inventor patent'' having a term of seven years.

Response: As discussed previously, the core mission of the Office is the granting and issuing of patents and the registration of trademarks, and the disseminating to the public information with respect to patents and trademarks. Renaming or enhancing the Disclosure Document Program would not advance the core missions of the Office. In addition, viable alternatives to disclosure documents, such as notebooks and commercial invention registries, and provisional patent applications, currently exist. The creation of a new ''independent inventor patent'' having different rights and/or patent term would require a change to the patent statutes, and thus extends beyond the issues relating to the existing Disclosure Document Program.

Rule Making Considerations

Regulatory Flexibility Act

For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that the changes in this final rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). There is no statutory provision relating to the Disclosure Document Program. The program dates back to 1969, when commercial services were not as abundantly available. Now, there are commercially available ''electronic notebooks'' that may be used to document evidence of conception of an invention. In addition, inventors may maintain a logbook containing fixed pages that may be witnessed to document evidence of conception of an invention. These alternatives to a disclosure document are available to inventors at a cost that is comparable to or less than the fee for a disclosure document. Thus, the program is no longer necessary.

Executive Order 13132

This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Executive Order 12866

This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

Paperwork Reduction Act

The information collection requirements being suspended by this rule were approved in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) by the Office of Management and Budget (OMB) under 0651–0030 disclosure documents. Suspension of the reporting requirements under 0651–0030 is expected to reduce the public reporting burden by 4,445 hours and $236,000. This final rule will thus not impose any additional reporting or recordkeeping requirements on the public.

Interested persons are requested to send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office; and (2) Robert J. Spar, Director, Office of Patent Legal Administration, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and recordkeeping requirements, Small Businesses.

■ For the reasons set forth in the preamble, 37 CFR part 1 is amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

§ 1.21 [Amended]

■ 2. Section 1.21 is amended by removing and reserving paragraph (c).

Dated: October 27, 2006.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E6–18606 Filed 11–2–06; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201

[Docket Nos. RF 2006–2 and RF 2006–3]

Designation as a Preexisting Subscription Service

AGENCY: Copyright Office, Library of Congress.

ACTION: Final order.

SUMMARY: The Copyright Royalty Board, acting pursuant to statute, referred a novel question of law to the Register of Copyrights concerning the designation of certain digital subscription music services as preexisting subscription services. Specifically, the Copyright Royalty Board requested a decision by the Register of Copyrights regarding whether the universe of preexisting subscription services was limited to three specific services. The Register of Copyrights, in a timely fashion, transmitted a Memorandum Opinion to the Copyright Royalty Board confirming that only three music services qualify as a preexisting subscription service for purposes of performing a sound recording publicly by means of a subscription digital audio transmission pursuant to a statutory license.

DATES: Effective Date: October 20, 2006.

FOR FURTHER INFORMATION CONTACT: Renee Coe, Attorney Advisor, and Tanya M. Sandros, Associate General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION: In the Copyright Royalty and Distribution Reform Act of 2004, Congress amended Title 17 to replace the copyright arbitration royalty panel with the Copyright Royalty Board (''Board''). One of the functions of the new Board is to make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119 and 1004 of the Copyright Act. In any case in which a novel question of law concerning an interpretation of a provision of the Copyright Act is presented in a ratesetting proceeding, the Board has the authority to request a decision of the Register of Copyrights (''Register''), in writing, to resolve such questions. *See*17 U.S.C. 802(f)(1)(B)(i). For this purpose, a ''novel question of law'' is a question of law that has not been determined in prior decisions, determinations, and rulings described in Section 803(a) of the Copyright Act.

On January 4, 2006, SoundExchange, Inc. (''SoundExchange'') filed a motion requesting that the Board refer to the Register of Copyrights a novel question of law, concerning, *inter alia*, the status of ancillary music services offered by Sirius Satellite Radio, Inc. (''Sirius'') and XM Satellite Radio (''XM'') for purposes of utilizing the statutory license set forth in Section 114 of the Copyright Act, title 17 of the United States Code. On May 4, 2006, SoundExchange filed a second motion, again requesting a referral of a novel question of substantive law, this time concerning the status of THP Capstar (''Capstar''), a company which, according to the SoundExchange motion, had purchased some of the assets of DMX, Inc. (''DMX'') — a company which had been operating under the Section 114 statutory license as a preexisting service.

After considering the arguments presented by SoundExchange and the replies filed by Sirius, XM, and Capstar, the Board agreed that the matters raised by SoundExhange's motions did present a novel question of law and agreed to submit the question to the Register. Accordingly, on September 20, 2006, the Board transmitted to the Register: (1) two Orders, dated August 21, 2006, referring a novel question of law; and (2) the Initial and Reply Briefs filed with the Board by SoundExchange, Sirius and DMX. The Board's transmittal triggered the 30–day decision period prescribed in Section 802 of the Copyright Act. This statutory provision states that the Register ''shall transmit his or her decision to the Copyright Royalty Judges within 30 days after the Register of Copyrights receives all of the briefs or comments of the participants.'' *See*17 U.S.C. 802(f)(1)(B)(i). On October 20, 2006, the Register transmitted a Memorandum Opinion to the Board that addressed the novel question of law. To provide the public with notice of the decision rendered by the Register, the Memorandum Opinion is reproduced in its entirety, below.

Dated: October 26, 2006.

Marybeth Peters,

Register of Copyrights.

Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559

[Docket No. RF 2006–2]
In the Matter of
Adjusting of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services

[Docket No. RF 2006–3]
In the Matter of
Digital Performance Right in Sound Recordings and Ephemeral Recordings For a New Subscription Service

MEMORANDUM OPINION

I. Introduction

On September 20, 2006, the Copyright Royalty Board (''Board''), acting on requests by SoundExchange, Inc. (''SoundExchange'') and pursuant to 17 U.S.C. § 802(f)(1)(B), referred a novel question of law[1] to the Register of Copyrights (''Register'') regarding the conditions under which an entity may be a ''preexisting subscription service'' under 17 U.S.C. § 114(j)(11). Specifically, the Board requested a decision by the Register as to the following:

> Is the universe of preexisting subscription services—defined in 17 U.S.C. § 114(j)(11) as services which perform sound recordings by means of noninteractive audio—only subscription digital audio transmissions and which were in existence and making such transmissions to the public for a fee on or before July 31, 1998—[limited by][2] law to only Muzak (provided over the DiSH Network), Music Choice, and DMX?[3]

The Board also stated that it ''specifically reserves any questions regarding successorship for its own subsequent determination as questions of fact or mixed questions of fact and law.''

In sum, eligibility for a preexisting subscription service license is limited to subscription services that satisfy the definition of 17 U.S.C. § 114(j)(11), which includes being in operation on July 31, 1998 and continuously operating since that time. In 1998, Congress identified those entities which satisfied the definition and were eligible at that time as being DMX, Music Choice and the DiSH Network. Therefore, today, those same services are the only ones that may qualify as being preexisting subscription services, since they are the only ones which can satisfy the requirement of being in operation as of July 31, 1998. Moreover, for purposes of participating in a rate setting proceeding, the term ''preexisting subscription service'' is best interpreted as meaning the business entity which operates under the statutory license. A determination of whether DMX is the same service that was identified by the legislative history in 1998 and has operated continuously since that time requires a factual analysis that is beyond the scope of the Register's authority for questions presented under 17 U.S.C. § 802(f)(1)(B).

II. Background and General Overview

A. Parties and Nature of Dispute

In Docket No. 2005–5 CRB DTNSRA, SoundExchange, representing copyright owners of digital audio sound recordings, alleges that Sirius Satellite Radio (hereafter, ''Sirius''), which is a user of sound recordings by publicly performing them as digital audio transmissions, does not satisfy the eligibility criteria to operate under the § 114 statutory license as a preexisting subscription service. In Docket No. 2006–1 CRB DSTRA, the same dispute is repeated between those two parties.[4] There is an additional party in Docket No. RF 2006–1 CRB DSTRA because SoundExchange raises similar objections against DMX, Inc. (hereafter, ''DMX''), which also publicly performs digital audio sound recordings.

B. Historical Background to Legal Disputes

The factual allegations are briefly summarized here to put the legal arguments in context. However, evaluation of the limited factual arguments presented in the briefs are beyond the scope of this decision and will not be considered by the Register in rendering her decision on the novel question of law referred by the Board. SoundExchange alleges that Sirius and DMX are not eligible for a statutory license for preexisting subscription services because they are not the entities that were in existence and making digital audio transmissions on or before July 31, 1998. SoundExchange argues that Sirius is a completely different company than Muzak, the entity that is eligible for a preexisting subscription service license.

[1] A ''novel question of law'' is a question of law that has not been determined in prior decisions, determinations, and rulings described in Section 803(a) of the Copyright Act. *See* 17 U.S.C. § 802(f)(1)(B)(ii).

[2] The bracketed words are omitted in the Board's order for Docket No. 2006–01 DSTRA.

[3] The Board orders quoted a portion of subparagraph (11). This is the entire provision:''A preexisting subscription service'' is a service that performs sound recordings by means of noninteractive audio–only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

[4] The briefs filed by SoundExchange in the two proceedings are identical, as are those filed by Sirius.

DMX bases its eligibility on the fact that it now owns and operates the service historically known as DMX. DMX has been continuously performing sound recordings by means of digital audio transmission since 1986. It is not disputed that, since 1986, the business known as DMX changed ownership and was restructured many times, including four times since 1998.

As a subsidiary of Maxide Acquisition, Inc., DMX went into bankruptcy proceedings in 2005. The current entity operating as DMX was acquired by THP Capstar Acquisition Corp. as part of the bankruptcy proceedings. SoundExchange was a party to those proceedings, as a creditor to DMX. The current DMX did not assume liability for royalties owed to SoundExchange by the DMX business entity that incurred those obligations prior to the bankruptcy proceedings. While there is agreement on that fact, there appears to be disagreement about the nature of the interests acquired by the current entity operating as DMX. SoundExchange states that the current business entity that is DMX, Inc. is not a successor in interest to the business that previously operated as DMX because it acquired some but not all of the DMX operations. DMX responds that it acquired assets sufficient to operate the DMX subscription service. On June 3, 2005, DMX filed a *Notice of Use of Sound Recordings Under Statutory License* as a preexisting subscription service, under the name THP Capstar Acquisition Corp. d/b/a DMX Music.

C. *Legal Background*

1. Statutory Framework: The Digital Millennium Copyright Act

The Digital Millennium Copyright Act (''DMCA''), enacted in 1998, amended the law for the statutory license to perform sound recordings as digital audio transmissions by adding the statutory provisions at issue here, among other changes. Pub. L. No. 105–304, 112 Stat. 2860, 2891, 2897–99 (Oct. 28, 1998). A major goal of the DMCA is to establish a market–based standard for setting royalty rates paid to copyright owners for use of their works under the § 114 statutory license. This standard, codified at 17 U.S.C. § 114(f)(2)(B), requires that rates and terms be set to reflect those that ''would have been negotiated in the marketplace between a willing buyer and a willing seller.'' This standard must be used to set rates for all services making digital transmissions of sound recordings under the § 114 statutory license, except for the preexisting subscription services. Rates for the preexisting subscription services are set based upon the statutory factors set forth at 17 U.S.C. § 801(b)(1),[5] and this did not change with the passage of the DMCA. That means that licensees operating under the statutory license as preexisting subscription services have the right to operate under terms and rates that were first set by a Copyright Arbitration Royalty Panel (CARP)[6] in May of 1998, and readjusted in July of 2003,[7] in accordance with the § 801(b)(1) standard. Thus, it becomes important to determine which services qualify as a preexisting subscription service.

While the statute does not specifically identify which services meet the statutory definition of a preexisting subscription service, the DMCA conference report states very specifically that there are three services that satisfy the definition of a preexisting subscription service and identifies each service by name several times throughout the report. H.R. Conf. Rep. No. 105–796, at 80–81 and 89 (1998). At one place, the report states:

> There was [sic] only three such services that exist: DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and the DiSH Network (operated by Muzak). As of July 31, 1998, DMX and Music Choice made transmissions via both cable and satellite media; the DiSH Network was available only via satellite.

Id. at 81.

And again, in its comments about the procedures in 17 U.S.C. § 114(f)(1) for determining reasonable rates and terms for the preexisting services, the conference report identifies each service that qualifies as a preexisting service:

> The conferees note that this subsection applies only to the three services considered preexisting subscription services, DMX, Music Choice and the DiSH Network, and the two services considered preexisting satellite digital audio radio services, CD Radio and American Mobile Radio Corporation.

Id. at 85. *See also id* at 89.[8] (final recitation of names of preexisting services as part of discussion in the section discussing the definition of the term, preexisting subscription service).

The DMCA conference report also discusses the reasons why Congress decided not to subject these preexisting services to the new rate setting standard or impose additional limitations on their transmissions. Specifically, the conference report states that the rationale for its grandfathering provisions is to ''prevent disruption of the existing operations by such services,'' and it explains that the grandfathering provisions for preexisting satellite digital audio radio services and their ''historical operations'' have a similar rationale. *Id*. at 81. The report also explains that a preexisting service does not lose its designation as such in the event the service decides to utilize a new transmission medium, provided that the subscription transmissions are similar. In explaining this nuance, the conference report states:

> In grandfathering these services, the conferee's objective was to limit the

[5] The current provisions of 17 U.S.C. § 801(b)(1) are a reenactment of those that were in effect in 1998. The Copyright Royalty and Distribution Reform Act of 2004 completely revised Chapter 8 of title 17, *United States Code*. Pub. L. No. 108–419, 118 Stat. 2341 (2004). There are only minor differences between the language that was in effect for that provision in 1998 and what is currently in effect. The provisions of 17 U.S.C. § 802(b)(1) that were in effect in 1998 are contained in the Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541, 2594 (1976), as amended by the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104–39, 109 Stat. 336, 348 (1995); Copyright Technical Amendments, Pub. L. No. 105–80, 111 Stat. 1529, 1533 (1997) and the Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860, 2902 (1998).

[6] As part of the changes made by the Copyright Royalty and Distribution Reform Act of 2004, the Board, which referred the question to the Register under consideration here, replaced the CARP system that had been established in 1993 with the passage of the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103–198, 107 Stat. 2304.

[7] In 1995, Congress established the digital performance right for sound recordings subject to certain limitations including a statutory license. Digital Performance Right in Sound Recordings Act of 1995 (''DPRSRA''), Pub. L. No. 104–39, 109 Stat. 336 (1995). A subscription digital audio service could operate under the statutory license to publicly perform sound recordings by means of a digital audio transmission. provided that the service satisfied certain conditions. One of the conditions was to pay a royalty that would be determined by a CARP with reference to four objectives set forth at 17 U.S.C. § 801(b)(1). The initial rate setting proceeding began in 1996, early in the history of services making digital audio transmissions. The entities that participated in the proceedings as services making digital audio transmissions were Muzak, Digital Cable Radio Associates (operating under the trade name Music Choice) and DMX, Inc. (which merged into TCI Music, Inc. during the proceeding). *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25,394 (May 8, 1998). In that proceeding, the CARP ultimately concluded that, at that time in the development of those types of services, it set a low rate favoring the license holders ''because a rate set toward the high end would thwart the statutory objectives under current market conditions. The CARP expressly noted that a future CARP may reach an entirely different result based on the then–current economic state of the industry and new information on the Services' impact on the marketplace.'' *Id.* at 25,405. These rates and terms were adjusted in 2003 in accordance with an agreement negotiated by the interested parties. *See* 68 Fed. Reg. 4744 (January 30, 2003) and 68 Fed. Reg. 39,837 (July 3, 2003).

[8] The language used here also appears in an earlier congressional report on the DMCA. Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998. *House Comm. on the Judiciary*, 105th Congress, at 60 [Comm. Print 1998].

> grandfather to their existing services in the same transmission medium and to any new services in a new transmission medium where only transmissions similar to their existing service are provided. Thus, if a cable subscription music service making transmission on July 31, 1998, were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service.
>
> If, however, a subscription service making transmissions on July 31, 1998, were to offer a new service either in the same or new transmission medium by taking advantage [sic] of the capabilities of that medium, such new service would not qualify as a preexisting subscription service. For example, a service that offers video programming, such as advertising or other content, would not qualify as a preexisting service, provided that the video programming is not merely information about the service itself, the sound recordings being transmitted, the featured artists, composers or songwriters, or an advertisement to purchase the sound recording transmitted.

Id. at 89.[9]

Thus, it is clear why a service would seek to be classified as a preexisting subscription service for purposes of § 114. A designation as a preexisting subscription service means that the service will pay royalty fees that are set according to a standard that may result in below market rates and it has the added benefit that the service can make its offerings of subscription transmissions in a new medium without losing the its status as a preexisting service. The legislative history construing the statutory framework that provides for these services also makes clear that these benefits are limited to only a handful of services that were in operation on July 31,1998.[10]

2. Summary of the Parties' Legal Arguments

a. SoundExchange Legal Arguments

Statutory Language. SoundExchange argues that neither DMX nor Sirius is eligible for a statutory license for preexisting subscription services because they do not satisfy the statutory requirements for preexisting subscription services. SoundExchange argues that the statutory license for preexisting subscription services is limited to ''business entities which were 'in existence and ... making [digital audio] transmissions to the public for a fee on or before July 31, 1998,' 17 U.S.C. § 114(j)(11) and are specifically named'' in the DMCA's legislative history. *Initial Brief of SoundExchange Addressing the Question Referred to the Register Concerning the Universe of Services Eligible for the Preexisting Subscription Service Compulsory License (''SoundExchange Brief'')*, at 2. It states that the definition of preexisting subscription services ''speaks of a service as something that is in existence and making transmissions as of July 31, 1998.'' *Id.* at 11. SoundExchange also argues that the language of the statutory definition should be interpreted so that an ''entity'' is a preexisting subscription service, citing as evidence, 17 U.S.C. § 114(e)(1) and (2), which provides authority for parties to negotiate. SoundExchange argues that § 114(e) read in conjunction with the definition at § 114(j)(11) makes it clear that preexisting services are the business entities identified in the legislative history.

Legislative History. SoundExchange argues that the statutory license for preexisting subscription services was created solely for the entities identified in the legislative history and ''solely for the purpose of preserving their business expectancy of operating under the legal standard for setting rates and terms that existed prior to the DMCA.'' *Id.* In support, SoundExchange quotes the conference report language that states the purpose of the exemptions is to ''prevent disruption of existing operations by such services.'' *Id.* at 2,13. SoundExchange contends that Congress intended to benefit those companies that had made a substantial prior investment in digital audio transmission services in reliance on the preexisting rate standard and were in fact making such transmissions. *SoundExchange Brief*, at 3. SoundExchange states that the conference report establishes a requirement that there are only three entities qualified to be preexisting subscription services and the three must be limited to those specifically identified by name.

SoundExchange alleges that once the business expectancy of the entity identified in the legislative history is ''extinguished,'' the statutory license ceases to exist. *Id.* at 4 and 11. It objects to any subsequent entity benefitting from the grandfathering provision as creating a ''freely alienable property right to the predecessor legal regime for new market entrants,'' which, SoundExchange maintains, Congress did not intend. *Id.*

Principle of Narrow Construction. In additional arguments, SoundExchange cautions that the Register should adhere to the principle that, since statutory licenses are derogations of the rights of copyright owners, they must be construed as narrowly as possible, both in the scope of the license and the eligibility criteria. *Id.* at 14. In light of this principle, SoundExchange advocates that these statutory licenses should be interpreted narrowly to ''restrict the perpetuation or expansion'' of the preexisting subscription services statutory licenses. *Id.* at 15. SoundExchange points out that the grandfathering provision is a deep government intrusion into the market place that is potentially discriminatory and that, in the past, the Register herself expressed a preference for parity among statutory licensees. *Id.* at 15. SoundExchange also draws attention to that fact that, aside from the statutory license context, it is a general principle of law that grandfathering provisions should be construed strictly and narrowly. Id. In support of those principles, SoundExchange reminds the Copyright Office of a precedent in which it adhered to those principles of narrowly and strictly construing grandfathering provisions. *Id.* at 17, citing *Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944 (April 16, 1984).

Third Party Transfer of Statutory Licenses. SoundExchange also argued that statutory licenses are subject to the same restrictions that generally apply against transferability of non–exclusive copyright licenses, citing authorities in support of that principle. *Id.* at 19. SoundExchange *also cites Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9th Cir. 1984) in which, SoundExchange alleges, the United States Court of Appeals for the Ninth Circuit established that the same principles apply to statutory licenses as to voluntary licenses. *Id.*

Based on the foregoing considerations, SoundExchange alleges that Sirius and DMX are not eligible for a statutory license as preexisting subscription services since they are not entities that were in existence and making digital audio transmissions on or before July 31, 1998. SoundExchange asserts that neither one is identified in the legislative history naming entities that are preexisting subscription services. SoundExchange maintains that Sirius is a completely different company than Muzak, the entity identified as a preexisting subscription service. SoundExchange also rejects DMX's claim to eligibility for a statutory license for preexisting services on the basis that, following bankruptcy proceedings for the previous entity operating the DMX preexisting subscription service, THP Capstar did not acquire sufficient assets to be a party in interest that is eligible for the statutory license.

[9] *Id.*

[10] *Id.*

SoundExchange concedes that a company does not lose its eligibility for a statutory license merely because it changes its name. *Id.*, at n. 6.

b. Sirius

Statutory Language. Sirius argues that it is eligible for a statutory license as a preexisting subscription service because it is performing sound recordings by digital audio transmission for the DiSH Network which is the preexisting subscription service that was in existence on July 31, 1998. Sirius bases its eligibility on the reference in the legislative history to the DiSH Network as a preexisting subscription service and contends ''that Congress intended status as a [preexisting subscription service] to flow directly from the fact that the programming is transmitted over the DiSH Network.'' *Memorandum of Sirius Satellite Radio Inc. Concerning Eligibility for Status as a ''Preexisting Subscription Service,''* at 4. Sirius maintains that, as long as the preexisting subscription service has continued to be DiSH Network, any business entity that provides transmission consistent with the statutory requirements is eligible for the license. Sirius alleges that the definition of preexisting subscription service only requires that the service, not the business entity, be in existence and operating at that time. Sirius points out that to constrain the DiSH Network to rely solely on Muzak is illogical since that ignores the fact that DiSH Network has no control over Muzak's business and would be unable to control important aspects of its service, such as the quality or nature of the content. Sirius maintains that there is nothing in the statute or legislative history to indicate that DiSH Network was not free to substitute a different transmitting entity. That would be commercially unreasonable and unfair to DiSH Network.

Legislative History. Sirius further argues that the legislative history is not pertinent since the statute is clear on its face and there is no need to resort to legislative history to interpret the plain meaning of the statute. Nevertheless, Sirius also argues that the legislative history does not support SoundExchange's interpretation but, rather, emphasizes that the beneficiary of the grandfathering provision is the service, not the business entity.

Principle of Narrow Construction. Sirius rejects as irrelevant SoundExchange's reliance on statutory canons regarding the interpretation of grandfather clauses, arguing that the concept of a grandfather clause is irrelevant here since Congress has identified the eligible entities. Sirius states that Congress' goal is to protect the status of preexisting subscription services. Also, in rebuttal, Sirius cites instances in which courts have rejected the canons cited by SoundExchange and instances in which courts have decided that such clauses must be broadly construed, contrary to SoundExchange's assertion that they must be narrowly construed. *Reply Memorandum of Sirius Satellite Radio Inc. Concerning Eligibility for Status as A ''Preexisting Subscription Service,'' (''Sirius Reply'')*, at 7–8.

Sirius states that SoundExchange's reliance on the Register's 1984 cable compulsory license decision is irrelevant. In support of that position, Sirius argues that what was at issue in that cable compulsory licensing proceeding was a question of which rate to apply when a distant signal equivalent that was not grandfathered was substituted for a signal that was grandfathered, for which the Copyright Office relied on a determination previously made by the Copyright Royalty Tribunal, an organization that became defunct in 1993 and was replaced with the CARP system. Sirius states that the issue stands rather for the proposition that, in matters where the Tribunal had authority to regulate, the Register must give effect to the unambiguously expressed intent of the Tribunal.

Sirius dismisses SoundExchange's assertion that it is a fundamental principle that statutory licenses, as derogations of the rights of copyright owners, must be construed as narrowly as possible. Sirius rebuts that statement by pointing out that the statutory license for preexisting statutory licenses is, itself, a narrowly carved out performance right which is subject to many exceptions and limitations. Therefore, copyright owners, themselves, have very narrow and limited rights with regard to the statutory license to public performances of sound recordings. Therefore, Sirius reasons, it is the sound recording right itself that should be narrowly construed, not the restrictions in 17 U.S.C. § 114.

Past Practices. Sirius asserts that SoundExchange has acquiesced, by accepting royalty payments since 2004, in Sirius' having a statutory license for preexisting subscription services. Sirius maintains that, if it did not qualify for that statutory license, it was not obligated to pay any royalties since there is no fee established for new subscription services that provide audio programming bundled with cable or satellite services. Sirius also points out that SoundExchange received adequate notice to object to Sirius' eligibility prior to these proceedings because, in addition to receiving royalty payments, Sirius filed an Amended Notice of Use of Sound Recordings Under Statutory License, on May 18, 2004.

c. DMX

Statutory Construction. DMX argues in response that it is eligible for a statutory license for preexisting subscription services based on the plain language of the statute. It rejects SoundExchange's ''conflation of a service and the legal entity that operates it.'' *DMX Memorandum of Law on Novel, Material Question of Substantive Law Concerning the Preexisting Subscription Service Compulsory License (''DMX Memorandum''*), at 9. DMX points out that there are no requirements in the statute regarding ownership or restrictions on changes of control.

DMX states that § 114(d)(2)(B) is drafted to identify specific services that were in existence and operating on July 31, 1998, not to identify particular business entities that control those services. DMX cites several principles of statutory construction in support of its argument that the terms ''entity'' and ''entities'' should be interpreted as having separate meanings from the terms ''service'' and ''services'' where they appear in the statutory text. To illustrate this point, DMX cites examples that include: (a) § 114(d)(2)(C)(iv) (''the transmitting entity does not knowingly perform the sound recording, as part of a service that offers ... or a particular product or service advertised by the transmitting entity''), (b) § 114(d)(2)(C)(ix) (''the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title ... in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity''), (c) § 114(h)(1) (''If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under § 106(6), the copyright owner shall make [it] available ... to all bona fide entities that offer similar services''), (d) § 114(j)(6) (referring to transmissions made as ''part of a service'') and (e) § 114(j)(7) (''If an entity offers both interactive and noninteractive services''). *Id.* at 8.

In support of its interpretation that, if Congress had meant to limit the statutory license available under § 114(d)(2)(B) to specific business entities, rather than to subscription services, it could and would have drafted the statute accordingly. DMX cites well established principles of statutory construction in both its initial and reply briefs:

> SoundExchange's proffered interpretation of Section 114 thus violates the fundamental precept of statutory construction that requires interpretation of each provision in a section in such a way as to produce a harmonious whole. *See, e.g., Hammontree v. NLRB*, 925 F.2d 1486, 1496 (D.C. Cir. 1991) (''Established and familiar principles of statutory construction favor this latter interpretation ... for courts are obligated to construe statutes harmoniously whenever possible.'') (citation omitted). [SoundExchange's argument] also contravenes the equally fundamental interpretive principle that when a statute uses two different terms, Congress must have intended that two different meanings attach thereto. *See, e.g., American Portland Cement Alliance v. EPA,* 101 F.3d 772, 775 (D.C. Cir. 1996).

DMX Memorandum, at 8–9.

> The Supreme Court repeatedly has rejected arguments such as the one advanced by SoundExchange here that different terms used in the same statute should be presumed to have the same meaning. *See, e.g., Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n. 9 (2004) (''[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'') (citation omitted); Russello v. United States, 464 U.S. 16, 23 (1983) (''We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.''). ... The distinct language used by Congress is presumed to have been purposeful and is to be accorded appropriate deference. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (''[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'') (internal quotation omitted); *see also United States v. Labonte*, 520 U.S. 751, 757 (1997) (''We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant.'')

DMX, Inc.'s Reply Memorandum of Law on Novel, Material Question of Substantive Law Concerning the Preexisting Subscription Service Compulsory License (''DMX Reply Brief''), at 4.

Legislative History. DMX argues that there is no need to rely on the legislative history when the plain meaning of the statute is clear on its face. It rejects SoundExchange's interpretation of the legislative history, arguing instead for its own interpretation that, because the DMX subscription service is repeatedly named in the grandfathering provisions, it is the beneficiary of the exemption. DMX states that, like the statute, the legislative history treats a service as something offered or operated by an entity, rather than as a service being a particular business entity, citing H.R. Conf. Rep. No. 105–796, at 89.

Principle of Narrow Construction. DMX rejects SoundExchange's reliance on a Copyright Office interpretation of the compulsory copyright license for cable systems that involved a grandfathering issue. DMX states that, ''Just as the grandfathering provision at issue in the cable compulsory license regulation applied to signals rather than to [cable] systems, the grandfathering provision at issue here applies to services, not to the companies that operate them.'' *Id.*

Past Practices & Bankruptcy Proceedings. DMX points out that SoundExchange did not object to the reorganized business entities that held a preexisting subscription service statutory license to operate as DMX until recently, after DMX went through bankruptcy proceedings. DMX argues that SoundExchange is now acting contrary to its own past practice of acquiescing to the repeated, historical changes in ownership of the DMX preexisting subscription service. DMX alleges that SoundExchange is challenging DMX's right to a preexisting subscription service license to retaliate because the business currently controlling DMX did not take on the liability for royalty payments owed SoundExchange prior to the bankruptcy proceedings. DMX rejects SoundExchange's contention that DMX is not eligible for the preexisting subscription service statutory license because DMX did not acquire a statutory license from the former DMX in the bankruptcy proceedings. DMX points out that the CRB previously recognized that its eligibility for that license derives directly from the Copyright Act, referencing *Procedural Regulations for the Copyright Royalty Board,* 70 Fed. Reg. 30,901 (May 31, 2005) (''Statutory licenses ... enable a person to use copyrighted materials unilaterally, without contractual permission of the owners of the materials; so long as the user complies with applicable reporting and royalty payment obligations, such uses are not infringements of the owners' copyright.''). *Id.* at 10. DMX rebutted SoundExchange assertions that DMX is not eligible for the preexisting subscription service statutory license as a result of the bankruptcy proceedings. *Id.* at 9–11. *DMX Reply Brief*, at 7.

III. Legal Analysis

Statutory Language. Section 114 provides a statutory license to perform a sound recording publicly by means of a digital audio transmission. A major function of the language of § 114 is to identify the types of transmissions that fall within the scope of the license and the limitations on those transmissions, and to distinguish between the services that may utilize the license. To clarify the meaning of the terms used to identify these transmissions and the services, § 114 includes a number of definitions, including the definition for a ''preexisting subscription service,'' at § 114(j)(11).

The definition of a preexisting service specifies that in order for a service to qualify as a preexisting subscription service, the service must have been in existence and making transmissions of noninteractive audio–only subscription digital audio transmissions to the public for a fee on or before July 31, 1998. The current controversy surrounding the definition of a ''preexisting subscription service'' hinges on whether the service is a business entity which was offering music on a subscription basis on or before July 31, 1998, or whether the term merely refers to the use being made of the sound recordings during this time period.

DMX maintains that the term ''service,'' as used throughout § 114, does not extend to the business entity operating the preexisting subscription service but rather is a reference to the use of the music offered by DMX on or before July, 31,1998. Sirius takes a similar position, maintaining that the service, not the business entity, must have been in existence and operating at that time. SoundExchange, on the other hand, infers that the term ''service'' must refer to a specific business entity operating a digital music service because a service defined only by its use of sound recordings could not satisfy the requirement that the service was making transmissions on or before July 31, 1998.

In disputing SoundExchange's interpretation, DMX examines other provisions in § 114 to determine how these terms are used, citing, for example, § § 114(d)(2)(C)(iv) and (d)(2)(C)(ix), which uses the terms ''transmitting entity'' and ''service'' in the same paragraph. It also notes that the statute makes clear that an entity can offer more than one type of service, citing to the definition of an ''interactive service,''at § 114(j)(7) (noting that an entity can offer both an interactive and a noninteractive service) and to the section on licensing to affiliates at § 114(h). DMX maintains that under the rules of statutory construction use of these words in the same paragraph would necessarily mean that they are not one and the same.

However, § 114 is not a model of clarity or consistency and it is instructive to look closer at the use of the terms and examine further usages in § 114. For example, § 114(d)(2)(c) discusses the limitations on the transmissions made by two types of services, a new subscription service and a preexisting subscription service using a new medium for transmissions. In describing these limitations, the statute arguably uses the term ''transmitting entity'' as a generic term applicable to both types of services when discussing what these services cannot do when making the transmissions. But this interpretation is tenuous, especially in light of § 114(d)(2)(C)(iv), without further support in the statute of the dual nature of the term ''service.''

A more compelling argument for an interpretation that ''service'' means the ''business entity'' making the subscription transmissions can be made based upon an analysis of the sections that set forth the procedures for establishing rates and terms for the subscription transmissions. Section 114(e) specifically authorizes copyright owners of sound recordings and the entities performing the sound recordings to negotiate the rates and terms for use of the sound recordings under § 114. Again, use of the term ''entity'' appears to be used to encompass all entities that may operate under the statutory license and as DMX points out there is nothing in this section that would equate an ''entity'' with a ''service.'' However, § 114(e) must be read in conjunction with § § 114(f)(1) and (2), where it is necessary to distinguish among the ''entities'' for purposes of setting rates and terms because different standards are used to set rates for different ''services.''

Section 114(f)(1) sets forth the procedures for setting rates and terms for the preexisting subscription services and preexisting satellite digital audio radio services. It provides a negotiation period to allow the copyright owners of the sound recordings and the licensees to reach an agreement on the rates and terms rather than engage in a more formal hearing process. Moreover, it specifically names in the last sentence of this section the preexisting services and the preexisting satellite digital audio radio services as the entities authorized under § 114(e) to participate in this process. It reads as follows: ''Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Copyright Royalty Judges licenses covering such subscription transmissions with respect to such sound recordings.'' The identification of the preexisting subscription services as entities authorized to engage in the negotiations of the rates for the transmissions made by these services supports an interpretation in this context that the use of the term preexisting subscription service refers to the business entity that operates under the license and pays the royalty fees for the transmissions it makes.

Section 114(c)(3) also supports the interpretation. It discusses the circumstances under which an interactive service shall be granted an exclusive license for the public performance of a sound recording by means of a digital audio transmission. If the term ''interactive service'' as used in this context was limited only to the use of the sound recordings in such a way as to deliver the work on request to a recipient, then the sentence would have no meaning, since it is a business entity and not the service itself that must secure the license in order to offer the service.

At the end of this analysis, we recognize that both DMX and Sound Exchange offer plausible interpretations of the term ''preexisting subscription service,'' and each finds support to some extent for its interpretation in the statutory language. Since a clear meaning for the term ''preexisting subscription service'' cannot be discerned by analyzing the use of the term in the statute, it is necessary to turn to the legislative history to inform the decision.

Legislative History. The legislative history is pertinent because it specifically identifies the entities upon which Congress confers the status, and because it explains the rationale for making this distinction among the services. As previously quoted, the Conference Report identifies DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates and the DiSH Network (operated by Muzak), as the only three preexisting subscription services. Conf. Report at 81. While this information is helpful, it goes no farther than to name the entities that were in existence and making transmissions on or before July 31, 1998.

A more fruitful line of inquiry focuses on the reason why Congress chose to grandfather these three services as preexisting subscription services. On this point, the conference report states that:

> In grandfathering these services, the conferees' [sic] objective was to limit the grandfather to their existing services in the same transmission medium and to any new services in a new transmission medium where only transmissions similar to their existing service are provided.

Id. at 89.

While it would appear from this excerpt that Congress's purpose in grandfathering these services was to preserve a particular program offering, it was not its only purpose or even necessarily its major goal.

The Conference Report also makes clear that Congress distinguished between preexisting subscription services and new subscription services as a way to prevent disruption of the existing operations of the services that were in existence and operating before July 31, 1998. *Id.* at 81. It understood that the entities so designated as preexisting had invested a great deal of resources into developing their services under the terms established in 1995 as part of the Digital Performance Right in Sound Recording Act of 1995, and that those services deserved to develop their businesses accordingly. While DMX and Sirius would like to interpret the reference to ''existing operations'' as meaning only the offerings made by these named services before the cut–off date, the legislative history does not support that interpretation when these statements are read in context with the explanations for why Congress also grandfathered two other entities as preexisting satellite digital audio services, identified as CD Radio and American Mobile Radio Corporation.

First, the legislative history makes it clear that the two named preexisting satellite digital audio services are the business entities that purchased the FCC licenses to develop the satellite systems which they used to offer their subscription services. And second, the existing operations that Congress meant to protect included the development of the satellite systems over which these services were to operate and not just the day–to–day operations involved in making the music available to the subscriber. Had Congress been interested in only protecting the use of the music, then it would have not expressed its concerns about disrupting business plans to build facilities over which these services were to be offered.[11]

In construing the statutory language together with the legislative history, the logical conclusion is that Congress did use the term ''service'' to mean both the program offerings made on a subscription basis to the public and the business entity that secures the license to make the subscription transmissions. Although DMX contends that it would be difficult to determine whether a specific use of the term ''preexisting subscription service'' relates to the business entity or the use of the sound recordings by that entity, DMX Reply Brief at 6, that is not a reason to reject the conclusion. While usage of the term ''preexisting subscription service'' is ambiguous in some instances, its use to identify who receives the benefits of the designation and has the authority to operate under the statutory license and enter into negotiations to set rates and terms can only be read as referring to the business entity identified as the preexisting subscription service. To do otherwise would be to create confusion as to what entity had the right to participate in the rate setting process. Moreover, this approach closely adheres to the principles that support the adoption of a grandfather provision as explained more fully below.

Principle of Narrow Construction. Grandfathering provisions are frequently included in statutes to ensure continuity and to reward the investment and efforts of those who were the first to take on the struggles and risks of novel enterprises or methods. Moreover, as was stated in the arguments, it is a well established canon of statutory interpretation that grandfather provisions are to be narrowly interpreted *See United States v. Allan Drug Corporation*, 357 F.2d 713 (10th Cir. 1966) (noting that grandfather clause exemption must be construed strictly against one who invokes it).

Thus, based upon these principles of statutory construction and the explanations offered in the legislative history for the adoption of the grandfathered services, the better reading of the statute is that the preexisting services must be limited to the three named entities in the Conference Report, *i.e.*, DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and the DiSH Network (operated by Muzak) that were in existence and making transmissions of sound recordings by means of noninteractive audio–only subscription digital transmissions on or before July 31, 1998.

The question remains, however, whether the designation applies to the type of offerings made by the service or the business entity operating at the relevant time. As discussed previously, we conclude that the beneficiary of the grandfather provision should be the business entity that was providing the service at the time. While there is a debate among the parties as to whether DMX today is the same business entity as it was in 1998, the Office declines to reach this question because it would involve the interpretation of facts that go beyond the scope of this inquiry.

On the other hand, it is appropriate for the Office to consider whether for purposes of § 114 Sirius can provide the same type of music service that Muzak offered in 1998 through DiSH Network. The answer to this inquiry hinges on the status of DiSH Network and whether it or the music service content provider offered over its network is the beneficiary of the grandfather provision. On this point, Sirius concedes that DiSH Network is a satellite television service which, in 1998, sought out a music service provider to supply the audio music channels. It also notes that the § 114 statutory license covers only audio services and that the royalty fees are calculated based on the revenues associated with the provision of the sound recordings and not the revenues generated by DiSH Network. We also note that DiSH Network is the apparent beneficiary of the exemption in § 114(d)(1)(C)(iii) which allows a direct broadcast satellite service provider to retransmit to the listener noninteractive music programming provided by a licensed source. Yet in spite of these facts, Sirius maintains that DiSH Network is the preexisting subscription service because it was specifically named in the legislative history, or alternatively, that Sirius itself is the beneficiary of the designation as a preexisting service through DiSH, because it is the provider of music services over the DiSH Network.

While it is clear that DiSH is identified in the legislative history as the preexisting service, often without any reference to Muzak as the provider of the audio channels carried over the DiSH network, the DiSH Network standing alone cannot be viewed as the preexisting service, nor does it have a need to be designated as such because of the exemption it enjoys under § 114(d)(1)(C)(iii). Section 114 involves the licensing of the public performance right to make digital transmissions of sound recordings. In 1998, the service making these transmissions over the DiSH Network was Muzak. Thus, it was Muzak that made the transmissions under the § 114 statutory license and it was Muzak that incurred the obligation to pay the royalties. Because DiSH itself did not operate under the § 114 statutory license, it makes no sense for it alone to be considered the preexisting service. Thus, the reference to DiSH Network in the legislative history is best interpreted as including the actual music service that did offer subscription transmissions of sound recordings over the DiSH Network at that time, *i.e.*, Muzak.

Moreover, to allow Sirius to step into the shoes of Muzak and offer the same type of subscription transmissions is inconsistent with a narrow construction of the grandfather provision. As stated earlier, the purpose of the grandfather provision was to prevent the disruption of existing operations which, in this case, was the offering of music channels supplied by Muzak. Muzak was the pioneer music service that incurred both the benefits and risks that came with its investment, and one such benefit was its status as a preexisting subscription service so long as it provided its music offerings over the DiSH Network. Sirius, however, cannot assume the benefits of the preexisting subscription service designation when it did not offer a subscription service during the industry's nascent years.

Third Party Transfer of Statutory Licenses. SoundExchange's arguments that Sirius and DMX are not entitled to assume the benefits of the statutory licenses held by Muzak and the previous business entity known as DMX is based, in part, on its theory that those previous business entities were barred from transferring their licenses due to restrictions similar to those against the transferability of non–exclusive copyright licenses. In support, SoundExchange cites *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9th Cir. 1984). That authority is not persuasive on this point because the U.S. Court of Appeals for the Ninth Circuit stated that it did not reach the issue of whether the license at issue was compulsory. *Id.* at 1333.

Statutory licenses are freely available to all potential users without consent from copyright owners or other licensees, provided that the user adheres to the regulations governing the statutory license, including all reporting requirements and royalty payment obligations.

[11] *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25,394 (May 8, 1998). In that proceeding, the CARP ultimately concluded that, at that time in the development of those types of services, it set a low rate favoring the license holders ''because a rate set toward the high end would thwart the statutory objectives under current market conditions.''

Past Practices and Bankruptcy. Issues relating to whether the parties had sufficient notice to be deemed to have acquiesced in matters now being challenged are beyond the question referred and are for the CRB's determination. The same is true with regard to the impact that bankruptcy proceedings may have on the outcome of its proceedings.

Conclusion. The Copyright Royalty Board referred a novel question of law to the Register which asked: ''Is the universe of preexisting subscription services, [as defined by § 114(j)(11)], limited by law to only Muzak (provided over the DiSH Network), Music Choice, and DMX?'' Before answering this question, the Office contemplated what Congress meant by the term ''preexisting subscription service,'' because there was a controversy over whether the term applied to the use of the sound recording, or the business entity that operated under the § 114 statutory license. Ultimately, the Office discerned that the term is used in the statute in both manners. A preexisting subscription service is used in § 114 sometimes to refer to the aggregate of the subscription transmissions that were made by the entities identified in the legislative history, and sometimes to identify the business entities operating under the statutory license on or before July 31, 1998, and that have the authority to negotiate rates and terms for use of the license. Whether Congress intended this outcome is unclear, but the Office's interpretation offers a workable reading of the statute and the legislative intent.

Nevertheless, for purposes of the question posed by the Board, the determination that the term refers to the business entities in existence and making subscription transmissions on or before July 31,1998, appears to be the more appropriate reading of the term ''preexisting subscription service'' for purposes of determining whether an entity can operate under the statutory license as a preexisting subscription service and participate in the rate setting process. Moreover, in light of Congress's decision to identify specific entities as being preexisting subscription services, it appears Congress meant to limit preexisting subscription service status to the three entities identified by the Board.

October 20, 2006.

Marybeth Peters,

Register of Copyrights

[FR Doc. E6–18590 Filed 11–2–06; 8:45 am]

BILLING CODE 1410–30–S

POSTAL SERVICE

39 CFR Part 3

Amendment to Bylaws of the Board of Governors

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: On September 11, 2006, the Board of Governors of the United States Postal Service adopted a revision to its bylaws. The purpose of this revision was to enable Postal Service management to submit relatively minor Negotiated Service Agreements (NSAs) to the Postal Rate Commission for consideration without first submitting those minor NSAs to the Postal Service Board of Governors. Consequently, the Postal Service hereby publishes this final rule.

DATES: *Effective Date:* September 11, 2006.

FOR FURTHER INFORMATION CONTACT: Wendy A. Hocking, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260–1000, (202) 268–4800.

SUPPLEMENTARY INFORMATION: This document publishes a revision to 39 CFR 3.3 of the Bylaws of the Board of Governors of the United States Postal Service. The Board's bylaws in paragraphs (f) and (g) of § 3.3 had reserved to the full Board the authorization for filing any request to the Postal Rate Commission for a recommended decision on changes in rates or mail classification. The Board revised paragraphs (f) and (g) of § 3.3 to provide that the Postmaster General may authorize the filing of a request to the Postal Rate Commission for minor NSAs without first submitting the request to the Postal Service Board of Governors. The changes were adopted by the Board on September 11, 2006. The purpose of the changes was to enable Postal Service management to submit relatively minor NSAs to the Postal Rate Commission without first coming to the Board for approval. This exception would apply only for submissions under the Commission's rules for streamlined consideration of requests to renew an existing NSA or to add one that is ''functionally equivalent'' to an existing NSA. Proposals for new baseline NSAs would still require Board approval in advance. At the end of the process, when the Commission completes its proceedings and submits a recommended decision, final consideration by the Governors is required in all cases by statute.

List of Subjects in 39 CFR Part 3

Administrative practice and procedure, Organization and functions (Government agencies), Postal Service.

■ Accordingly, part 3 of title 39 CFR is amended as follows:

PART 3—BOARD OF GOVERNORS (ARTICLE 111)

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

Authority: 39 U.S.C. 202, 203, 205, 401(2), (10), 402, 414, 416, 1003, 2802–2804, 3013; 5 U.S.C. 552b (g), (j); Inspector General Act, 5 U.S.C. app.; Pub.L. 107–67, 115 Stat.514 (2001).

■ 2. Section 3.3 is amended by revising paragraphs (f) and (g) to read as follows:

§ 3.3 Matters reserved for decision by the Board.

* * * * *

(f) Authorization of the Postal Service to request the Postal Rate Commission to submit a recommended decision on changes in postal rates, except that the Postmaster General may authorize such requests with respect to Negotiated Service Agreements filed for consideration under 39 CFR 3001.196 or 3001.197.

(g) Authorization of the Postal Service to request the Postal Rate Commission to submit a recommended decision on changes in the mail classification schedule, except that the Postmaster General may authorize such requests with respect to Negotiated Service Agreements filed for consideration under 39 CFR 3001.196 or 3001.197.

* * * * *

Neva Watson,

Attorney, Legislative, Legal Policy and Ratemaking.

[FR Doc. E6–18545 Filed 11–1–06; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2006–0629; FRL–8238–9]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Nitrogen Oxides Allowance Allocations for 2008

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the Maryland State Implementation Plan (SIP). The revision consists of the