789-6818.

**SUPPLEMENTARY INFORMATION:****Regulatory History**

69 FR 3288, January 23, 2004.  
69 FR 11353, March 10, 2004.  
69 FR 67514, November 12, 2004.

**I. Introduction and Summary**

The Commission initiated this rulemaking to consider amending its Rules of Practice and Procedure, 39 CFR 3001.1 *et seq.*, to include a definition of the term “postal service.”<sup>1</sup> As a result of comments received in response to Order No. 1389 as well as further consideration of the issues presented, the Commission proposed a revised definition, which read as follows: “*Postal service*” means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services supportive or ancillary thereto.”<sup>2</sup> The revised definition differed from that originally proposed in two principal respects. First, it made the Service’s statutory “postal service” duties the touchstone of the definition rather than any specific activities the Postal Service may or may not perform. Second, in response to comments,<sup>3</sup> the accompanying discussion made clear what had been implied—that electronic communication services offered by the Postal Service to the public fell within the scope of the definition.

Order No. 1424 provided interested persons an opportunity to comment on the revised definition. The proposal is supported by mailing and consumer interests, as well as by a competitor of the Postal Service. It is opposed by two commenters, albeit on entirely different grounds.

Parcel Shippers Association (PSA), Pitney Bowes Inc., and the Office of the Consumer Advocate and Consumer Action (OCA/CA), endorse the revised definition as is.<sup>4</sup> United Parcel Service

(UPS) supports the proposed rule, but suggests that the definition be modified to delete the reference to correspondence.<sup>5</sup> The Association for Postal Commerce (PostCom) argues that the Postal Service is not authorized to offer purely electronic services unrelated to physical mail delivery whether on a regulated or unregulated basis. In the alternative, based on the assumption that the Commission will proceed with defining postal service, PostCom suggests modifications to more closely track the statute.<sup>6</sup> The Postal Service restates its earlier contention that the Commission lacks the authority to determine the scope of its own jurisdiction, contending that the definition may only restate the “prevailing law,” which it defines by reference to two court opinions.<sup>7</sup>

The Commission finds the comments of the parties to be helpful and, upon review, has revised the definition in minor respects in the final rule. The Postal Service is alone in its view that the Commission lacks authority to determine the scope of its own jurisdiction. While it reiterates that position in its comments, it fails to address the substance of Order No. 1424, which discussed in detail the merits of the Postal Service’s arguments and the basis for the Commission’s conclusions.<sup>8</sup> In the instant order, the Commission rejects the Postal Service’s contention that it is limited simply to restating “prevailing law” as the Postal Service would define it, finding it both contrived and myopic. The final rule imposes no restrictions on the types of service, postal or otherwise, that the Postal Service may wish to offer. It remains free to offer whatever services or products management may wish to offer subject to the requirements of the Act. For those that fall within the meaning of the final rule, however, the Postal Service has an obligation to obtain a recommended decision before commencing a service or charging the public. Procedures are established herein to address existing services

and Office of the Consumer Advocate and Consumer Action Comments on Proposed Amendment to the Commission’s Rules, February 1, 2005, at 2 (OCA/CA Initial Comments). OCA/CA also suggest procedures by which the Commission can monitor the commercial activities of the Postal Service for compliance with the Postal Reorganization Act. *Id.* at 9–19.

<sup>5</sup> Reply Comments of United Parcel Service on Revised Proposed Amendment to the Commission’s Rule, March 1, 2005, at 2–3 (UPS Reply Comments).

<sup>6</sup> PostCom Comments on Proposed Rulemaking Concerning the Definition of “Postal Service”, February 1, 2005 (PostCom Initial Comments).

<sup>7</sup> Initial Comments of the United States Postal Service in Response to Order No. 1424, February 1, 2005, at 4–6 (Postal Service Initial Comments).

<sup>8</sup> See Order No. 1424, *supra*, at 6–39.

unilaterally begun by the Postal Service which meet the definition of the term postal service.

The rule is supported by mailers, private industry in competition with the Postal Service, and consumer interests. The final rule comports with the statute, legislative history, and case law. It is in the public interest and is necessary and proper for the Commission to carry out its responsibilities under the Act.

Having thoroughly considered the record, including the parties’ comments, in this proceeding, the Commission finds it appropriate to adopt as its final rule new paragraph (s) to § 3001.5 of its Rules of Practice and Procedure, 39 CFR 3001.1, as follows: “*Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services incidental thereto.” The amendment is effective 30 days after publication in the **Federal Register**.

**II. The Unsettled Nature of New Services**

This proceeding was precipitated by a petition filed by Consumer Action, which requested the Commission to commence proceedings concerning 14 services offered by the Postal Service without prior Commission approval.<sup>9</sup> It also was precipitated by a number of other recent proceedings in which the “postal” character of a new service was squarely at issue. In Order No. 1389, the Commission discussed the relatively few proceedings in which it was called upon to consider, for jurisdictional purposes, the meaning of the term “postal service,” following the decision in *Associated Third Class Mail Users v. U.S. Postal Service (ATCMU)*,<sup>10</sup> which vested the Commission with jurisdiction over special services.<sup>11</sup> Following the Commission’s review of special services in Docket No. R76–1 and Docket No. MC78–3, involving the Postal Service’s request for a recommended decision to establish an Electronic Computer Originated Mail subclass, nearly 20 years elapsed before the Commission had occasion again to consider the issue as presented in a series of dockets commencing in 1995.

The first two dockets in this series, Docket Nos. C95–1 and C96–1, raised

<sup>9</sup> See PRC Order No. 1388, Docket \*2003, January 16, 2004.

<sup>10</sup> *Associated Third Class Mail Users v. U.S. Postal Service*, 405 F.Supp. 1109 (D. D.C. 1975); *National Association of Greeting Card Publishers v. U.S. Postal Service*, 569 F.2d 570 (D.C. Cir. 1976); *U.S. Postal Service*, 434 U.S. 884 (1977).

<sup>11</sup> See PRC Order No. 1389, January 16, 2004, at 1–9.

<sup>1</sup> See Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure, PRC Order No. 1389, January 16, 2004.

<sup>2</sup> Notice and Order Concerning Proposed Amendment to the Commission’s Rules of Practice and Procedure, PRC Order No. 1424, November 12, 2004, at 3–4, 49.

<sup>3</sup> See, e.g., Comments of United Parcel Service in Support of Proposed Rule, March 9, 2004, at 3–4; and Office of the Consumer Advocate and Consumer Action Comments on Proposed Amendment to the Commission’s Rules of Practice and Procedure, March 15, 2004, at 4–6; see also PostCom Comments on Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure, March 1, 2004, at 3, 4.

<sup>4</sup> See Comments of the Parcel Shippers Association to the Proposed Rule Concerning the Definition of “Postal Service,” January 11, 2005; Comments of Pitney Bowes Inc., February 1, 2005;

the issue of the meaning of the term "postal service," and are distinguishable from subsequent proceedings in that neither involved new technology.<sup>12</sup> Docket No. C95-1 concerned shipping and handling charges for orders placed with the Postal Service Philatelic Service Fulfillment Center,<sup>13</sup> while Docket No. C96-1 concerned fees for a new packaging service (Pack & Send).<sup>14</sup> Docket No. C99-1 introduced a novel element to the controversy involving the Postal Service's offering new services to the public without first requesting a recommended decision from the Commission, namely, the use of new technology to provide the service; indeed this has been central to virtually all subsequent disputes over the Postal Service's unilateral offering of new services.<sup>15</sup>

The complaint in Docket No. C99-1 concerned Post Electronic Courier Service (Post E.C.S.), an all-electronic means of transmitting documents securely via the Internet.<sup>16</sup> This proceeding was distinguishable from the earlier complaints because it involved an all-electronic service, and also because the Commission never reached

<sup>12</sup> Since this is the third order in this proceeding, it will be assumed that the reader is familiar with the background of this proceeding, including the Commission's institutional history involving jurisdictional determinations. Hence, the following discussion will be somewhat abbreviated. For a more complete discussion, see Order No. 1389, *supra*, at 1-9.

<sup>13</sup> The Commission dismissed the complaint, finding that the handling and shipping of catalog orders placed with the Philatelic Fulfillment Service Center were not closely related to the delivery of mail and, thus, charges for those services did not constitute fees for postal services under 39 U.S.C. 3662. PRC Order No. 1075, Docket No. C95-1, September 11, 1995.

<sup>14</sup> The Commission found Pack & Send to be a postal service because, among other things, it represented "an entirely new form of access" to parcel services and because of its potential public effect, particularly on the Commercial Mailing Receiving Agency industry. PRC Order No. 1145, Docket No. C96-1, December 16, 1996, at 12, 17-18. Following this finding, the Commission held further proceedings in Docket No. C96-1 in abeyance pending a filing by the Postal Service requesting a recommended decision concerning Pack & Send service, or the filing of a notice by the Service indicating that the packaging service was discontinued. *Id.* at 25. Further proceedings proved unnecessary as the Postal Service chose to discontinue Pack & Send service. PRC Order No. 1171, Docket No. C96-1, April 25, 1997.

<sup>15</sup> The sole exception is Docket No. C2004-3 involving stamped stationery.

<sup>16</sup> In its motion to dismiss, the Postal Service argued that the Commission lacked the authority to determine the status of the service as either postal or nonpostal. The Commission denied the motion, finding that its mail classification authority empowered it to review the status of services proposed or offered by the Postal Service. Nor was the Commission persuaded, based on the record developed to that point, that the service did not include domestic operations or that it was nonpostal. PRC Order No. 1239, Docket No. C99-1, May 3, 1999, at 12-21.

the question whether Post E.C.S. was or was not a postal service, as the complaint was subsequently dismissed as moot.<sup>17</sup> Notably, however, the Commission did not find it dispositive that service did not entail hard-copy mail.<sup>18</sup>

In Docket No. R2001-1, a discovery dispute ensued over various services offered by the Postal Service, e.g., Post E.C.S., USPS eBillPay, and USPS Send Money. The Postal Service objected to these interrogatories, characterizing the services as nonpostal and irrelevant to the rate proceeding. The Postal Service was directed to respond to certain interrogatories; however, this ruling was suspended as a result of a settlement filed in that proceeding.<sup>19</sup>

The petition filed by Consumer Action, which became the springboard for this rulemaking, requested the Commission to initiate proceedings concerning 14 services offered by the Postal Service without prior Commission approval. The 14 services ranged from electronic services, such as online payment services and electronic postmark, to miscellaneous other services, such as retail merchandise and the Unisite Antenna Program. The Postal Service argued that all of the services identified in the petition were nonpostal.<sup>20</sup>

Subsequent to the commencement of this proceeding, DigiStamp, Inc. filed a complaint which, among other things, contends that the Postal Service is offering a postal service, Electronic Postmark, without first obtaining a recommended decision from the Commission.<sup>21</sup> As an element of its complaint, DigiStamp alleges competitive harm.<sup>22</sup> The Postal Service submitted an answer to the complaint as well as a motion to dismiss, arguing, *inter alia*, that the Commission "lacks authority to resolve the claims that DigiStamp has made."<sup>23</sup> DigiStamp submitted a reply to the Postal Service's motion, challenging the Postal Service's authority to implement Electronic

<sup>17</sup> PRC Order No. 1352, Docket No. C99-1, November 6, 2002.

<sup>18</sup> PRC Order No. 1239, *supra*, at 17-21.

<sup>19</sup> See P.O. Ruling R2001-1/42, January 29, 2002, at 5-11, 13.

<sup>20</sup> For a complete discussion of issues concerning the petition, see PRC Order No. 1388, Docket \*2003, January 16, 2004.

<sup>21</sup> See Complaint of DigiStamp, Docket No. C2004-2, February 25, 2004.

<sup>22</sup> *Id.* at 3 and 7.

<sup>23</sup> Motion of the United States Postal Service to Dismiss, Docket No. C2004-2, April 26, 2004, at 5. In the alternative, the Postal Service argues that the complaint should be dismissed because Electronic Postmark is a nonpostal service. *Id.* at 6 et seq. See also Answer of the United States Postal Service, Docket No. C2004-2, April 26, 2004.

Postmark unilaterally.<sup>24</sup> The matter is pending before the Commission.

Finally, the dispute over the status of various services offered by the Postal Service continued in the latest omnibus rate proceeding, Docket No. R2005-1. During discovery, OCA sought relatively detailed data about every domestic service or product sold by the Postal Service that is not contained in the Domestic Mail Classification Schedule. The Postal Service provided some information but objected to the interrogatories arguing, among other things, lack of relevance, *i.e.*, that nonpostal services are outside the Commission's jurisdiction. Following motion practice, the Postal Service was directed to file certain additional information in response to the interrogatories.<sup>25</sup>

### III. The Commission Has Authority to Determine Its Own Jurisdiction

Section 3603 of the Postal Reorganization Act, 39 U.S.C. 101 et seq., authorizes the Commission to adopt "rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5, and take any other action [it] deem[s] necessary and proper to carry out [its] functions and obligations to the Government of the United States and the people as prescribed under this chapter." 39 U.S.C. 3603. No party disputes the Commission's authority to adopt a definition of the term "postal service." The Postal Service, however, argues that the Commission is limited simply to restating "prevailing law," which it defines as the *ATCMU* opinion as affirmed by *NAGCP I*.<sup>26</sup>

The Postal Service concept of "prevailing law" is contrived. On the one hand, it would limit those precedents to the factual situation prevailing 30 years ago. On the other hand, the Postal Service ignores "prevailing law" establishing that the Commission's interpretation, not the Postal Service's, is entitled to deference regarding rate and classification matters.

While *ATCMU* and *NAGCP I* provide a standard for evaluating analogous services, it is indisputable that those opinions addressed a narrow question, *i.e.*, whether certain long-established, traditional special services were postal

<sup>24</sup> DigiStamp Answer in Response to Motion of the United States Postal Service to Dismiss, Docket No. C2004-2, May 3, 2004.

<sup>25</sup> See P.O. Ruling R2005-1/58 and P.O. Ruling R2005-1/70.

<sup>26</sup> *National Association of Greeting Card Publishers v. U.S. Postal Service*, 569 F.2d 570 (D.C. Cir. 1976) (*NAGCP I*), vacated on other grounds, 434 U.S. 884 (1977). See Postal States Postal Initial Comments at 3.

services or not.<sup>27</sup> Those opinions did not address or even consider the potential impact of the profound technological changes that have occurred in the nearly 30 years since they were issued and which have been central to many of the new services offered unilaterally by the Postal Service. The “prevailing law” is simply not the prevailing factual situation; rather it is the standards which are to be used to evaluate and resolve controversies wrought by wholly new technologies not envisioned when the opinions were issued.<sup>28</sup>

The Postal Service takes the position that the Commission lacks authority to determine the scope of its own jurisdiction under Chapter 36 of the Act.<sup>29</sup> The Postal Service further contends that it cannot be bound by any definition that extends beyond its interpretation of prevailing law.<sup>30</sup> Under its theory, its unilateral declaration of whether any service or product is or is not postal is determinative. Thus, under the Postal Service’s theory, the Commission’s jurisdiction is based not on its own consideration of the facts as applicable to policies and the rate and classification factors of the Act, but rather on what the Postal Service unilaterally determines to be postal.

In Order No. 1424, the Commission rejected this claim, explaining in some

<sup>27</sup> The Postal Service has concluded similarly. In their decision in Docket No. C96–1, the Governors characterized *ATCMU* as the “one case which attempted a definition of postal versus nonpostal as applied to specific services then offered.” Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on the Complaint of the Coalition Against Unfair USPS Competition, Docket No. C96–1, April 8, 1997, at 11 (Governors’ Decision Docket No. C96–1) (emphasis added).

<sup>28</sup> In an effort to bolster its contention that the legal standard for the term “postal service” has been definitively determined, the Postal Service quotes a passage from Order No. 1145 paraphrasing *NAGCP I* Postal Service Initial Comments at 2. The attempt is unavailing. The Commission’s reliance on that precedent to frame the jurisdictional issue in Docket No. C96–1 was entirely appropriate since Pack & Send service had the earmarks of service traditionally offered by the Postal Service, notably without any reliance on new technology. In contrast, in Docket No. C99–1, the Commission found existing precedent inadequate to resolve the jurisdictional dispute regarding Post E.C.S. service, an all-electronic means of transmitting documents securely via the Internet. PRC Order No. 1239, May 3, 1999, at 18. As noted above, the Commission did not find it dispositive that Post E.C.S. service did not entail hard-copy mail. *Id.* at 15–21.

<sup>29</sup> See Initial Comments of the United States Postal Service, March 15, 2004, at 1–2.

<sup>30</sup> Postal Service Initial Comments at 4. This is similar to its claim in earlier comments that it “would not in any way be bound by the definition which the Commission is now proposing [in Order No. 1389] to incorporate into its rules.” Initial Comments of the United States Postal Service, March 15, 2004, at 3.

detail the basis of its conclusion that it has the primary responsibility for interpreting whether services offered by the Postal Service are subject to Chapter 36 of the Act.<sup>31</sup> Nothing in the Postal Service’s comments warrants altering that conclusion. The Postal Service’s interpretation remains wholly unconvincing.

The Postal Service’s view of the “prevailing law” ignores a series of cases, including *NAGCP I*, holding that the Commission’s interpretation of rate and classification matters is due deference.<sup>32</sup>

The Supreme Court has affirmed this principle:

Although the Postal Reorganization Act divides ratemaking responsibility between two agencies, the legislative history demonstrates ‘that ratemaking \* \* \* authority [was] vested primarily in [the] Postal Rate Commission.’ S. Rep. No. 91–912, p. 4 (1970) (Senate Report); see *Time, Inc. v. USPS*, 685 F. 2d 760, 771 (CA2 1982); *Newsweek, Inc. v. USPS*, 663 F. 2d, at 1200–1201; *NAGCP III*, 197 U.S. App. D.C., at 87, 607 F. 2d, at 401. The structure of the Act supports this view. While the Postal Service has final responsibility for guaranteeing that total revenues equal total costs, the Rate Commission determines the proportion of the revenue that should be raised by each class of mail. In so doing, the Rate Commission applies the factors listed in § 3622(b). Its interpretation of that statute is due deference. See *Time, Inc. v. USPS*, 685 F. 2d, at 771; *United Parcel Service, Inc. v. USPS*, 604 F. 2d 1370, 1381 (CA3 1979), *cert. denied*, 446 U.S. 957 (1980).

*National Association of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 821 (1983).

The Court of Appeals for the D.C. Circuit specifically resolved any suggestion that the Commission lacked the implicit authority to assert jurisdiction: “[A]ny reasonable examination of the purposes of the Act discloses Congress’ implicit design that the distinct functions of service

<sup>31</sup> PRC Order No. 1424, *supra*, at 2; see also *id.* at 6–9. This has been a consistent long-held position by the Commission. See, e.g., PRC Op. R74–1, Vol. 2, Appendix F; PRC Op. R76–1, Vol. 1, at 263 *et seq.*, and Vol. 2, Appendix F; PRC Order No. 1239, May 3, 1999, at 9–14; see also *United Parcel Service v. U.S. Postal Service*, 604 F.2d 1370, 1381 (3rd Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

<sup>32</sup> Furthermore, the Postal Service’s interpretation is contrary to the well-settled principle that an agency’s interpretation of its own jurisdiction is entitled to deference. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–44 (1984) (*Chevron*); *Transmission Access Policy Study Group v. Federal Energy Regulatory Commission*, 225 F.3d 667, 694 (D.C. Cir. 2000) (“It is the law of this circuit that the deferential standard of [*Chevron*] applies to an agency’s interpretation of its own statutory jurisdiction.”); and *Oklahoma Natural Gas Company v. Federal Energy Regulatory Commission*, 28 F.3d 1281, 1283 (D.C. Cir. 1994).

provision and rate adjustment be divided between the Postal Service and the Rate Commission.” *NAGCP I* at 597.<sup>33</sup>

Criticizing the Postal Service’s jurisdictional argument as “wholly unconvincing,”<sup>34</sup> the Court noted that the Commission “advances an interpretation of the Act quite at odds with that of the Service and fully in accord with the conclusion reached by the district court.” In light of this, the Court of Appeals stated that “[t]he district court, in short, without expressly stating so might simply have deferred to the long-held and reasonable interpretation given the statute by the very agency whose jurisdiction is at issue.”<sup>35</sup>

The 3rd Circuit Court of Appeals reaffirmed the principle succinctly: “[I]t was recognized there, [in *NAGCP v. USPS*, 569 F.2d 570 (D.C. Cir. 1976)] as we do here, that the agency entitled to deference in the interpretation of 39 U.S.C. 3622–24 is the Rate Commission—not the Postal Service—as it is the Rate Commission which is charged with making recommended decisions on changes in rates and mail classification.”<sup>36</sup>

In sum, it is clear that “rate and classification supervision [vests] in the Postal Rate Commission.”<sup>37</sup>

Furthermore, the deference afforded the agency is particularly compelling regarding challenges to rules adopted under notice and comment rulemaking.<sup>38</sup> In such a situation, if Congress has not directly addressed a matter and if the agency’s answer is based upon a permissible construction of the statute, the agency’s interpretation will be upheld by a reviewing court.<sup>39</sup> This is especially

<sup>33</sup> The court’s holding answers the Postal Service’s misplaced claim that the Act excludes “an implicit delegation of authority to the Commission to define postal and nonpostal services.” Postal Service Initial Comments at 6–7. Moreover, the Postal Service’s statement misreads the order. The Commission has not asserted or even suggested that it has authority to define nonpostal services.

<sup>34</sup> *NAGCP I* at 597.

<sup>35</sup> *Id.* at 595, n.110.

<sup>36</sup> *United Parcel Service v. U.S. Postal Service*, 604 F.2d 1370, 1381 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

<sup>37</sup> *United Parcel Service v. U.S. Postal Service*, 455 F. Supp. 857, 869 (E.D. Pa. 1978), *aff’d*, 604 F.2d 1370 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

<sup>38</sup> *U.S. v. Mead Corp.*, 533 U.S. 218, 229–31 (2001). (clarifying that *Chevron* deference is afforded to rules issued with procedural safeguards such as notice and comment). See generally *Chevron, supra*, 467 U.S. at 842–44 (1984), concerning the high degree of deference afforded to agencies.

<sup>39</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–44 (1984).

true when the agency is using the rulemaking to clarify the extent of its jurisdiction.<sup>40</sup> Courts give strong deference to agency regulations that have undergone strict notice and comment rulemaking because:<sup>41</sup>

The rulemaking process, by its very design, encourages public scrutiny of an agency's proposed course of action. By giving notice of the proposed rule, the agency provides interested parties with the opportunity to express their views and bring their political influence to bear on the process.

These procedural safeguards give all interested parties the ability to influence the rulemaking and agency process in a meaningful way.<sup>42</sup> Accordingly, a rule promulgated and vetted through the formal rulemaking process by the Commission on matters clarifying its jurisdiction is entitled to significant deference, whereas ad hoc, unilateral, unchecked Postal Service decisions on services it believes are not subject to Commission review are not.<sup>43</sup>

#### IV. The Meaning of the Term "Postal Service" Is Not Frozen in Time

In its comments, the Postal Service contends that the meaning of the term "postal service" has been, for all intents and purposes, settled since the mid-1970s, following the District Court's *ATCMU* opinion as affirmed in *NAGCP I*.<sup>44</sup> It argues that both the Commission and it have employed the "resulting legal standard since that time[.]" quoting, as affirmation, the Commission's order in Docket No. C96-1 involving the complaint regarding Pack & Send service.<sup>45</sup>

The Postal Service's premise, that the meaning of the term "postal service" was resolved in the 1970s, is flawed. First, the question before the *ATCMU* court was a narrow one, namely

whether or not certain special services were subject to the Commission's jurisdiction. In affirming the Commission's jurisdiction, neither the *ATCMU* nor the *NAGCP I* courts addressed the jurisdictional status of services not before them, let alone completely new forms of service.

As a general matter, each of the services then at issue, e.g., forwarding and return, registry, insurance, collect on delivery, and money orders, was a long-time, traditional service offered by the Postal Service and its predecessor, the Post Office Department. Significantly, each involved some form of hard-copy service. Thus, there was no reason for the court to engage in a broader inquiry.

Secondly, the Postal Service's argument rests on an implicit assumption that the absence of controversy renders the matter settled. In fact, the absence of controversy is merely an indication of inactivity, a manifestation of the status quo, not an indication that the matter is settled. As discussed above, during the 20 years following the *ATCMU* opinion, there was simply little occasion or need to revisit the issue. The absence of controversy is of no import in determining whether the term "postal service" applies to the spate of new services introduced by the Postal Service, some of which entail the use of electronic communications not in existence at the time of the *ATCMU* opinion.

Finally, the Postal Service overreaches in characterizing the matter as settled based on the *ATCMU* opinion. The Governors' remarks in Docket No. C96-1 cast that opinion in the correct light. While expressing various policy concerns with the Commission's conclusion in that proceeding that "Pack & Send" was a postal service, the Governors note that, "[v]irtually the only judicial assistance for the task has come from one case, litigated more than 23 years ago, early in the history of the reorganized Postal Service."<sup>46</sup> The *ATCMU* opinion remains instructive in evaluating proposed services that exhibit characteristics similar to those at issue in that case, and for identifying the agency responsible for applying Chapter 36 to entirely new services based on technologies not extant at the time of that decision. Contrary to the Postal Service's contention, *ATCMU* is not dispositive of matters it never considered, let alone addressed.

The Governors' decision is pertinent for a separate reason. In discussing its

policy concerns with the Commission's order, the Governors lament the lack of clarity surrounding what is or is not a postal service. "It would be far better if the legal standards were clear, well settled, and universally understood, so that full attention could be given to meeting the real needs of the public." *Id.* at 16. "With the benefit of additional years of experience, perhaps it is now time to revisit the drawing of the relevant lines." *Id.* at 17. The Commission does not disagree with these sentiments and, indeed, as noted in prior orders, they are consistent with the purpose of this proposed rulemaking.

In amending its Rules of Practice to include a definition of the term "postal service," the Commission's intent is "to provide guidance to the Postal Service and the public for evaluating what falls within the scope of sections 3622 and 3623 of the Postal Reorganization Act."<sup>47</sup> The need to develop a definition became apparent because, as evident from the discussion above, the jurisdictional status of various services offered unilaterally by the Postal Service had become increasingly controversial. Accordingly, the Commission concluded that "it would be administratively most efficacious to clarify [the term] by rule rather than on an ad hoc basis."<sup>48</sup> The Commission's decision to proceed in this fashion is well within its discretion.<sup>49</sup>

It has also become apparent that the uncertainty is exacerbated by a lack of transparency. Service may be offered (and subsequently terminated) by the Postal Service without an opportunity for any public input or review. Illustratively, many of the services at the heart of Consumer Action's petition are no longer offered by the Postal Service or are offered in reconstituted form. Some may have had or continue to have substantial public effect.

The Postal Service's status as a government entity supports the need for Commission review of new postal products. Services provided include those subject to its statutory monopoly as well as those in competition with the private sector. The potential for harm is significant, raising issues of possible undue discrimination/preference and unfair competition. The need to prevent this is acute and the statute provides a means for affected parties to be heard. 39 U.S.C. 3624(a). The Commission fully appreciates the Postal Service's

<sup>40</sup> *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 820-21 (1983) (Upholding the Commission's position that the Act does not dictate or exclude the use of any method of attribution of costs method and stating that: "[a]n agency's interpretation of its enabling statute must be upheld unless the interpretation is contrary to the statutory mandate or frustrates Congress' policy objectives."); see also *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

<sup>41</sup> *Fior d'Italia, Inc. v. United States*, 242 F.3d 844, 852 (9th Cir. 2001), *rev'd on other grounds*, 536 U.S. 238 (2002).

<sup>42</sup> See *Ohio Dep't of Human Servs. v. U.S. Dep't of Health and Human Servs.*, 862 F.2d 1228, 1236 (6th Cir. 1988).

<sup>43</sup> See *U.S. v. Mead Corp.*, 533 U.S. 218, 229-31 (2001). Even assuming that the Postal Service's unilateral determinations were entitled any deference, it would be minimal since its determinations are not pursuant to APA's rulemaking or adjudicatory procedures. See also *Skidmore v. Swift & Co.*, 323 U.S. 134 (1984).

<sup>44</sup> Postal Service Initial Comments, *supra*, at 1-2.

<sup>45</sup> *Id.* at 2.

<sup>46</sup> Governors' Decision Docket No. C96-1, *supra*, at 17.

<sup>47</sup> PRC Order No. 1424, November 12, 2004, at 1.

<sup>48</sup> PRC Order No. 1389, January 16, 2004, at 8; see also PRC Order No. 1424, *supra*, at 3.

<sup>49</sup> See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); see also *SEC v. Chenery Corp.*, 332 U.S. 194, 199-204 (1947).

need to grow revenues.<sup>50</sup> The Commission, however, has a concomitant duty to consider, among other things, the effect of establishing new postal services and their rates on the general public and on competitive enterprises in the private sector.

None of the foregoing is intended to suggest that any specific existing, but unreviewed service, or any new service offered by the Postal Service would necessarily be considered a postal service. But for those that fall reasonably within the meaning of the rule, it is imperative that the Postal Service follow the requirements of the statute, *i.e.*, by requesting a recommended decision from the Commission thereby allowing affected members of the public an opportunity to present facts and argument before an expert, independent agency.

#### V. The Rule Does Not Limit Services the Postal Service May Wish to Offer

In Order No. 1424, responding to a Postal Service argument that a Commission definition of the term "postal service" imposes no limit on its authority under the Act, the Commission made it clear that the rule in no way limits the types of service, postal or otherwise, that the Postal Service may wish to offer.

The Postal Service is free to offer whatever services or products it wishes subject to the strictures of the Act. However, for those that are postal services, as defined by the Commission, the Postal Service has an obligation to obtain a recommended decision before commencing a service or charging the public.<sup>51</sup>

The Postal Service quotes this passage and argues that it is the *Commission's belief* that "however it expands its definition of postal services, the Postal Service would be required to seek its approval prior to offering any service that the Commission had defined to be a postal service."<sup>52</sup> It then offers conjecture suggesting that the Commission may act arbitrarily, changing the definition capriciously over time.<sup>53</sup>

The Postal Service's representation of the Commission's belief is a red herring; and its conjecture that the Commission will redefine the term "postal service" without regard to the statute or the facts is not well-founded. The Commission

has thoroughly documented its reasons for initiating this rulemaking.<sup>54</sup>

The final rule is a product of a long, deliberative process. Interested persons, including the Postal Service, have been afforded multiple opportunities to comment. The Commission has reviewed those comments thoroughly. In fact, based on that review, the Commission revised the proposed rule and gave parties a further opportunity to comment. At the same time, the Commission explained in detail the basis for its conclusions. Thus, this rulemaking does not represent a case of the Commission "changing its thinking" (*see* Postal Service Initial Comments at 6), but rather is the Commission's *de novo* review of its authority under Chapter 36 of the Act for purposes of providing guidance to the Postal Service and the public as to what constitutes postal services.

Although the Postal Service may chafe under the requirements of the Act,<sup>55</sup> it should respect the existing law. Under the Act, the Postal Service must submit a request to the Commission for a recommended decision on changes in the mail classification schedule to the extent it wishes to provide a postal service. Management's initial characterization of a service as postal or not neither deprives the Commission of jurisdiction over postal services nor precludes Commission review, on complaint or otherwise, for purposes of determining its statutory jurisdiction. Such review does not encroach on management's prerogatives in a manner not contemplated by the Act. The *United Parcel Service* court addressed this very point:<sup>56</sup>

Management was vested in the Postal Service, rate and classification supervision in the Postal Rate Commission. We recognize and weigh heavily the congressional goal of greater managerial flexibility, but also recognize another congressional purpose that finds its incarnation in the Postal Rate Commission. The Commission's existence insures that an agency independent of the Postal Service will provide for public notice and hearing input of those affected by the proposed action and full and on the record, *see* 39 U.S.C. 3624(a), consideration of pertinent factors and congressionally imposed goals before certain types of decisions are made.

<sup>54</sup> *See, e.g.*, PRC Order No. 1389, *supra* at 1–12; and PRC Order No. 1424, *supra*, at 1–6.

<sup>55</sup> *See, e.g.*, Governors' Decision, Docket No. C96–1, ("The Postal Service should be able, quickly and efficiently, to test the viability and design of service offerings that provide service of value to the general public, and that have already been established in the marketplace.")

<sup>56</sup> *United Parcel Service v. U.S. Postal Service*, *aff'd*, 604 F.2d 1370 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

\* \* \* \* \*

The very existence and function of the Postal Rate Commission bespeaks a limitation on postal management's freedom.

Moreover, the Commission has adopted rules specifically to accommodate requests for expeditious consideration of experimental classifications. *See* 39 CFR 3001.67. If the Postal Service believes that the current rules are inadequate for its purposes, it may petition for appropriate relief.

In the final analysis, the Commission properly is acting to clarify the scope of its own jurisdiction. The proposed rule is consistent with the Act, its legislative history, and precedent. It concerns only the provision of postal services. The Postal Service remains free to offer whatever services are consistent with its statutory mandate. Nothing in the rule affects the lawfulness of the Postal Service initiatives that are not postal. The lawfulness of the Postal Service's nonpostal activities is not an issue for resolution by the Commission.<sup>57</sup> However, the prices for services within the ambit of the rule adopted herein must be set in accordance with section 3624.

#### VI. Substantive Comments

##### A. PostCom

PostCom reiterates its claim that the Postal Service is not authorized to offer electronic services unless they are "directly related to the delivery of 'written and printed matter, parcels, and like materials.'" <sup>58</sup> Consequently, it contends that what it labels "purely electronic services" cannot be within the Commission's jurisdiction.<sup>59</sup> PostCom argues that the only technological advances contemplated by Congress in passing the Postal Reorganization Act in 1970 "are those that contribute to the efficient physical carriage of mail."<sup>60</sup>

PostCom fails to support its suggestion that Congress contemplated that the Postal Service's use of new technology would be limited to physical deliveries with more than supposition. It argues that postal services "cannot include all manner of technological innovations affecting communications" such as facsimile, Voice-Over-Internet-Protocol (VOIP), and video

<sup>57</sup> *See, e.g.*, PRC Order No. 724, December 2, 1986, at 11; PRC Order No. 1239, May 3, 1999, at 13.

<sup>58</sup> PostCom Initial Comments, PostCom initial Comments, *supra*, at 1.

<sup>59</sup> *Ibid.*; *see* PostCom Reply Comments on the Proposed Rulemaking Concerning the Definition of "Postal Service," April 15, 2004, at 2.

<sup>60</sup> PostCom Initial Comments at 2.

<sup>50</sup> *See* Report on Nonpostal Initiatives, Docket \*2003, March 10, 2003, at 1 ("To fulfill its universal service mandate and mission, the Postal Service must find ways to use existing resources to generate new revenue.")

<sup>51</sup> PRC Order No. 1424, *supra* at 7–8.

<sup>52</sup> Postal Service Initial Comments at 5.

<sup>53</sup> *Id.* at 5–6.

conferencing, for to do so “would open a Pandora’s box of confusing federal jurisdictional issues.”<sup>61</sup> As OCA/CA note, PostCom reads Order No. 1424 too broadly.<sup>62</sup> The Commission’s jurisdiction is restricted to domestic services provided by the Postal Service and further to the panoply of “postal services” offered by the Postal Service, including those used to “bind the Nation together through the personal, educational, literary, and business correspondence of the people.” 39 U.S.C. 101(a). Thus, there is no federal jurisdictional controversy.<sup>63</sup>

In concluding that the Postal Service may avail itself of technological advances to provide postal services, the Commission relies on Congress’ own words that it intended to: “[c]reate a lasting foundation for a modern, dynamic, and viable postal institution that is both equipped and empowered at all times to satisfy the postal requirements of the future technological, economic, cultural, and social growth of the Nation.”<sup>64</sup> That Congress intended a “modern, dynamic, and viable postal institution” did not require it to envision particular future technological advances, but only that it contemplated that the Postal Service would be “equipped and empowered” to use them in meeting the “postal requirements” of the Nation. As the Commission has observed: “The Act does not require the Postal Service to ignore innovations, and to remain, in essence, the equivalent to the best buggy whip manufacturer it can be.”<sup>65</sup>

Under PostCom’s theory, the Postal Service may employ new technology, but only if related to physical mail delivery. PostCom would permit the Postal Service to modernize to a limited degree, *e.g.*, electronic return receipt and tracking services, but preclude it from employing technological advances that affect its principal duties of receiving, transmitting, and delivering mail services, as they may evolve over

time, to postal patrons.<sup>66</sup> The distinction is arbitrary and without support.

PostCom takes issue with the Commission’s description of Airmail and Express Mail as new forms of postal service, arguing that “these services are a new means to deliver the same written and printed matter, and parcels.”<sup>67</sup> While that characterization is not incorrect, the quality that gave rise to the new form of postal service is the transmission, not the delivery, which, in any event, remained the same.<sup>68</sup>

In the alternative to its legal position, PostCom expresses general support for the proposed definition, but suggests that it be revised in two ways.<sup>69</sup> First, noting that the terms “ancillary and supportive” lack a statutory predicate, PostCom suggests substituting the term “incidental thereto”, which is found in section 403(a).<sup>70</sup> The Commission finds this suggestion reasonable and adopts it, albeit not for reasons advanced by PostCom. In suggesting the change, PostCom contends that “it is these very terms that over-extend the definition of ‘postal services’ to encompass electronic communications services unrelated to physical mail delivery.”<sup>71</sup> The Commission rejects this contention.

The phrase “supportive or ancillary thereto” has been used by the Commission for nearly 30 years to describe jurisdictional special services that support or are ancillary to the collection, transmission, or delivery of mail.<sup>72</sup> Elaborating, the Commission noted that such services “enhance the value of service rendered under one of the substantive mail classes by providing such features as added security, added convenience or speed, indemnity against loss, correct information as to the current address of

a recipient, etc.”<sup>73</sup> PostCom describes “incidental services” in virtually the same terms, *i.e.*, as services which enhance the value of mail.<sup>74</sup> Thus, while adopting this change, the Commission does not perceive it as substantively altering the scope of its long-held views of supportive or ancillary services.

Second, PostCom suggests that the phrase “including, but not limited to” be deleted, noting that it is not found in section 403 and contending that it is redundant to the phrase “and like materials” which is. This suggestion will not be adopted.

The two phrases serve different purposes. The phrase “and like materials” takes into account changes in postal services required by “the future technological, economic, cultural, and social growth of the Nation.”<sup>75</sup> The phrase “including, but not limited to,” was employed to make it plain that the term “correspondence” was intended to encompass all forms of written communications. This is consistent with section 101(a), that the Postal Service be “operated as a basic communications service,”<sup>76</sup> and section 403(a), the requirement that it receive, transmit, and deliver written and printed matter, parcels, and like materials.

#### B. United Parcel Service

UPS contends that many non-package items, such as catalogs and printed advertisements, “are arguably not ‘correspondence.’”<sup>77</sup> Because such items are undeniably postal services, UPS suggests that potential controversy would be avoided by substituting the phrase “letters, other written and printed matter, and like materials” for “correspondence, including, but not limited to, letters, printed matter, and like materials.”<sup>78</sup>

The Commission will not adopt the suggestion, but will clarify that “correspondence,” as used in the rule, includes all manner of non-package materials, *e.g.*, advertisements, catalogs, solicitations, newspapers, magazines, etc. In short, “non-package items” are covered by the term “printed matter.” The Commission includes the term “correspondence” in the rule because that is the means by which the Postal Service fulfills its basic function,

<sup>73</sup> PRC Op. R76–1, Vol. 1, at 267.

<sup>74</sup> PostCom Initial Comments at 4.

<sup>75</sup> H.R. Rep. No. 1104, *supra*, at 3650.

<sup>76</sup> *Id.* at 3671.

<sup>77</sup> UPS Reply Comments, *supra*, at 2.

<sup>78</sup> *Ibid.* UPS’s suggestion does not reply to any parties’ comments and as such is more properly considered as initial comments. Since no party objected to the suggestion or sought to file a reply, the Commission will address it.

<sup>66</sup> H.R. Rep. No. 91–1104, *supra*, at 3671. (“[T]he United States Postal Service shall be operated as a basic communications service provided to all the people by the Government of the United States[.]”)

<sup>67</sup> PostCom Initial Comments at 3–5.

<sup>68</sup> In its initial comments in this proceeding, PostCom appears to recognize that transmission connotes something more than vehicular transportation. PostCom Comments on Proposed Rulemaking Concerning Amendment to the Rules of Practice and Procedure, March 1, 2004, at 4. The concept is not new. As early as Docket No. MC78–3, involving Electronic Computer Originated Mail, the Postal Service characterized electronic communications as a form of transportation. PRC Op., Docket No. MC78–3, December 17, 1979, at 59.

<sup>69</sup> PostCom Initial Comments at 3–5. The Postal Service views PostCom’s suggestions as preferable to the proposed rule. Reply Comments of the United States Postal Service in Response to Order No. 1424, March 1, 2005, at 2.

<sup>70</sup> PostCom Initial Comments at 5.

<sup>71</sup> *Id.* at 4.

<sup>72</sup> See PRC Op. R76–1, Vol. 1, at 266–67 (footnote omitted); *id.*, Vol. 2, Appendix F.

<sup>61</sup> *Ibid.*

<sup>62</sup> OCA/CA Reply Comments at 5–6.

<sup>63</sup> PostCom’s concern over opening Pandora’s box appears to be overblown for another reason. It is not the purpose of this order to attempt to foresee how future technological change may affect the Postal Service. On more than one occasion, however, the Commission has dealt with possibly competing federal jurisdictional issues with comity and dispatch. See, *e.g.*, PRC Op. Docket Nos. MC76–1 *et al.*, June 15, 1977; PRC Op. Docket Nos. MC78–3, December 17, 1979.

<sup>64</sup> See PRC Order No. 1424, *supra*, at 32, quoting H.R. Rep. No. 1104, 91st Cong., 2nd Sess. 2 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News, Vol. 2, at 3650; (hereinafter H.R. Rep. No. 91–1104 with page cites to U.S.C.C.A.N.).

<sup>65</sup> PRC Order No. 1424 at 32.

namely “to provide postal services to bind the Nation together through the \* \* \* correspondence of the people.” Section 101(a). As used in section 101(a), correspondence includes all forms of written communications between and among “the people,” running the gamut from personal to business to cultural. UPS’s suggested alternative language would forego use of this term and, therefore, the Commission does perceive it as an improvement over the proposed rule.

### C. OCA/CA

OCA/CA, who support the proposed rule, characterize the Commission’s findings and suggest procedures for reviewing the Postal Service’s unclassified commercial activities. In discussing the Commission’s “jurisdictional findings,” OCA/CA make several statements that appear to be problematic in certain respects. For example, they state that “[t]he Commission’s order accepts the OCA and CA interpretation that § 404(a)(6) only relates to Postal Service activities undertaken on behalf of other government agencies.”<sup>79</sup> The Commission did not adopt OCA/CA’s “narrow definition,”<sup>80</sup> a conclusion seemingly acknowledged elsewhere in their comments.<sup>81</sup> However, other than illustratively, the Commission finds it unnecessary to address these statements since the order speaks for itself and, moreover, OCA/CA do not seek any modification to the proposed rule.

OCA/CA propose procedures for reviewing all Postal Service activities for compliance with the Act.<sup>82</sup> First, they request that the Commission initiate classification proceedings pursuant to section 3623 to review the current commercial services provided by the Postal Service.<sup>83</sup> They suggest that if the Commission concludes that no classification is warranted, whether a postal service or not, it should issue a declaratory order finding the service to be inappropriate or unauthorized.<sup>84</sup>

Second, OCA/CA suggest that, upon complaint, the Commission may review commercial activities pursuant to section 3662. For services found to be

postal, they suggest that the Commission issue findings via a declaratory order; for services found not to be postal, they suggest that the Commission issue “a public report advising the Postal Service to desist from continuing to offer such services.”<sup>85</sup>

The procedures suggested by OCA/CA are premature and thus needlessly confrontational. The Commission believes that the Postal Service should take the lead in assuring that current services comply with the rule and the procedures discussed below are intended to facilitate that approach. It is the Commission’s hope and expectation that those procedures will bring an end to the uncertainty regarding the postal status of ongoing services unilaterally offered by the Postal Service.

### VII. Procedures

The Commission had no predetermined outcome in mind when it initiated this proceeding. Its goal was to provide guidance to the Postal Service and the public concerning services that are subject to sections 3622 and 3623 of the Act. All interested persons have had ample opportunity to comment on the proposed rule. The proposed rule is supported by mailer, competitor, and consumer interests. Notably, no party supports the Postal Service’s position.

The Commission has carefully considered the comments, as evidenced by both Order No. 1424 and this order issuing the final rule. In particular, recognizing that the Postal Service maintained a different legal theory, the Commission took great pains to address its arguments thoroughly. *See, e.g.*, Order No. 1424, *supra*, at 18–39. The final rule is a product of painstaking analyses and is fully consistent with the Act, the legislative history, and precedent.

The Commission comes with an open mind to the next step in this process, classifying services as postal or not. Those services or products that satisfy the definition are subject to the rule. There may be some contentious issues and “hard” choices. Nonetheless, in a reasonable period of time, controversy and confusion associated with such services will be eliminated.

It is the Commission’s expectation that the Postal Service will exercise good faith in complying with procedures outlined below. Since the genesis of this rulemaking is the Consumer Action petition, the Postal Service is requested to submit an update of each of the 14 services referenced in

the petition, briefly describing its current status. The successor, if any, to each service no longer offered or otherwise terminated should be described. The Postal Service is requested to file the update by no later than February 17, 2006.

For each current unreviewed service (or product) that fairly falls within the meaning of the final rule, the Postal Service shall file, not later than June 1, 2006, a request for a recommended decision to establish such service as a permanent or experimental classification with rates and fees consistent with 39 U.S.C. 3622(b).<sup>86</sup> The request should conform to the Commission’s rules for such requests. Five months is provided to afford the Postal Service sufficient time to prepare the requisite filings. To the extent practicable, however, the Postal Service should endeavor to file such requests as they are prepared.

Finally, the Postal Service shall file a list identifying and providing a brief description of each current unreviewed service that, in its opinion, falls outside the meaning of the final rule. In a series of interrogatory responses in Docket No. R2005–1, the Postal Service provided a description of its nonpostal services offered during the base year.<sup>87</sup> It should be a relatively easy matter to update this material as needed. This material should be filed no later than June 1, 2006.

The Commission has before it two complaints alleging that the Postal Service is providing “postal service” without first obtaining a recommended decision from the Commission. *See* Docket No. C2004–2, Complaint on Electronic Postmark and Docket No. C2004–3, Complaint on Stamped Stationery. A motion to dismiss is pending in Docket No. C2004–2. It is the Commission’s intent to address the threshold issue whether or not to hear these complaints in orders to be issued relatively early in the New Year.<sup>88</sup>

#### *It is ordered:*

1. The Commission amends its Rules of Practice and Procedure by inserting new paragraph 5(s), 39 CFR 3001.5(s) as follows: “*Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence,

<sup>86</sup> “Unreviewed” is intended to apply to services (or products) currently offered by the Postal Service that have not been established through the procedures of §§ 3622–3625.

<sup>87</sup> *See, e.g.*, Tr. 8D/4730–42.

<sup>88</sup> In its answer to the complaint in Docket No. C2004–3, the Postal Service indicated its intent to file a motion to dismiss. Answer of United States Postal Service, Docket No. C2004–3, August 31, 2004, at 8. Apparently, none was filed. If the Postal Service wishes to submit a motion to dismiss, it should do so by no later than January 17, 2006.

<sup>79</sup> OCA/CA Initial Comments, *supra*, at 5.

<sup>80</sup> PRC Order No. 1424, *supra*, at 17. The Commission’s view is that appropriate courts must resolve what nonpostal services the Postal Service may or may not offer.

<sup>81</sup> *See* OCA/CA Initial Comments at 12.

<sup>82</sup> *Id.* at 11, 12–13.

<sup>83</sup> *Id.* at 11. Separately, CA requests the Commission to initiate a classification proceeding regarding the services that were the subject of its petition in Docket No. \* 2003. *Id.* at 10.

<sup>84</sup> *Id.* at 14. For activities found not to be postal, they suggest that the Commission order that they be terminated as *ultra vires*. *Id.* at 15.

<sup>85</sup> *Id.* at 18.



including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services incidental thereto.” effective 30 days after publication in the **Federal Register**.

2. For each current unreviewed service (or product) that fairly falls within the meaning of the final rule, the Postal Service shall file, not later than June 1, 2006, a request for a recommended decision to establish such service as a permanent or experimental classification.

3. The Postal Service shall file, not later than June 1, 2006, a list identifying and providing a brief description of each current unreviewed service that, in its opinion, falls outside the meaning of the final rule.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.  
**Steven W. Williams**,  
*Secretary.*

**List of Subjects in 39 CFR Part 3001**

Administrative practice and procedure, Postal service.

■ For the reasons discussed above, the Commission amends 39 CFR part 3001 as follows:

**PART 3001—RULES OF PRACTICE AND PROCEDURE**

■ 1. The authority citation for part 3001 continues to read as follows:

**Authority:** 39 U.S.C. 404(b); 3603; 3622–24; 3661, 3663.

**Subpart A—Rules of General Applicability**

■ 2. Amend § 3001.5 by adding new paragraph (s) to read as follows:

**§ 3001.5 Definitions.**

\* \* \* \* \*

(s) *Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services incidental thereto.

[FR Doc. 06–180 Filed 1–13–06; 8:45 am]

**BILLING CODE 7710-FW-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 60 and 61**

[AZ, CA, HI, NV–075–NSPS; FRL–8013–4]

**Delegation of New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants for States of Arizona, California, Hawaii, and Nevada**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is finalizing updates for delegation of certain federal standards to state and local agencies in Region IX. This document is addressing general authorities mentioned in the regulations for New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants, updating the delegations tables and clarifying those authorities that are retained by EPA.

**DATES:** This rule is effective on March 20, 2006 without further notice, unless EPA receives adverse comments by February 16, 2006. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

**ADDRESSES:** Submit comments, identified by docket number [Docket Number], by one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions.
2. E-mail: [steckel.andrew@epa.gov](mailto:steckel.andrew@epa.gov).
3. Mail or deliver: Andrew Steckel (Air–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

*Instructions:* All comments will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through <http://www.regulations.gov> or e-mail. [Http://www.regulations.gov](http://www.regulations.gov) is an “anonymous access” system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due

to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

*Docket:* The index to the docket for this action is available electronically at <http://www.regulations.gov> and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Cynthia G. Allen at (415) 947–4120, U.S. Environmental Protection Agency, Region IX, Rulemaking Office (AIR–4), 75 Hawthorne Street, San Francisco, California 94105.

**SUPPLEMENTARY INFORMATION:** The supplementary information is organized in the following order:

What Is the Purpose of This Document?  
 Who Is Authorized To Delegate These Authorities?

What Does Delegation Accomplish?  
 What Authorities Are Not Delegated by EPA?  
 Does EPA Keep Some Authority?  
 Administrative Requirements

**What Is the Purpose of This Document?**

Today’s action will update the delegation tables in 40 CFR parts 60 and 61, to allow easier access by the public to the status of delegations in various state or local jurisdictions. We are following the general procedures described in 67 FR 20652 (April 26, 2002). The updated delegation tables will include the delegations approved in response to recent requests, as well as those previously granted. Those tables are shown at the end of this document.

Recent requests for delegation that will be incorporated into the CFR tables are identified below. Each individual submittal identifies the specific NSPS and NESHAPS for which delegation was requested. All of these requests have already been approved by letter and simply need to be included in the CFR.

Agency	Date of request
Hawaii Department of Health.	April 20, 2004.
Nevada Division of Environmental Protection.	December 27, 2004, June 22, 2005, and August 17, 2005.
Pima County Department of Environmental Quality.	November 8, 2004.
San Joaquin Valley Air Pollution Control District.	September 28, 2004.