

## Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

## Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

## Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

## Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order, because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a statement of Energy Effects under Executive Order 13211.

## Environment

We have analyzed this proposed rule under Commandant Instruction M16475.ID, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2-1, paragraph (32)(e), of the Instruction, from further environmental documentation. Under figure 2-1, paragraph (32)(e), an "Environmental Analysis Check List" and a "Categorical

Exclusion Determination" are not required for this rule.

## List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

### PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05-1(g); Section 117.255 also issued under authority of Pub. L. 102-587, 106 Stat. 5039.

2. In § 117.261 add paragraphs (q) and (y); revise paragraphs (r) through (x) and (z) and paragraphs (aa) and (aa-1); and add new paragraphs (z-1), (z-2) and (z-3) to read as follows:

#### § 117.261 Atlantic Intracoastal Waterway from St. Marys River to Key Largo.

\* \* \* \* \*

(q) *Indiantown Road bridge, mile 1006.2*. The draw shall open on the hour and half-hour.

(r) *Donald Ross bridge, mile 1009.3, at North Palm Beach*. The draw shall open on the hour and half-hour.

(s) *PGA Boulevard bridge, mile 1012.6, at North Palm Beach*. The draw shall open on the hour and half-hour.

(t) *Parker (US-1) bridge, mile 1013.7, at Riviera Beach*. The draw shall open on the quarter and three-quarter hour.

(u) *Flagler Memorial (SR A1A) bridge, mile 1020.9, at Palm Beach*. The draw shall open on the quarter and three-quarter hour.

(v) *Royal Park (SR 704) bridge, mile 1022.6, at Palm Beach*. The draw shall open on the hour and half-hour.

(w) *Southern Boulevard (SR 700/80) bridge, mile 1024.7, at Palm Beach*. The draw shall open on the hour and half-hour.

(x) *Ocean Avenue bridge, mile 1031.0, at Lantana*. The draw shall open on the hour and half-hour.

(y) *Ocean Avenue bridge, mile 1035.0, at Boynton Beach*. The draw shall open on the hour and half-hour.

(z) *N.E. 8th Street (George Bush) bridge, mile 1038.7, at Delray Beach*. The draw shall open on the hour and half-hour.

(z-1) *Atlantic Avenue (SR 806) bridge, mile 1039.6, at Delray Beach*. The draw shall open on the quarter and three-quarter-hour.

(z-2) *Linton Boulevard bridge, mile 1041.1, at Delray Beach*. The draw shall open on the quarter and three-quarter hour.

(z-3) *Spanish River bridge, mile 1044.9, at Boca Raton*. The draw shall open on the hour and half-hour.

(aa) *Palmetto Park bridge, mile 1047.5, at Boca Raton*. The draw shall open on the hour and half-hour.

(aa-1) *Boca Club, Camino Real bridge, mile 1048.2, at Boca Raton*. The draw shall open on the hour, twenty minutes past the hour and forty minutes past the hour.

\* \* \* \* \*

Dated: February 24, 2004.

**Harvey E. Johnson, Jr.,**

*Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.*

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## POSTAL RATE COMMISSION

### 39 CFR Part 3001

[Docket No. RM2004-2; Order No. 1394]

#### New Reporting Requirements for Nonpostal Services

**AGENCY:** Postal Rate Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission proposes amending its rules to establish certain reporting requirements for the Postal Service's nonpostal services and products. The relatively recent expansion of nonpostal services and products offered by the Postal Service has caused various stakeholders to express concerns that those services and products may be cross-subsidized by jurisdictional services. The proposed rule is designed primarily to provide sufficient information regarding the Postal Service's nonpostal services and products to determine the presence (or absence) of cross-subsidies. The data are needed so that the Commission can recommend rates for jurisdictional services that comport with the requirements of the Postal Reorganization Act.

**DATES:** Initial comments due April 15, 2004; reply comments due May 17, 2004.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>.

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

**SUPPLEMENTARY INFORMATION:**

## Regulatory History

69 FR 3288 (January 23, 2004)

The Commission proposes to amend its rules of practice and procedure, 39 CFR 3001.1 *et seq.*, to establish certain reporting requirements for the Postal Service's non-jurisdictional activities. The proposed amendments are designed to better enable the Commission to fulfill its ratemaking responsibilities under chapter 36 of the Postal Reorganization Act, 39 U.S.C. 3601 *et seq.*

### 1. Background

In Order No. 1388, the Commission denied, in part, and granted, in part, a petition filed by Consumer Action (CA) requesting the Commission to initiate a proceeding to consider the jurisdictional status of 14 services provided by the Postal Service to the public without prior Commission approval.<sup>1</sup> In granting the request that it initiate a rulemaking proceeding to establish reporting requirements for the Postal Service's non-jurisdictional activities, the Commission indicated that it would, in the near future, issue a notice of proposed rulemaking regarding such reporting requirements. This order fulfills that undertaking, setting forth the proposed rules governing the information to be filed by the Postal Service in support of its formal rate requests.

In urging the Commission to initiate a rulemaking proceeding, CA, joined by the Office of the Consumer Advocate (OCA), refers to the Commission's long-standing policy of reviewing the costs and revenues of non-jurisdictional services to ensure the absence of cross-subsidies.<sup>2</sup> Citing Commission precedent, CA and OCA argue that the Commission must have accurate financial data regarding non-jurisdictional services to forecast accurately the costs and revenues of jurisdictional (domestic) services.<sup>3</sup> They contend that absent that information, the Commission cannot determine the net revenues needed from jurisdictional services to enable the Postal Service to achieve a break-even financial result as required by section 3621 of the Act.<sup>4</sup>

To test for cross-subsidies, CA and OCA urge "application of the incremental cost test for non-

jurisdictional services in the aggregate, for each individual non-jurisdictional service, and for each group of such services."<sup>5</sup> In addition, CA and OCA argue that any losses associated with nonpostal services be excluded from amounts recovered through prior year losses. To that end, they suggest that in omnibus rate proceedings the Postal Service be required to submit evidence separating past jurisdictional losses from non-jurisdictional losses.<sup>6</sup>

The Postal Service contends that the specific rules proposed by CA and OCA are unnecessary and unauthorized.<sup>7</sup> It characterizes them as having two purposes, namely, inducing it to account for nonpostal services in a way that conforms to CA/OCA's judgment, and arming the Commission with data to enable it to critique the specific rates and fees established by the Postal Service for each nonpostal service. The Postal Service concludes that "[b]oth objectives are unnecessary and lie outside the Commission's authority."<sup>8</sup> Generally, the balance of the Postal Service's discussion recounts the discovery dispute from Docket No. R2001-1, involving several of the services raised by CA's petition.<sup>9</sup> The Postal Service summarizes the procedural history and arguments that OCA and it advanced, concluding that the Presiding Officer's Ruling granting, in part, OCA's motion to compel was wrongly decided.<sup>10</sup>

The Postal Service did not address the specific rules suggested by CA and OCA, indicating that it would reserve its comments until and if a rulemaking were initiated.<sup>11</sup> More generally, it asserts that the "detailed information sought pertaining to specific nonpostal services is largely irrelevant and unnecessary for exercise of the Commission's functions in an omnibus rate case."<sup>12</sup> Moreover, it appears to suggest that requiring the filing of such information "would be unauthorized and could lead to a denial of due process."<sup>13</sup> Finally, the Postal Service

<sup>5</sup> *Id.* at 38. Quoting testimony of Postal Service witness Panzar from Docket No. R97-1, they define the incremental cost test as follows: "The revenues collected from any service (or group of services) must be at least as large as the additional (or incremental) cost of adding that service (or group of services) to the enterprise's other offerings." *Ibid.* n.97 (emphasis in original).

<sup>6</sup> *Id.* at 39.

<sup>7</sup> Comments of United States Postal Service on Consumer Action Petition, January 30, 2003, at 38 (Postal Service Comments).

<sup>8</sup> *Id.* at 38-39.

<sup>9</sup> *Id.* 39-43.

<sup>10</sup> *Id.* at 44.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.* at 45.

<sup>13</sup> *Ibid.*

contends that the proposed rule barring recovery of losses incurred by non-jurisdictional services from jurisdictional services "would be entirely unauthorized."<sup>14</sup>

Two commenters specifically endorsed the proposal by CA and OCA to initiate a rulemaking proceeding to establish reporting requirements concerning the Postal Service's non-jurisdictional activities. The Association for Postal Commerce (PostCom) states that the concept is not "revolutionary," noting that other agencies have developed "fairly elaborate accounting conventions" for industries subject to their jurisdiction.<sup>15</sup> Pitney Bowes, Inc. argues that regulatory oversight is needed to guard against the possibility that jurisdictional services will subsidize non-jurisdictional services. Accordingly, it urged the Commission to commence hearings to consider establishing cost accounting controls and reporting standards for nonpostal services.<sup>16</sup>

### 2. Rationale for the Rule

As a general matter, in rate proceedings nonpostal services have generated little controversy not only because the sums involved were relatively minor but also because few services were offered. Some entailed "public" services, such as the sale of U.S. savings bonds, sale of migratory bird stamps, and passport applications, performed by the Postal Service for other government agencies for which it is reimbursed.<sup>17</sup> Others involved minor services, offered as a convenience to postal patrons, such as photocopying, over which the Commission disclaimed jurisdiction.<sup>18</sup>

No longer are nonpostal services noncontroversial. The relatively recent proliferation of nonpostal "initiatives," ranging from various e-commerce services to prepaid phone cards to wireless communication towers on postal property, gives rise to the need to more closely consider their effects, if any, on jurisdictional rates. Not only has there been a sea change in the nature of

<sup>14</sup> *Ibid.*

<sup>15</sup> Comments of PostCom, January 30, 2003, at 1.

<sup>16</sup> Comments of Pitney Bowes, Inc., April 18, 2003, at 6.

<sup>17</sup> For purposes of this discussion, it is unnecessary to dwell on any distinctions between nonpostal services provided to the public by the Postal Service on behalf of other federal agencies under section 404(a)(6) and those provided to other agencies pursuant to section 411 of the Act. As discussed below, the proposed rule is occasioned by the need to consider the rate effects of the Postal Service's introduction of new, commercial nonpostal ventures irrespective of the legal authority for them.

<sup>18</sup> PRC Op. R76-1, Vol. 2, App. F at 20.

<sup>1</sup> PRC Order No. 1388, January 16, 2004.

<sup>2</sup> Letter, executed by CA and OCA, incorporated by reference in support of Consumer Action's petition, October 15, 2003, at 34-38 (Joint Letter).

<sup>3</sup> *Id.* at 35-36. The precedent cited includes PRC Order Nos. 1025 and 1034 in Docket No. R94-1 and Presiding Officer's Ruling No. R87-1/78 in Docket No. R87-1.

<sup>4</sup> *Id.* at 36-37.

the services provided, but there is also a growing concern that the costs associated with these services are largely being recovered through jurisdictional rates. In turn, this has led many to urge the need for greater transparency and accountability with respect to nonpostal services.

Historically, nonpostal services performed by the Postal Service fell within the rubric of "public service" costs. The Kappel Commission identified various subsidies under which the Post Office Department (POD) operated, including nonpostal services performed for other government agencies. "Unreimbursed non-postal services are some relatively small but widespread services rendered to other Government agencies (e.g., providing space for Civil Service examinations)."<sup>19</sup> To eliminate this subsidy, the Kappel Commission advocated that the POD be reimbursed for all nonpostal services performed for other government agencies.<sup>20</sup> That policy appears to be practiced today. See, e.g., Account 42341 (migratory bird stamps), Account 43420 (passport applications), and Account 42321 (food coupons).

Unlike these "public services," the spate of recent "nonpostal initiatives" has an entirely different hue. The services identified in Consumer Action's petition, and discussed in Order No. 1388, are in no sense "public services."<sup>21</sup> Rather, these represent commercial ventures, many of which, in competition with private industry, attempt to employ technological advances to grow revenues. Some of these services may ultimately be classified as "postal services." Others

may not. See PRC Order No. 1389, January 16, 2004. For purposes of this rulemaking resolution of their status is immaterial. The Postal Service classifies them all as nonpostal and thus, at a minimum, they would be subject to any reporting requirements adopted in this proceeding. The Commission recognizes the unresolved dispute concerning the scope of the Postal Service's authority to engage in such nonpostal activities under the Act.<sup>22</sup> But again, resolution of that issue is of no moment to this rulemaking. Currently, the Postal Service is providing commercial, nonpostal services. Consequently, a need for the reporting requirements exists apart from the Postal Service's authority to offer the services. As the Commission has observed: "[t]he lawfulness of the independent actions by which the Postal Service implemented a service is simply not an issue before the Commission[.]"<sup>23</sup>

Concerns about the Postal Service's development of new products began to surface as early as 1998. In a report that year, the General Accounting Office (GAO) provided, among other things, financial data on 19 new products the Postal Service marketed and/or had under development during fiscal years 1995 through 1997.<sup>24</sup> Among the 19 new services are: FirstClass Phone Card, Sure Money, Liberty Cash, Unisite Antenna Program, REMITCO, and Electronic Commerce Services.<sup>25</sup> GAO reported that for fiscal years 1995 through 1997 these services lost an aggregate of \$84.7 million, with only one product, Retail Merchandise, generating a profit (\$5.0 million) during this period.<sup>26</sup>

Subsequent GAO reports, issued in 2000 and 2001, focused solely on the Postal Service's e-commerce activities. The first report, it is fair to say, was critical of the accuracy and completeness of the financial data the

Postal Service provided concerning its various e-commerce initiatives.<sup>27</sup> As a consequence, GAO stated that it did:

not believe the financial data that USPS provided could be used to reliably assess USPS' progress toward meeting its overall financial performance expectation that revenues generated by e-commerce products and services in the aggregate are to cover their direct and indirect costs as well as make a contribution to overhead.<sup>28</sup>

In an update to this report, issued in December 2001, GAO concluded that the financial information reported by the Postal Service concerning its e-commerce and Internet-related activities remained deficient, finding it "not complete, accurate, and consistent."<sup>29</sup> Aside from handcuffing management's ability to assess the financial performance of new service offerings, the lack of reliable data has important rate implications.

Concerns continue to be raised as to whether USPS e-commerce initiatives in the aggregate are being cross-subsidized by other postal products and services. In response to our previous report, USPS officials noted that e-commerce products and services in the aggregate are to cover their incremental costs and thus not be cross-subsidized. To date, based on financial information provided to us, this goal has not been met, and it is not clear when this goal will be realized.<sup>30</sup>

In the intervening time since this report was issued, December 2001, perhaps the Postal Service has corrected the deficiencies in its financial reporting identified by GAO. While the Commission hopes that is the case, concerns about whether nonpostal services are being cross-subsidized by postal services and products remain legitimate. All stakeholders, including most notably ratepayers and competitors, have an interest in the performance of new nonpostal products and services offered by the Postal Service. Without accurate, complete, and consistent financial information regarding such services, there can be no assurance that no cross-subsidy exists.

Two more recent reports, which endorse the need for greater accountability by the Postal Service, provide support for this rulemaking.

<sup>19</sup> *Towards Postal Excellence, The Report of the President's Commission on Postal Reorganization*, June 1968, at 137 (Kappel Commission Report); see also *id.*, Vol. 2 at 6-7 ("Loss on nonpostal services, mainly for other Government agencies (e.g., sale of documentary stamps, provision of custodial service for building space occupied by other Government agencies);" and *id.* at 6-9 ("A first category of subsidized services is the nonpostal services performed for other government agencies (\$25.4 million in FY 1967) and very minor amounts of government mail (\$0.4 million in FY 1967))." (Footnote omitted.)

<sup>20</sup> Kappel Commission Report at 138. The Commission notes that the POD was "reimbursed for most such services." *Ibid.*

<sup>21</sup> The services identified in the petition include: Mall Package Shipment Program, Returns@Ease, Liberty Cash, Unisite Antenna Program, Retail Merchandise, NetPost CardStore, NetPost Certified Mail, USPS FirstClass Phone Card, Sure Money, USPS eBillPay, USPS Send Money, USPS Pay@Delivery, and USPS Electronic Postmark. For a description of these services, see PRC Order No. 1388, January 16, 2004, at 6-9. The petition also identified ePayments as a separate service. In its Report on Nonpostal Initiatives, March 10, 2003, the Postal Service indicated that ePayments has been superseded by Online Payment Services.

<sup>22</sup> CA and the OCA contend that the Postal Service's authority under section 404(a)(6) of the Act is limited to providing nonpostal services on behalf of other government agencies. Joint Letter at 25-26. The Postal Service argues that section 404(a)(6) authorizes it to provide commercial nonpostal services. In addition, it claims additional authority comes from its statutory mission and functions. Postal Service Comments at 13-17. For a discussion of this issue, see PRC Order No. 1388, January 16, 2004, at 15-21.

<sup>23</sup> PRC Order No. 1239, May 3 1999, at 13; see also PRC Order No. 1388, January 16, 2004, at 18-19.

<sup>24</sup> U.S. Postal Service, Development and Inventory of New Products, November 1998, Report No. GAO/GGD-99-15, at 3-4.

<sup>25</sup> *Id.* at 19; the figures are unaudited. Appendix III to the report contains a description of each service and summary of its financial results.

<sup>26</sup> *Id.* at 4, 19 and 20. For the first three quarters of FY 1998, the net loss narrowed to \$3.7 million, with four of the remaining 13 active services reporting net profits.

<sup>27</sup> U.S. Postal Service, Postal Activities and Laws Related to Electronic Commerce, September 2000, Report No. GAO/GGD-00-188, at 4; see also *id.* at 27-30 (GAO Report GGD-00-195).

<sup>28</sup> *Id.* at 27. In emphasizing the need for reliable financial data, GAO specifically noted that expense data should include, among other things, expenses related to (a) information systems and (b) other infrastructure initiatives used to support the e-commerce services. *Id.* at 29.

<sup>29</sup> U.S. Postal Service, Update on E-Commerce Activities and Privacy Protections, December 2001, Report No. GAO-02-79, at 6-7; see also *id.* at 11-15 (GAO Report 02-79).

<sup>30</sup> *Id.* at 3; see also *id.* at 15-16.

First, the President's Commission on the Postal Service stated its belief that the Postal Service, as a public entity, "has a responsibility to the public to be transparent in its financial reporting."<sup>31</sup> In addition, the President's Commission discussed the need to safeguard against cross-subsidization.<sup>32</sup>

Second, based on audits in 2003, the Office of Inspector General (OIG) reports that the NetPost Services program, which consists of Mailing Online (now discontinued), CardStore, Premium Postcards, and Certified Mail, fell short of original financial projections.<sup>33</sup> In addressing the issue of accountability, the OIG states: "The Postal Service must also continue to improve its financial operations to ensure it is accountable to the public and is providing the best service at the lowest cost."<sup>34</sup>

Finally, various stakeholders question whether the Postal Service should be engaged in nonpostal initiatives in competition with private industry.<sup>35</sup> While that policy issue is beyond the scope of this rulemaking, it highlights the need for reporting requirements that may aid in evaluating complaints that the Postal Service is competing unfairly. Of late, much has been written about the need for greater financial transparency by the Postal Service in general and, more specifically, regarding its nonpostal activities.<sup>36</sup> It is imperative that, to the extent of its authority to offer commercial nonpostal services in competition with private industry, the Postal Service, as a government-owned and -operated monopoly, price such

services in a manner that, based on publicly available data, provides demonstrable assurance that it is not competing unfairly.

### 3. Legal Authority

Section 3603 specifically authorizes the Commission to "promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5, and take any other action they deem necessary and proper to carry out their functions \* \* \*." 39 U.S.C. 3603. The Commission has concluded that it is "necessary and proper to carry out [its] functions" to amend its rules to ensure that the Postal Service's burgeoning nonpostal service activities are not being cross-subsidized by jurisdictional services.

The need for an accurate accounting of the Postal Service's "postal" and "nonpostal" activities is indisputably relevant to the Commission's authority to recommend rates for jurisdictional (postal) services. Section 3621 mandates that the Postal Service operate under a break-even requirement, *i.e.*, revenues from postal rates and fees must equal as nearly practicable the Postal Service's total estimated costs. 39 U.S.C. 3621. Section 3622(b)(3) requires that each class or type of mail bear the direct and indirect postal costs attributable to it plus a reasonably assignable portion of the Postal Service's other costs. In addition, section 403(c) prohibits both undue discrimination among users and any undue preference for any user.

To recommend rates that satisfy the Act, the Commission must have accurate cost and revenue information regarding both jurisdictional (domestic postal) services and non-jurisdictional (nonpostal and international) services. Without such information, the Commission cannot reasonably determine the net revenue to be generated by jurisdictional services that would enable the Postal Service to achieve a financial break-even result. Nor, without reliable estimates of the Postal Service's non-jurisdictional revenues and expenses, can the Commission ensure, under section 3622(b)(3), that costs properly attributable to non-jurisdictional services are not reflected in rates for jurisdictional services. Such data are "necessary and proper" for the Commission to recommend rates for jurisdictional services that are fair and equitable and free from cross-subsidies.

The Postal Service has recognized these principles, acknowledging that non-jurisdictional costs and revenues (concerning international mail services) are prerequisites to determine revenues

from jurisdictional services.<sup>37</sup> In addition, it has observed that nonpostal services must cover their costs, lest costs be unfairly shifted to users of other services.<sup>38</sup> Apparently to preclude this, the Postal Service stated that "it must seek to price its nonpostal services in a fair and reasonable way, including coverage of their attributable costs plus a reasonable contribution to overhead."<sup>39</sup>

The proposed rule does not represent a wholesale restructuring of the Commission's filing requirements. The Commission's Rules have long required the Postal Service to separate costs between postal and nonpostal services.<sup>40</sup> Briefly, the proposed amendments to rule 54 would require the Postal Service to identify each nonpostal service (rule 54(h)(1)(i)(a)), provide the total annual direct and indirect costs accrued in providing the service (rule 54(h)(1)(i)(b)), and provide the total annual revenues earned by the Postal Service in providing the service (rule 54(h)(1)(i)(c)). The proposed rule also encompasses those nonpostal services and products that are based on a strategic alliance or contract between the Postal Service and one or more parties. Rule 54(h)(1)(ii).

Concerning the scope of the proposed rule, two clarifying comments may be useful. First, while the proposed rule uses the term "nonpostal service" it is intended to encompass all of the Postal Service's commercial nonpostal activities, whether deemed a service, a product, or otherwise styled differently. Second, the proposed rule requires that the costs associated with any service that has been terminated or discontinued be reported. Regarding the phrase "terminated or discontinued," the intent of the rule is for the Postal Service to report the costs of every nonpostal service which it has ceased to offer whether temporarily or permanently, including reconstituting the service in a revised form.<sup>41</sup>

The proposed rule is designed primarily to provide sufficient information regarding the Postal

<sup>37</sup> PRC Op. R94-1, November 30, 1994, para. 1085.

<sup>38</sup> GAO Report GGD-00-188, *supra*, at 46.

<sup>39</sup> *Ibid.*

<sup>40</sup> *See, e.g.*, rule 54(h) promulgated March 22, 1972. 38 FR 7528.

<sup>41</sup> To be sure, a distinction may be drawn between terminate and discontinue even if both may be defined as "to put an end to." Webster's Encyclopedic Unabridged Dictionary of the English Language, 1989. In that regard, the Commission notes that in its Report on Nonpostal Initiatives, March 10, 2003, the Postal Service described the status of its Mail Package Shipment Program as "discontinued" (at 5), whereas it described that program as "terminated" in its Update to Report on Nonpostal Initiatives, November 14, 2003.

<sup>31</sup> Report of the President's Commission on the United States Postal Service, July 31, 2003, at 66.

<sup>32</sup> *Id.* at 67.

<sup>33</sup> Office of Inspector General, Semiannual Report to Congress, April 1, 2003-September 30, 2003, at 26.

<sup>34</sup> *Id.* at 8.

<sup>35</sup> *See, e.g.*, Comments of Pitney Bowes, Inc., April 18, 2003, Comments of the Computer & Communications Industry Association on the Motion of the Office of the Consumer Advocate to Request that the Commission Institute a Proceeding to Consider the Postal/Nonpostal Character of Specified Services and the Establishment of Rules to Require a Full Accounting of the Costs and Revenues of Nonpostal Services, January 28, 2003; and Comments of the Council for Citizens Against Government Waste on the Motion of the Office of the Consumer Advocate to Request that the Commission Institute a Proceeding to Consider the Postal/Nonpostal Character of Specified Services and the Establishment of Rules to Require a Full Accounting of the Costs and Revenues of Nonpostal Services, January 30, 2003.

<sup>36</sup> In addition to the various reports cited above, see also Letter to The Honorable Daniel K. Akaka, Chairman, and The Honorable Thad Cochran, Ranking Minority Member, Subcommittee on International Security, Proliferation, and Federal Services Committee on Governmental Affairs from the General Accounting Office by Bernard L. Ungar, Director, Physical Infrastructure Issues and Linda Calbom, Director, Financial Management and Assurance, November 13, 2002.

Service's nonpostal services and products to determine the presence (or absence) of cross-subsidies. The data are needed so that the Commission can recommend rates for jurisdictional services that comport with the requirements of the Act. It may be recalled that the Postal Service contended that the purpose of the specific amendments suggested by CA and OCA was to provide, among other things, information "to enable [the Commission] to critique the specific rates and fees established by the Postal Service for each nonpostal service."<sup>42</sup> In this context, the meaning of the term "critique" is unclear. Nonetheless, any concern the Postal Service may have about Commission review of its pricing of nonpostal services would be unfounded. The proposed rule does not require information about specific rates or rate design. Nor is the proposed rule intended as a means to set prices for nonpostal services or otherwise encumber management's legal authority to offer such services. This is not to suggest, however, that the Commission will eschew examining the performance of individual nonpostal services for purposes of considering claims of unfair competition.

To test for cross-subsidies, CA and OCA suggest that the Commission employ an incremental cost test, one endorsed by the Postal Service in rate proceedings, as follows: "The revenues collected from any service (or group of services) must be at least as large as the additional (or *incremental*) cost of adding that service (or group of services) to the enterprise's other offerings."<sup>43</sup> In Docket No. R97-1, the Commission accepted that description of the test,<sup>44</sup> and furthermore, in Docket No. R2000-1, indicated that it "remains interested in continuing the development of the incremental cost test to the point that it can be applied to reliably identify cross subsidies in proposed rates."<sup>45</sup> To the extent that nonpostal service incremental costs can be calculated, the incremental cost test would be an appropriate vehicle for testing the existence of cross-subsidies. In that regard, it would appear that the Postal Service believes that such costs can be calculated since, as noted below, it suggests the need for e-commerce services in the aggregate to cover their

incremental costs to avoid being cross-subsidized.

With respect to its nonpostal initiatives, the Postal Service has recognized that "complete and accurate cost, revenue and performance data [must] be tracked and periodically reported to senior management."<sup>46</sup> Consequently, any burden imposed on the Postal Service by the proposed rule would appear to be minimal. Moreover, the type of data the proposed rule is designed to yield is necessary to test for cross-subsidies, a standard the Postal Service appears to recognize as appropriate. For example, regarding its e-commerce services, the Postal Service has indicated that it will: ensure that in the aggregate, the revenues generated by such products and services will cover their direct and indirect costs as well as make a contribution to overhead. Further, eCommerce products and services in the aggregate are to cover their incremental costs and thus not be cross-subsidized. Also, it is intended that each eCommerce product and service should cover its costs.<sup>47</sup>

In conclusion, by statute the Postal Service, a public entity, is to be operated as a basic and fundamental service for the public. 39 U.S.C. 101(a). The public interest is not served if rates and fees for postal services are saddled with costs properly related to nonpostal services. Various stakeholders have expressed legitimate concerns regarding the nature and performance of the Postal Service's nonpostal activities. There is a demonstrable need for complete and accurate financial data regarding the Postal Service's nonpostal services and products to ensure that rates recommended by the Commission are free from cross-subsidies. In sum, the proposed rule, which provides for greater accountability and transparency regarding the Postal Service's nonpostal activities, is necessary and proper for the Commission to fulfill its ratemaking responsibility under the Act. The amendments to the Code of Federal Regulations proposed in this rulemaking are set forth following the ordering paragraphs herein.

<sup>46</sup> Letter from Mr. John M. Nolan, Deputy Postmaster General, to Mr. Bernard L. Ungar, Director, Government Business Operations Issues, August 29, 2000, GAO Report GGD-00-188, *supra*, at 74.

<sup>47</sup> GAO Report GGD-00-188, *supra*, at 46. In its comments to the GAO, the Postal Service recognizes the principle that nonpostal services must cover their costs, lest costs be unfairly shifted to users of other services. It states that it should price such services "in a fair and reasonable way, including coverage of their attributable costs plus a reasonable contribution to overhead." *Ibid*. It is unclear what, if any, distinction the Postal Service intended between the costs related to nonpostal services and those related to eCommerce products and services.

#### 4. Procedural Matters

*Comments.* By this order, the Commission hereby gives notice that comments from interested persons concerning the proposed amendments to the Commission's rules are due on or before April 15, 2004. Reply comments may also be filed and are due May 17, 2004.

*Representation of the general public.* In conformance with section 3624(a) of title 39, the Commission designates Shelley S. Dreifuss, director of the Commission's Office of the Consumer Advocate, to represent the interests of the general public in this proceeding. Pursuant to this designation, Ms. Dreifuss will direct the activities of Commission personnel assigned to assist her and, upon request, will supply their names for the record. Neither Ms. Dreifuss nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding.

#### *It is ordered:*

1. Interested persons may submit initial comments by no later than April 15, 2004. Reply comments may also be filed and are due no later than May 17, 2004.

2. Shelley S. Dreifuss, Director of the Office of the Consumer Advocate, is designated to represent the interests of the general public.

3. The Secretary shall arrange for publication of this Proposed Rulemaking in the **Federal Register**.

Issued: March 5, 2004.

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 proposes to amend 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, 3662, 3663.

#### **Subpart B—Rules Applicable to Requests for Changes in Rates or Fees**

2. Amend § 3001.54 as follows:

- a. Remove paragraph (b)(4).
- b. Add new paragraphs (h)(1)(i) and (ii) to read as follows:

#### **§ 3001.54 Contents of formal requests.**

\* \* \* \* \*

<sup>42</sup> Postal Service Comments at 38-39.

<sup>43</sup> Joint Letter at 38, n.97 (emphasis in original), citing Direct Testimony of John C. Panzar on Behalf of the United States Postal Service, Docket No. R97-1, Exh. USPS 11 at 8.

<sup>44</sup> PRC Op. R97-1, para. 4026.

<sup>45</sup> PRC Op. R2000-1, para. 4054.

(h) *Separation, attribution, and assignment of certain costs.* (1) \* \* \* (i) With respect to each nonpostal service provided by the Postal Service for the fiscal years specified in paragraph (f) of this section, the Postal Service shall provide:

(a) An identification and reasonably thorough description of the service, including any service terminated or discontinued during the relevant fiscal years;

(b) The total, annual, accrued direct and indirect costs, separately identified, to provide the service, including, but not limited to, development costs, start-up costs, capital costs, common and joint costs, and costs associated with each service that has been terminated or discontinued.

(c) The total annual revenues earned by the Postal Service in providing the service.

(ii) Nonpostal services referred to in paragraph (h)(1)(i) of this section include those based on a strategic alliance or contract between the Postal Service and one or more parties.

\* \* \* \* \*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

[FRL-7633-1]

#### Protection of Stratospheric Ozone: Notice of Data Availability; New Information Concerning SNAP Program Proposal on HCFC-141b Use in Foams

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

**ACTION:** Notice of data availability and request for comment.

**SUMMARY:** The Environmental Protection Agency is making available to the public information related to a July 11, 2000 proposed rule under the Significant New Alternatives Policy (SNAP) Program under section 612 of the Clean Air Act. The SNAP program reviews alternatives to Class I and Class II ozone depleting substances and approves use of alternatives which reduce the overall risk to public health and the environment. The July 11, 2000 proposed rule concerned use of several hydrochlorofluorocarbons (HCFCs) in foam blowing applications. On July 22, 2002, EPA took final action with respect to a number of the HCFCs, but deferred its decision on the use of HCFC-141b in

foam blowing applications due to the pending production and import ban of HCFC-141b (January 1, 2003) and incomplete information regarding the technical viability of alternatives. Since that publication, EPA received information from outside parties through letters, meetings, and the HCFC-141b Exemption Allowance Petition process (68 FR 2819) that addresses the use of HCFC-141b in foam blowing applications. Today, the Agency is making available for public review and comment information on alternatives to HCFC-141b currently used in each sector, and on the import of pre-blended HCFC-141b polyurethane systems. We plan to consider this information and any comment received during the comment period in determining what future action to take on our July 11, 2000 proposal regarding the use of HCFC-141b in foam blowing applications.

We are not soliciting comments on any other topic. In particular, we are not soliciting comments on the final SNAP foam rule published on July 22, 2002 (67 FR 47703) or the final HCFC allowance allocation rule, including the HCFC-141b exemption allowance petition process published on January 21, 2003 (68 FR 2819).

**DATES:** We will accept comments on the new data through April 9, 2004.

**ADDRESSES:** Comments may also be submitted electronically, by facsimile, or through hand delivery/courier. Follow the detailed instructions as provided at the beginning of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** For further information about this notice, contact Suzie Kocchi by telephone at (202) 343-9387, or by e-mail at [kocchi.suzanne@epa.gov](mailto:kocchi.suzanne@epa.gov). Overnight or courier deliveries should be sent to the office location at 1310 L Street, NW, Washington, DC 20005. Notices and rulemakings under the SNAP program are available on the Internet at <http://www.epa.gov/ozone/snap/regs>.

#### **SUPPLEMENTARY INFORMATION:**

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## **I. General Information**

### *A. How Can I Get Copies of Related Information?*

#### 1. Docket

EPA has established an official public docket for this action under Docket ID No. OAR-2003-0228 (continuation of Docket A-2000-18). The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Hard copies of documents from prior to the public comment period are found under Docket ID No. A-2000-18. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Air and Radiation Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566-1742, and the telephone number for the Air and Radiation Docket is (202) 566-1742.

#### 2. Electronic Access

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket