



School of Public Policy

Study on Universal Postal Service and the Postal Monopoly

Appendix H

Policy Options

Contents

1	Introduction: Three Pillars of Modern Postal Policy	5
2	Options for Ensuring Universal Postal Service.....	10
2.1	<i>Pros and cons of a legally specified USO.....</i>	<i>10</i>
2.1.1	Considerations supporting a legal USO.....	10
2.1.2	Considerations opposing a legally specified USO.....	14
2.2	<i>Status quo.....</i>	<i>17</i>
2.3	<i>Option 1. No USO (except price rules).....</i>	<i>18</i>
2.4	<i>Option 2. Statutory USO.....</i>	<i>21</i>
2.5	<i>Option 2. Remedial regulation administered by the Commission</i>	<i>23</i>
2.6	<i>Option 3. License-based regulation administered by the Commission.....</i>	<i>28</i>
2.7	<i>Option 4. Contract between government and the Postal Service</i>	<i>30</i>
3	Options for Defining the Components of the USO	32
3.1	<i>Geographic scope of universal services</i>	<i>32</i>
3.1.1	Status quo.....	32
3.1.2	Option 1. To all points in the United States.....	33
3.1.3	Option 2. To the home or premise of every natural or legal person.	33
3.1.4	Option 3. To cities, villages, and along principal routes of public transportation in rural areas.	34
3.1.5	Option 4. Exceptional circumstances.....	34
3.2	<i>Range of universal service products.....</i>	<i>35</i>
3.2.1	Status quo.....	35
3.2.2	Option 1. All postal products provided by the Postal Service	36
3.2.3	Option 2. Market dominant products provided by the Postal Service	37
3.2.4	Option 3. Postal products covered by the postal monopoly law.....	38
3.2.5	Option 4. Transmission of items of certain physical characteristics	39
3.2.6	Option 5. Transmission of items necessary to bind the Nation together ..	40
3.3	<i>Access to universal services.....</i>	<i>42</i>
3.3.1	Status quo.....	42
3.3.2	Option 1. Standards for location of post offices and postal agencies.	43
3.3.3	Option 2. Standards for location of public collection boxes.....	45
3.4	<i>Delivery of universal services.....</i>	<i>46</i>

3.4.1	Status quo.....	46
3.4.2	Option 1. Standards for delivery mode.....	47
3.4.3	Option 2. Standards for frequency of delivery.....	48
3.5	<i>Prices of universal services</i>	51
3.5.1	Status quo.....	51
3.5.2	Option 1. Statutory price caps limited to single-piece products.	54
3.5.3	Option 2. Geographically uniform prices for single-piece first class letters	55
3.5.4	Option 3. Revise uniform rate rule for library and media mail	58
3.5.5	Option 4. Commercial flexibility for Postal Service pricing competitive products.....	58
3.6	<i>Quality of universal services</i>	59
3.6.1	Status quo.....	59
3.6.2	Option 1. Quality of service standards for some or all universal services	59
3.6.3	Option 2. Criteria for quality of service standards set by the Postal Service	60
3.6.4	Option 3. Expanded Commission review of changes in universal services	61
3.7	<i>Protection of the rights of users of universal services</i>	61
3.7.1	Status quo.....	61
3.7.2	Option 1. Transparent procedures for complaint handling and redress by the Postal Service (and other providers of universal service).....	62
3.7.3	Option 2. Right of appeal of complaint case to an independent body	62
4	Options for the Postal Monopoly.....	63
4.1	<i>Pros and cons of a postal monopoly</i>	63
4.1.1	Justifications for the postal monopoly	63
4.1.2	Considerations against continuing the postal monopoly	68
4.2	<i>Status quo</i>	72
4.3	<i>Option 1. Clarify the scope of postal monopoly</i>	74
4.3.1	Define the term "letters and packets" as used in current law	74
4.3.2	Define the monopoly to cover first class mail	75
4.3.3	Monopoly over carriage of textual communications recorded on paper ..	76
4.3.4	Repeal obsolete statutory provisions	78

4.4	<i>Option 2. Provide for an orderly phase out of the postal monopoly and related legal constraints on the Postal Service.....</i>	78
4.4.1	Options for phasing out the postal monopoly.....	79
4.4.2	Developing a "competition-friendly" universal service obligation	80
4.4.3	Making Postal Service more "competition capable"	81
4.5	<i>Option 3. Authorize the Commission to limit the postal monopoly where unnecessary to sustain universal service</i>	82
5	Options for the Mailbox Monopoly	85
5.1	<i>Pros and cons of a mailbox monopoly.....</i>	85
5.2	<i>Status quo.....</i>	90
5.3	<i>Option 1. Authorize the Commission to regulate access to the mailbox</i>	91
5.4	<i>Option 2. Authorize the mailbox owner to control the mailbox.....</i>	92
6	Final Observations	95
6.1	<i>Role of a USO</i>	95
6.2	<i>Administration of a USO.....</i>	98
6.3	<i>The scope of the USO.....</i>	99
6.4	<i>Postal monopoly.....</i>	106
6.5	<i>Mailbox monopoly</i>	108
6.6	<i>The way forward</i>	108

1 Introduction: Three Pillars of Modern Postal Policy

Modern national postal policy may be thought of as resting upon three legal pillars: the universal service obligation, the monopoly laws, and the institutional organization of the Postal Service. In the United States, discussion of postal policy has usually focused on the finer points of rate caps, cost allocation, market dominance, workshare discounts, cross-subsidies, and the like. In the Postal Accountability and Enhancement Act (PAEA) of 2006, however, Congress requested detailed analyses of the fundamental determinants of national postal policy. A study on the universal service obligation and the monopoly laws was committed to the Postal Regulatory Commission, and a review of the institutional organization of the national post office was entrusted to the General Accounting Office.¹

The idea that national postal policy is determined by three primary legal institutions is relatively recent. Prior to 1970, national postal policy was determined by the political process. Congress approved the budget of the Post Office each year, approved appointments to major posts, and made most the key operational decisions. After World War II, Congressional consideration of postal policy focused on two key issues, rates and wages. If there was a unifying theme to public policy discussions, it was the lengthy debate over whether the Post Office was a public service or a business. While the postal monopoly law of 1872 was of central importance for the Post Office, it was viewed by Congress more as an axiom than an element of policy.

In the 1970 Postal Reorganization Act, Congress transferred control over most postal policy issues to an independent government agency, the Postal Service. The 1970 act authorized the Postal Service to manage the national postal system in a "business-like" manner, for the most part free of direct control by the President, Congress, or a regulatory agency. Within general statutory guidelines, the Postal

¹ The PAEA also directed the Federal Trade Commission to prepare an analysis of how U.S. law generally applies differently to competitive products of the Postal Service and similar products of private companies and to recommend ways to ending such differences. The deadline for this study was set one year before the deadline for the Commission's study on the universal service obligation and the monopoly laws and four years before the GAO study on institutional reform. By clarifying and evaluating legal distinctions, the FTC survey provides a useful starting point for analysis of each of the three pillars of modern postal policy.

Service was authorized to determine for itself the budget, rates and classifications, modes of access and delivery, compensation of employees, capital expenditures, and the scope of the monopoly. The role of Congress consisted mainly of approving supplemental appropriations. The Postal Rate Commission's mission was focused on cost attribution and the appropriate allocation of institutional costs among groups of mailers. It was never intended that the Commission should establish a legal framework for provision of postal services in a manner corresponding to the regulation of the aviation and surface transportation industries by the Civil Aeronautics Board and the Interstate Commerce Commission, respectively. After a few years of transitional problems, policy debates tended to concentrate on issues such as the appropriate allocation of responsibilities between the Commission and the Postal Service and the proper approaches towards price regulation and cost allocation.

A recasting of the fundamental bases of postal policy has emerged gradually after more than a decade of congressional deliberations over modernization of the Postal Reorganization Act. The initial impetus for legislation came from calls by the Postal Service for more commercial flexibility to allow it to adapt to changing commercial circumstances. When Congressional efforts stalled, President George W. Bush appointed a special commission to recommend "a proposed vision for the future of the United States Postal Service" over the long term.² While endorsing most of the reforms then under consideration by Congress, the President's Commission also cast a spotlight on more fundamental issues. The President's Commission emphasized the changing nature of communications, affirmed the importance of universal service while urging a more flexible approach over time, raised basic questions about the scope and future of the monopoly laws, and urged sweeping changes in the organizational structure and management of the Postal Service.³ The President's

² Exec. Order No. 13278, 67 Fed. Reg. 76671 (Dec. 13, 2002).

³ See, e.g., President's Commission, *Embracing the Future* 7-13 (changing communications environment, need for new business model); 21-26 (modern "archaic" postal monopoly law, revisit mailbox monopoly law); 28-30 (long term review of universal service), 35-51 (reorganize management), 62-65 (case for Commission administration of universal service obligation and monopoly laws), 107-37 (restructuring management-employee relations).

Commission articulated the long term questions that needed to be addressed but eschewed simplistic answers.

In the PAEA, Congress consolidated these questions into two major studies addressing three topics: the universal service obligation, the monopoly laws, and institutional reform. This conceptual framework is similar to that used in other industrialized countries. Although other countries have their own postal traditions, all modern economies face the same basic challenge: how to adapt a traditional postal system that has long played a critical role in commerce and society to fundamental changes in national and global communications markets. Proceeding by somewhat different paths to somewhat different ends, all countries are finding that a vocabulary that includes terms like USO, monopoly, and institutional reform helps to frame the public policy issues at stake.

In American postal law, the idea of a "universal service obligation" is novel and requires clarification. Unlike the concepts of postal monopoly and institutional organization, the term USO cannot be easily and immediately associated with a long legal history or specific statutory antecedents. The idea of a universal service obligation (USO) has been popularized by the Postal Service in the last decade but without a specific indication of how it should be defined or administered. The origin of the term seems to be a public relations effort by the American Telephone and Telegraph Company in the early 1900s. The term was adopted as a usual legal concept in American and European telecommunications law. In the European Union, the concept of a "universal service obligation" has been introduced into postal law in the course of postal reform efforts beginning in the 1980s. In this appendix, the term "universal service obligation" (USO) refers to a *legal standard* that defines with specificity the level of postal services whose availability will be assured to persons and in places covered by the USO. This appears to be the way the term is used in the European Union and the consistent with intent of the inquiry ordered by Congress in the PAEA.

Describing modern postal policy in terms of three legal pillars is, of course, only a way of clarifying and organizing the public policy choices that must be made. In

reality, the three pillars are closely interrelated. Each serves as part of a larger legal framework that regulates a system of complementary public and private delivery services. The nature of the universal service obligation will affect the scope of the monopoly laws. The scope of the monopoly has implications for institutional reform. The direction of institutional reform will determine how the burden of the universal service obligation is distributed and enforced. This appendix identifies and evaluates options for reforming two of the three legal pillars of postal policy: the universal service obligation and the monopoly laws. Institutional reform will be touched only to highlight potential interrelationships between this study and the GAO study to follow.

This appendix was prepared by the members of the team of consultants assembled by George Mason University. The specific legal provisions and ideas set out in this appendix represent our collective best judgment as to the range of the plausible options available to Congress and the President. There are several sources for the "plausible" options included in this appendix. Many are components of postal reforms debated and adopted in other industrialized countries. Some are adapted from regulatory reform in other sectors in the U.S. economy. Other options are taken from the report of the President's Commission on the United States Postal Service. In some cases, the options presented are derived from postal reform proposals which were put forward in Congress and, although not accepted when originally proposed, now seem to merit reconsideration. In a few instances, the list of options includes ideas that appear to be widely, but erroneously, thought to be part of current law. In some cases, the options are alternatives to one another since they are mutually exclusive; in other cases, multiple options could be adopted without conflict. In all cases, the status quo is deemed an option by default.

Our goal has been to prepare a set of options which reasonable persons—well versed in the history of the postal sector in the United States and related developments in the U.S. and other countries—will consider a fair sampling of policy alternatives likely to advance the public interest of the United States by fostering a modern and innovative postal system suited to the needs and expectations of the American people in the twenty-first century. Since reasonable persons disagree in matters of postal policy, the set of policy options is wide-ranging. The options

presented could accommodate a universal service obligation that falls anywhere between full-featured to narrowly drawn and a monopoly policy that falls anywhere between an expansion of current law and complete repeal. We shall attempt to summarize briefly the apparent pros and cons associated with each option without necessarily agreeing with any (it would be logically impossible to agree with all). In the last chapter, we offer our own summary observations on the way forward.

2 Options for Ensuring Universal Postal Service

Is it necessary or desirable to use the law to define and control the supply of universal postal service? What agency or organization should be ultimately responsible for ensuring provision of universal postal service? What is the best regulatory framework for administering and enforcing the universal service obligation? Answers to such threshold questions are largely independent of the specific content of the USO. This chapter considers first the pros and cons of adopting a specific legal USO as opposed to continuing with an approach relies less on law and more on Congressional oversight. Second, this chapter reviews different ways to administer a legal USO. The next chapter considers possible components of a legal USO.

2.1 Pros and cons of a legally specified USO

2.1.1 Considerations supporting a legal USO

In other countries and other U.S. sectors, the usual reason for imposing a universal service obligation on a public enterprise or a regulated sector appears to be an expectation of increased competition. The basic concern is that more competition will induce public service providers to pursue their corporate self-interest more vigorously and shortchange traditional public service objectives. New competition may result from changing technology or other factors, but it often the case the USO and liberalization go hand in hand.

In the U.S. telecommunications sector—the only sector in which federal law prescribes an explicit USO—the universal service obligation was introduced as a component of deregulation in 1996.⁴ The purpose of the universal service obligation was to create legal standards under which the Federal Communications Commission (FCC) could administer a program of external cross-subsidies to replace internal cross-subsidies rendered unsustainable by increased competition. The House

⁴ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. Details of the universal service obligation mechanism created by this act are discussed below, section ??.

committee report lucidly explained the relationship between the USO and increasing competition as follows:⁵

*The primary purpose of H.R. 1555 is to increase competition in telecommunications markets and to provide for an orderly transition from a regulated market to a competitive and deregulated market. The mechanisms currently providing for universal service are uniquely suited for a regulated market where limits on competition guarantee economic returns that are sufficient to attract private investment and to allow firms to subsidize their own high-cost consumers. The market environment that H.R. 1555 would create would make such internal subsidies much less viable because deregulation would remove the near-guaranteed returns allowed in a regulated market, and with them the ability of the regulated firm to subsidize high-cost customers. Thus, CBO [Congressional Budget Office] expects that over time enactment of H.R. 1555 would lead to the disappearance of internal subsidies (those conveyed within companies, between classes of users). In its place, we would expect a new system of transfers consisting almost entirely of external subsidies that would appear in the federal budget.*⁶

In similar fashion, deregulation of the aviation industry in 1978 was accompanied by creation of a new program, administered by the Department of Transportation, to ensure small community air service.⁷

In the postal sector, as well, more competition is coming. New competition may be expected from changes in the monopoly laws made by the PAEA and, more significantly, from increased use of electronic alternatives. The Postal Service has declared, "[T]he reality is that there are alternatives to every piece of mail."⁸ Indeed, the prospect of increasing competition was a prime motivator for the PAEA. The

⁵ S. Rep. No. 108-318, 108th Cong., 2d Sess., at 22-23 (Aug. 25, 2004).

⁶ H.R. Rep. No. 204, 104th Cong., 1st Sess. (Jul. 24, 1995).

⁷ See Airline Deregulation Act of 1978, Pub. L. 95-504, § 33, 92 Stat. 1705, 1732-39 (small community air service program). In addition, some federal laws have promoted availability important infrastructure services in rural areas where there was no possibility of competition. See, .e.g., the Rural Electrification Act of 1936, ch. 432, 49 Stat. 1363.

⁸ Postal Service, *Report on Universal Postal Service 2*.

Senate committee report leading to the PAEA explicitly drew the link between increasing competition and commercial flexibility, quoting the Postal Service's Transformation Plan with approval:

The Postal Service currently operates under a regulatory structure created more than thirty years ago in the 1970 Postal Reorganization Act, a bill enacted *at a time when nobody imagined that innovations like fax machines, cell phones and the Internet would one day compete with hard copy mail.* The current structure offers the Postal Service little opportunity to innovate or even to quickly change the prices it charges for its products in response to changes in the market. . . . The Postal Service acknowledged this itself in the Transformation Plan: "While the basic charter of the Postal Service has remained static since its inception in 1970, the mailing industry and private sector delivery companies have evolved to meet the changing needs of the marketplace. Indeed, innovation and competition were not primary concerns of the 1970 Act. The Act was designed to allow the Postal Service to do what it did in 1970 in a more businesslike manner. *By definition and structure, a government entity has goals and mandates that the private sector does not have, and these inhibit the flexibility needed for direct competition. In the far different and more competitive environment of 2002, a revision of the Postal Service's 1970 charter is overdue.*"⁹

Consistent with these observations, the Senate committee proposed to authorize the Commission to develop specific legal standards to implement the universal service provisions of Title 39, although this proposal was not incorporated in the final act.¹⁰

In some cases, policymakers in the U.S. and other industrialized countries have contemplated a legally defined USO when public services are considered unsatisfactory. For example, in the European Union, one of the original objectives of the Postal Directive was to remedy perceived defects in the quality of service in some member states and thus to promote greater uniformity across the EU and weld

⁹ S. Rep. No. 318, 108th Cong., 2d Sess., at 6 (Aug. 25, 2004) (emphasis added, footnotes omitted).

¹⁰ S. Rep. No. 108-318, 108th Cong., 2d Sess., at 22-23 (Aug. 25, 2004).

member countries into a "single market."¹¹ Similarly, in the United States, members of Congress sought, albeit unsuccessfully, to use statutory service requirements to stop the Postal Service from ending twice daily deliveries in 1950 or introducing cluster box delivery in 1970s. Using appropriations riders, Congress has tried to ensure that the Postal Service does not reduce the frequency of delivery or close small and rural post offices.

Looking back on the evolution of postal services in the U.S. over the last 38 years, some policymakers might consider that the public would have been better served by a specific and legally binding definition of the universal services expected of the Postal Service. Looking forward, the possibility of unacceptable service reductions would seem to be increasing. As the Postal Service has pointed out, a probable decline in mail volumes will increase the pressure on the Postal Service to trim universal services, perhaps to a substantial extent. Some policymakers may conclude that definite legal standards should be put in place in advance in order to ensure an orderly reduction in universal services according to agreed public interest criteria.

Moreover, for some policymakers, the case for a legal USO may be strengthened by consideration of general regulatory principles. Law benefits society by promoting clarity, certainty, and even-handed treatment. Clearly specified USO standards will make it easier for the Commission to determine the cost of universal service and for policymakers to determine whether the cost is excessive or not. A legal USO will allow all citizens to know what are the minimum standards of service are and what are the limits to the Postal Service's discretion, and they will be able to plan accordingly. The possibility that some areas or some customers will receive better treatment than others will be reduced. A legal USO will ensure the national postal

¹¹ See Green Paper on the Development of the Single Market for Postal Services, COM/1991/0476 final, at 182-83 (1992); Directive 1997/67/EC, OJ L 15, 21 Feb. 1998, p. 14, Recital 7 ("in that the regions deprived of postal services of sufficiently high quality find themselves at a disadvantage as regards both their letter service and the distribution of goods"). While the original Postal Directive limited the scope of national postal monopoly statutes, it did not presume eventual repeal.

policy is implemented impartially and not by persons with a direct pecuniary interest in how it is applied.¹²

Almost all industrialized countries have embraced the concept of a legally specified USO to define the minimum set of postal services assured the citizenry. In the European Union, the Postal Directive requires all 27 member states to enact a USO that is consistent with EU-wide standards. Norway, Iceland, and Liechtenstein follow the EU practice. In Australia, the postal law and implementing regulations define a set of "community service obligations." In New Zealand, the post office has agreed in a contract with the government to maintain a specified set of basic services.

2.1.2 Considerations opposing a legally specified USO

A specific USO is not, however, necessarily required to ensure universal postal service. Since 1971, the Postal Service has provided nationwide postal services without an overall legally specific USO. Absence of a USO does not mean there are no constraints on the Postal Service. The Postal Service is a government agency subject to Congressional oversight. Until relatively recently, each house of Congress maintained a standing committee or subcommittee primarily devoted to postal matters. The Postal Service was subject to a politically defined mandate rather than a legally defined mandate. Over the years, members of Congress have employed various forms of political pressure—including protests from individual members, public hearings, committee reports, and appropriations riders—to require the Postal Service to provide specific services they deemed appropriate. It could be argued that the current system of broadly stated universal service goals and Congressional oversight has worked well. The United States has an acceptable level of universal service postal service.

The main argument against establishing a legal universal service obligation is that it would limit the authority of the Postal Service to improve the efficiency of the postal system. The Postal Service "recommends that the USO be defined broadly so

¹² See, e.g., the classic discussion of impartial justice in *Tumey v. Ohio*, 273 U.S. 510, 523, 531-534 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties).

as not to prohibit or limit creating a more efficient network, replacing facilities with alternative access where appropriate, and reducing delivery days if necessary to continue affordable services as needed." According to the Postal Service, the case for flexibility is strengthened by the prospect of future declines in mail volume.

The Postal Service will need flexibility to ensure the long-term fulfillment of the universal service obligation (USO), particularly as volume continues to erode and finances become more challenging. The Postal Service recommends . . . that the obligation to provide universal service be limited to market dominant products. The Postal Service also recommends that the USO be defined broadly so as not to prohibit or limit creating a more efficient network, replacing facilities with alternative access where appropriate, and reducing delivery days if necessary to continue affordable services as needed.¹³

"In summary," says the Postal Service, "no changes should be made to more strictly define the USO."¹⁴

At a minimum, the Postal Service's comments highlight a need to distinguish clearly between a universal service obligation and appropriate managerial discretion. A USO should specify only the *minimum* services required by the public interest and not the *maximum* performance that Congress or the Commission thinks that Postal Service can or should attain. Management of the Postal Service must be left to the Postal Service. The Senate Government Affairs Committee recognized this distinction in 2004 in its proposal to authorize the Commission to implement sections 101 and 403 of the act:

The Committee's main intent in giving the Regulatory Commission the authority to interpret universal service through regulation is to ensure that the service the Postal Service provides its customers is consistent with

¹³ Postal Service, *Report on Universal Postal Service* 85-86. Confusingly, this report by the Postal Service bears the same title as that implied by the PAEA in describing the report which the Commission is preparing for submission to Congress: "the Postal Regulatory Commission shall submit a report to the President and Congress on universal postal service and the postal monopoly." Postal Accountability and Enhancement Act, Pub. L. 109-435, § 702, 120 Stat. 3198, 3243 (2006).

¹⁴ Postal Service, *Report on Universal Postal Service* 4.

the statutory definition of universal service. The service standards established by the Regulatory Commission, however, should be reasonable. They should not force the Postal Service to charge higher rates or make dramatic changes to its retail and mail processing networks in order to meet them. In establishing and revising such standards, the Regulatory Commission should take into account the level of service the Postal Service provides now and how successfully that service has met the needs of its customers. The Regulatory Commission should also take into account the fact that many Americans now use other forms of communication, such as e-mail, electronic bill pay, and fax machines, to conduct business and keep in touch with friends and family. Over the years, the service standards established by the Regulatory Commission should reflect the fact that more and more Americans are likely to turn to these, and other, electronic forms of communication. . . .

There is some concern that the authority given the Regulatory Commission to establish service standards would allow that body to micromanage the Postal Service and involve itself in product design. This is not the Committee's intent. One of the overarching goals of S. 2468 is to give the Postal Service the flexibility necessary to act more like a private business.¹⁵

The Postal Service's comments also draw attention to the distinction between the efficiency of the Postal Service and the efficiency of public postal policy. There is no reason why a properly specified USO should inhibit the efficiency of the Postal Service. The Postal Service will make deliveries with equal efficiency whether the USO requires delivery six times per week or three times per week. On the other hand, it is likely true that any USO creates inefficiencies at a macro economic level. No matter how efficiently the Postal Service does its job, the delivery services sector overall will operate at less than peak efficiency if the law requires the Postal Service to produce services that do not justify the cost of production in an economic sense. In general, the most efficient way to produce goods and services is to allow producers to adjust their products continually in response to changes in demand and the offerings

¹⁵ S. Rep. No. 108-318, 108th Cong., 2d Sess., at 22-23 (Aug. 25, 2004).

of competitors. To impose legal standards—or political standards—on a market is to accept a certain level of inefficiency in return for a guarantee that some services will be maintained that would not otherwise be provided by the competitive market. Protecting the authority of the Postal Service to manage its operations ensures the efficiency of the Postal Service. Defining the minimum criteria which the postal system must meet to protect the public interest may affect the overall efficiency of the sector, but this would seem to be a question of public policy, not of Postal Service efficiency.

2.2 *Status quo*

In the Postal Reorganization Act of 1970, Congress articulated a national postal policy and the general duties of the Postal Service, but these policy provisions were not intended to define a specific universal service obligation for the Postal Service, nor do they do so. They address the key features of a national postal system only in general terms. From time to time since 1970, Congress has concluded that the public interest was not sufficiently protected by broadly defined policy objectives dependent on political oversight. In the 1970s Congress added procedural requirements to limit the discretion of the Postal Service to close post offices, and in the 1980s, Congress began the practice of requiring a minimum frequency of delivery in appropriations acts. Similarly, in 2006 Congress adopted a legal standard constraining increases in the rates for market dominant products. Nonetheless, for the most part, it is the Postal Service that determines what specific services are needed to fulfill broad statutory policy objectives. The result is what might be termed a "quasi-USO"—a set of broadly stated objectives that depend upon political oversight supplemented by specific legal requirements in certain areas.

A basic feature of the current quasi-USO is that the various elements of universal service have not been considered as whole. Under the current law, two elements of universal service are especially strictly controlled: the six-day service requirement and the statutory price caps. The Postal Service is authorized, indeed required, to sacrifice other features of universal service in order to meet these requirements. Hence, cluster boxes replace curbside delivery, collection boxes are withdrawn, post

offices and postal agencies are closed, delivery time standards are loosened, and so on. Each of these steps may well have been sound public policy, but at no point has Congress or the Commission reviewed the public's minimum needs for the various features of universal service and struck a reasoned balance between competing considerations.

Some policymakers may consider that the current quasi-USO, even if imperfect, has worked better than the alternatives. Other policymakers may consider that the legal framework for postal services would be improved by a more specific and more balanced definition of the universal services required by the Postal Service.

If Congress considers that a legal USO is appropriate for the United States, there are several possible approaches towards administration. A consideration of these will help clarify what a legal USO might entail. Each could be adapted to different approaches that might be taken with respect to the monopoly laws.

2.3 Option 1. No USO (except price rules)

Although the Postal Service has stated general support for the status quo, it has also urged elimination of three legally defined service obligations that Congress has grafted on to the Postal Reorganization Act since 1970. First, Postal Service recommends ending the provision in appropriations acts mandating minimum delivery frequencies at the 1983 levels.¹⁶ Second, the Postal Service objects to language in appropriations acts that prohibit use of appropriated funds to consolidate or close small rural and other small post offices (a seemingly ineffective provision). The Postal Service notes that this language has "constrained" the Postal Service from implementing internal operational guidelines.¹⁷ Third, the Postal Service proposes elimination of the statutory requirements requiring it to consult with local officials before closing post offices: "What Postal Service management most needs to meet the challenges inherent in a world of stagnant or diminishing mail volume is the

¹⁶ Postal Service, *Report on Universal Service* 21.

¹⁷ Postal Service, *Report on Universal Postal Service* 24.

flexibility to open or close; buy, sell or lease; and manage its full range of facilities."¹⁸ Eliminating these statutory provisions would eliminate virtually all legal universal service obligations currently imposed on the Postal Service except for those relating to prices: the price caps, the rules relating to reduced rates for preferential mail, and the uniform rate rules for letters and library and media mail.

Some policymakers might support such changes for the reasons articulated by the Postal Service. By reducing statutory requirements, however, these changes would seem to increase the responsibility of Congress to oversee implementation of the law.

¹⁸ Postal Service, *Report on Universal Postal Service* 25.

Table 1. Elements of the universal service obligation in the European Union

Service element	Primary universal service obligations
1. Geographic scope	<p>"Users" shall enjoy the right to a universal service "at all points in their territory." Art. 3(1).</p> <p>Universal service must provide "one delivery to the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations." Art. 3(3).</p>
2. Range of products	<p>Collection, sorting, transport and distribution of (1) "postal items up to 2 kilograms" and (2) postal packages up to 10 kilograms" and (3) services for registered items and insured items." Art. 3(4).</p> <p>"Postal item" is defined to include items of correspondence, books, catalogues, newspapers, periodicals, postal packages containing merchandise with or without commercial value, and any other items prepared in a mailable format. Art. 2(6). The term "postal package" is undefined. Express services are exempt from the scope of universal services.</p>
3. Access	<p>Member states shall "take steps to ensure that the density of the points of contact and of the access points takes account of the needs of users."</p> <p>Art. 3(2). Collection from all access points not less than five days per week. Art. 3(3)</p>
4. Delivery	<p>"Not less than five working days a week, save in circumstances or geographical conditions deemed exceptional, and that it includes as a minimum . . . one delivery to the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations." Art. 3(3).</p>
5. Rates	<p>Prices must be "affordable," "cost-oriented," and "transparent and non-discriminatory." Art. 12. Costs must be developed according the principles of a fully distributed cost allocation system. Art. 14.</p> <p>Member states decide whether to apply price controls by ex ante, price cap, or ex post procedures.</p>

Table 1. Elements of the universal service obligation in the European Union

Service element	Primary universal service obligations
6. Quality of service	<p>Intra-EU cross-border: 85 percent of first class letter mail sent between member states must be delivered by the third day after posting. Arts. 16, 18.</p> <p>Domestic: member states shall "ensure that quality-of-service standards are set and published . . . in order to guarantee a postal service of good quality." National standards to be consistent with cross-border standard. Annual independent monitoring of service performance and publication of results. Arts. 16, 17.</p>
7. User protection	<p>Member states to ensure that "transparent, simple and inexpensive procedures are made available by undertakings providing postal services for dealing with postal users' complaints, particularly in cases involving loss, theft, damage or noncompliance with service quality standards (including procedures for determining where responsibility lies in cases where more than one operator is involved)."</p> <p>Redress procedures must include "where warranted, for a system of reimbursement and/or compensation."</p> <p>Member states provide for appeal to a "competent national authority . . . where users' complaints to undertakings providing postal services within the scope of the universal service have not been satisfactorily resolved."</p> <p>An annual report on the resolution of users' complaint must be published by "universal service providers and, wherever appropriate, undertakings providing services within the scope of the universal service." Art. 19.</p>
<p><i>Source:</i> Directive 1997/67/EC, OJ L 15, 21 Feb. 1998, p. 14, as amended by Directive 2002/39/EC, OJ L176, 5 Jul. 2002, p. 21 and Directive 2008/6/EC, OJ L 52, 27 Feb. 2008, p. 3.</p>	

2.4 Option 2. Statutory USO

One way to establish a legal USO would be for Congress to define the obligation in a statute. Enforcement of the USO could then be committed to the Commission or to the courts. Although Congress determined key elements of postal policy prior to 1970, it has never tried to fully specify the minimum levels of a universal service guaranteed to the American people. The closest modern equivalent of a legislatively specified USO is probably the Postal Directive adopted by the European Union in

1997.¹⁹ In some cases, the Postal Directive defines specific service requirements; in other cases, the Postal Directive articulates principles that member states should implement in defining specific service requirements suited to their circumstances. In European law, the essential purpose of the USO is to establish minimum criteria for the postal systems of member states: "to guarantee at Community level a universal postal service encompassing *a minimum range of services of specified quality* to be provided in all Member States at an affordable price for the benefit of all users, irrespective of their geographical location in the Community."²⁰ The universal service obligations in the EU Postal Directive are summarized in table 1.

If Congress were to enact statutory standards for a universal service obligation in a manner similar to the EU Postal Directive, the likely role of the Commission would be to enforce those standards. In other words, with respect to the USO, the Commission would have more a quasi-judicial role and less of a quasi-legislative or policymaking role.

Pros and cons. The pros and cons of legislative specification of the universal service obligation are reasonably apparent. Universal service is an issue of broad public policy, and it is the function of Congress to determine national policy in such matters.²¹ Congressional enactment of a universal service obligation will ensure the broadest possible public consultation and political acceptance of the final product. A statute will also bring stability to the USO definition for legislative revisions are inherently difficult.

¹⁹ Directive 1997/67/EC, OJ L 15, 21 Feb. 1998, p. 14, *as amended by* Directive 2002/39/EC, OJ L176, 5 Jul. 2002, p. 21 *and* Directive 2008/6/EC, OJ L 52, 27 Feb. 2008, p. 3. In European law, a "directive" is a framework law adopted by the European Union and directed to governments of EU member states. It is up to the member states to enact national legislation to implement a directive in a manner appropriate their different legal traditions and political philosophies. Hereafter, the term "Postal Directive" refers the Directive 1997/67/EC as amended.

²⁰ Directive 1997/67/EC, OJ L 15, 21 Feb. 1998, p. 14, Recital 11.

²¹ *Cf.* S. Rep. No. 108-318, 108th Cong., 2d Sess., at 39 (Aug. 25, 2004) ("From the perspective of the Committee, both the postal monopoly and universal service are issues of broad public policy—not regulatory issues. For that reason, the Committee decided that the power to refine either the monopoly or the universal service obligation should remain in the hands of Congress").

On the other side of the ledger, however, it must be noted the Congress has found it difficult to address the technical details of postal policy. In deliberations over the PAEA, Congress abandoned proposals to specify the particulars of a new rate policy in favor of adopting broad statutory principles to be implemented by the Commission. Likewise, an analysis of the universal service obligation quickly leads to technical economic and operational issues that must be weighed against one another. Moreover, given the rapid pace of change in the communications markets, it may be expected that any specification of the USO will have to be revised from time to time. In light of the eleven-year gestation of the PAEA, it may be questioned whether Congress is well equipped to provide timely updates to specific policy determinations.²² Finally, it may be noted that Congressional decisions tend to reflect a balancing of political interests rather than an objective application of specific standards to the nation. The uneven introduction of rural free delivery at the turn of the twentieth century would appear to be cautionary example. Moreover, the vagueness that is often necessary to achieve political compromise may foster unnecessary litigation unless there is some means for supplementing Congressional decisions with specific standards.

In sum, it is at least arguable that the national interest would be best served by Congress establishing the principles to be met by a universal service obligation and delegating to the Commission responsibility for specifying and continually updating the particular legal requirements of the USO.

2.5 Option 2. Remedial regulation administered by the Commission

If Congress concludes that the Commission should be charged with administering a USO according to statutory guidelines, it will be also be necessary for Congress to determine how the Commission should implement its authority. Congress could direct the Commission to remedy any lapses or incipient lapses in universal service or it could require the Commission to manage the production of postal services more pro-

²² During the development of the third postal directive in Europe, some the most advanced public postal operators made credible arguments that the USO provisions in the Postal Directive were too inflexible and increasingly ill-suited to a changed market. Commission staff, however, concluded that the political difficulties of fine tuning the USO provisions were prohibitive.

actively (described in the next section). These options are not stark alternatives but different starting points that could blend into one another at the margins.

A good example of remedial regulatory approach is provided by U.S. telecommunications law. The Telecommunications Act of 1996 authorized the Federal Communications Commission (FCC) and state regulators to define, and periodically revise, a regulatory definition of universal service in light of seven policy guidelines set out in the act. These telecommunications policy guidelines are similar to the objectives of postal policy listed in sections 101 and 403 of Title 39. The telecommunications guidelines provided as follows:

(1) Quality and Rates.—Quality services should be available at just, reasonable, and affordable rates.

(2) Access to Advanced Services.—Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in Rural and High Cost Areas.—Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and Nondiscriminatory Contributions.—All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and Predictable Support Mechanisms.—There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to Advanced Telecommunications Services For Schools, Health Care, and Libraries.—Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional Principles.—Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.²³

Moreover, in establishing and revising a definition of universal services, the FCC and state regulators are directed to consider the extent to which telecommunications services:

- (A) are essential to education, public health, or public safety;
- (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
- (C) are being deployed in public telecommunications networks by telecommunications carriers; and
- (D) are consistent with the public interest, convenience, and necessity.²⁴

In order to ensure provision of universal services, the Telecommunications Act provides that the FCC and state regulators shall designate one or more telecommunications operators as providers of universal services ("eligible telecommunications carriers") in appropriate areas. These operators may apply for subsidies to cover the costs of maintaining universal services where necessary. If the FCC or a state regulator determines that a community or a portion of area does not have universal services even with the possibility of financial support, it shall determine "which common carrier or carriers are best able to provide such service" and order the services provided.²⁵ All telecommunications operators are required to

²³ Telecommunications Act of 1996, Pub. L. 104-104, § 101, 110 Stat. 56, 71, *adding* 47 U.S.C. § 254(b) (2000).

²⁴ Telecommunications Act of 1996, Pub. L. 104-104, § 101, 110 Stat. 56, 71, *adding* 47 U.S.C. § 254(c)(1) (2000). The FCC has defined the categories of telecommunications services that will be supported in its universal service program in Part 54 of its regulations. 47 C.F.R. Part 54 (2007).

²⁵ Telecommunications Act of 1996, Pub. L. 104-104, § 102, 110 Stat. 56, 80, *adding* 47 U.S.C. § 214(e) ("If no common carrier will provide the services that are supported by Federal universal service support mechanisms . . . to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide

obtain licenses from the FCC before providing services and, as a condition of their licenses, must keep the FCC informed about their business activities and possible lapses in universal service.

Germany has taken a roughly similar approach towards ensuring universal postal service within the context of the EU Postal Directive. The specific requirements of the USO are set out in the German postal law and an implementing ministerial decree.²⁶ Any company engaged in the business of delivering letters weighing up to 1 kilogram (2.2 pounds) must obtain a license from the postal regulator.²⁷ If the postal regulator determines that universal service is "not being appropriately or adequately provided" in a portion of the country, it may impose a universal service obligation on a postal license holder with a dominant position in the same or an adjacent geographic area and require that operator to provide the necessary postal services. If the designated postal operator suffers a loss as a result, it may claim compensation from the regulator. Alternatively, the German postal regulator may solicit bids from other postal operators for provision of the necessary universal services. In such cases, the amount of compensation is determined by contract.²⁸ To cover the costs of this universal service program, the postal regulator may impose what amounts to a universal service tax on licensed postal operators. In addition, the German post law provides that regulation focuses mainly on market dominant providers of postal services and, in particular, on their supply of single-piece services.

In both the FCC and German regulatory frameworks, substantial reliance is placed on remedial regulatory steps to ensure universal service. The universal service obligation is defined in advance without reference to individual operators. When a lapse in universal service is discovered, the regulator steps in to require provision of

such service for that unserved community or portion thereof.").

²⁶ Universal Postal Service Ordinance (*Post-Universaldienstleistungsverordnung* or PUDLV) (Jan. 1, 1998). A current version may be found at <http://bundesrecht.juris.de/pudlv> (in German). The following notes and text refer to the English translation of the Universal Postal Service Ordinance (PUDLV) found in Annex I-C.

²⁷ German Postal Act, art. 5. The licensing requirement does not include carriage of cargo letters and express services.

²⁸ German Postal Act, art. 14.

universal service by a licensed operator. In the U.S. telecommunications industry, the definition of the USO is adopted by the FCC in accordance with policy standards enacted by Congress. In the case of German postal services, the definition of the USO is adopted by the German minister in accordance with policy standards and specific criteria set out in the EU Postal Directive and the German post law.

A remedial approach could be adapted to accommodate both monopoly and non-monopoly services. For example, if the definition of universal service were to include parcel services, it is possible that in some area of the nation a private company would be able to supply better services than the Postal Service. In such case, if permitted by Congress, the Commission could contract with the private operator to provide universal parcel services or other services outside the postal monopoly. If (and only if) the postal monopoly were repealed, the Commission would be able to retain a private company for all types of postal services, much as the Postal Service itself contracts with private firms for delivery of mail in some rural areas.

Pros and cons. A remedial regulatory framework has several prominent virtues. By focusing most regulatory intervention on the situations where universal service is imperiled it makes the most economical use of regulatory resources. A remedial approach effectively builds on, rather than displacing, the incentives for efficiency and innovation created in the commercially viable portion of the market. A remedial approach is also consistent with the U.S. regulatory approach towards other industries so that the Commission could make use of lessons learned in other sectors.²⁹ Indeed, the PAEA's greater reliance on complaint procedures, rather than *ex ante* rate regulation, represents a more remedial approach toward regulation. Remedial regulation may provide a somewhat less certain guarantee against market lapses in return for greater flexibility and efficiency in the market overall. Relying on complaints presumes that someone has something to complain about and can afford to

²⁹ As noted above, the deregulation of the Civil Aeronautics Board was accompanied by the creation of a small community air service program that, likewise, focused the regulatory efforts of the government—in this case, the Department of Transportation—on the problem areas rather than the aviation sector as a whole. See Airline Deregulation Act of 1978, Pub. L. 95-504, § 33, 92 Stat. 1705, 1732-39.

complain. However, it would seem possible to overcome most practical administrative problems with a well-designed system for monitoring market developments. More fundamentally, a remedial approach to regulation may be poorly suited to a situation in which public policy departs from normal market solutions in a big way. For example, if there comes a day when most mailers prefer the rates and service levels associated with three-day service but Congress determines that the public interest requires continuation of six-day service, then remedial regulation may be inadequate to the task of ensuring provision of universal service. It may be more appropriate for the Commission to spell out in advance precisely what services the Postal Service (or other providers of universal services) must provide.

2.6 Option 3. License-based regulation administered by the Commission

An alternative to a remedial regulatory approach is one based on a more pro-active regulation of licenses. The United Kingdom exemplifies a regulatory regime that relies primarily on conditions attached to individual licenses to ensure universal service. In the U.K., no person may operate a business for delivery of "letters" without a license issued by the British postal regulator, Postcomm.³⁰ Postcomm is obliged to attach whatever conditions it considers necessary to licenses to achieve three statutory goals. These are, in order of priority, (i) to ensure the provision of universal service, (ii) to further the interests of users of postal services by promoting effective competition, and (iii) to promote efficiency and economy on the part of the postal operators.

Accordingly, Postcomm has attached conditions to licenses for all postal operators. The most heavily conditioned license is that of Royal Mail since it is dominant in the postal services market. Royal Mail's 116-page license includes 22 conditions. These

³⁰ A "letter" is defined as "any communication in written form on any kind of physical medium to be conveyed and delivered to the address indicated by the sender on the item itself or on its wrapping (excluding any book, catalogue, newspaper or periodical)." U.K. Post Act, § 125(1). The licensing scheme exempts carriage of letters if (i) the price of service is at least UKL 1.00 (US\$ 1.99) or (ii) the weight of the letter is at least 350 grams (12.3 oz.). In addition to the price and weight limits of the licensed area, the act provides a number of other exemptions.

conditions address issues such as prices, universal service obligations, standards of service, complaint handling, free services for the blind, provision of information to users, integrity of mail, access to postal facilities, prohibitions against unfair commercial advantage, mergers, accounting rules, financial resources, and reports to Postcomm. The conditions relating to universal service are detailed. For example, Royal Mail must make delivery to each address point at least once each working day. It must establish collection boxes so that "in each postcode area where the delivery point density is not less than 200 delivery points per square kilometer not less than 99% of users or potential users of postal services are within 500 meters of a post office letter box."³¹ One condition establishes national service standards. For example, on an annual basis Royal Mail must deliver at least 93 percent of first class mail by the first business day after mailing. A mailer is entitled to compensation if he or she receives service quality of less than 93 percent. Similar service standards have been established for each universal service, including retail second class, bulk first class, bulk second class, bulk third class, standard parcels, European international delivery, and special delivery. In addition, for first class mail, Royal Mail must set and comply with service standards for each of the 121 postcode areas. Separate postcode standards are set for intra-postcode letters and for letters leaving each postcode.³² Postcomm can enforce quality of service standards by fines. Postcomm has also required Royal Mail to make its address database available to all operators.³³

Licenses issued to other postal operators also include conditions. Primarily, these licenses require postal operators to comply with two codes of practice designed to protect users. A "mail integrity code" requires licensees to ensure the safety and security of the mail they handle and meet standards for training employees. A "common operational procedures code" prescribes rules for marking items transported with an identifying code and for handling wrongly addressed and misdelivered mail.³⁴

³¹ Postcomm, "Amended Licence Granted to Royal Mail Group Plc" at 12, Condition (3)(2)(a) (May 25, 2006).

³² *Id.*, at 14-26, Condition 4.

³³ *Id.*, at 108-09, Condition 22.

³⁴ *See, e.g.*, Postcomm, "Licence Granted to TNT Post UK Limited" (Jan. 20, 2006). Even a license for

Although other licensing systems are less elaborate than the British,³⁵ all seek to regulate the supply of all universal services in order to ensure compliance with the universal service obligation. In principle, license conditions are more forward looking and all encompassing than the remedial regulatory controls exemplified by the FCC and the German post law. Like a more remedial approach, a licensed based regulatory approach can be adjusted to any policy option with respect to the monopoly laws.

Pros and cons. A license-based regulatory regime is more flexible than a statutorily defined USO because the regulator can modify the license conditions. Because of the emphasis on ex-ante controls a license-based approach can achieve virtually complete assurance against service failure. Of course, such assurance comes at a cost. Some would suggest, for example, that the British regulator has indeed guarded against any lapse in universal service but at the cost of too tightly regulating the entire delivery services sector. Another disadvantage of the licensed-based system is that, depending on how broadly "universal service" is defined, it may imply a need to regulate all private delivery services who provide services with the scope of the universal service area. As noted, this has been the approach in the United Kingdom.

2.7 Option 4. Contract between government and the Postal Service

The postal law in New Zealand does not define or require provision of universal service, but the government, as the owner of New Zealand Post, obliges New Zealand Post to provide universal service in accordance with a "Deed of Understanding."³⁶ The current Deed was agreed upon in 1998 in conjunction with adoption of the Postal Services Act which repealed the postal monopoly. In form, the Deed is a contract agreed upon by both parties, although the New Zealand government owns 100

a non-dominant operator like TNT requires 53 pages. *See generally* Postcomm, "Postal Code of Practice for Common Operational Procedures: A Decision Document" (Aug. 2005); "Protecting the Integrity of Mail – A Code of Practice: A Decision Document" (Aug. 2005).

³⁵ For example, the Swedish regulator also employs conditions attached to the license Sweden Post to ensure maintenance of universal service, but the license takes up only four pages. Swedish Post and Telecom Agency (PTS), Decision of Jun. 28, 2001 (Posten AB: Licence terms and conditions).

³⁶ "Deed of Understanding Between New Zealand Post Limited and the Government" (Feb. 17, 1998) (hereafter "1998 Deed of Understanding"). A copy made be found at http://www.med.govt.nz/templates/Page___1387.aspx (access, Oct. 1, 2008).

percent of New Zealand Post and appoints its directors. In the Deed, New Zealand Post has agreed to provide a specified minimum level of universal services. There is no time limit to the Deed, but the terms of the Deed can be changed by mutual agreement. The Deed is an agreement between government and New Zealand Post and "does not create any right or obligation enforceable at the suit of any other person."³⁷ New Zealand Post does not receive a public subsidy or payments from a universal service fund.

A contractual USO can be employed with or without a postal monopoly. In New Zealand, the Deed of Understanding was introduced in 1989. At this time New Zealand still enjoyed a monopoly, but in view of legislation reducing the monopoly, the government feared that a more commercially minded post office might reduce services below acceptable levels. In 1998, New Zealand repealed the postal monopoly, and the Deed of Understanding was continued in revised form.

Pros and cons. The great virtue of a universal service contract is simplicity. The definition of universal service is provided in the contract. Parliament has not been required to define universal service or even guidelines for the definition of universal service. There are no regulatory problems because there is no regulator. On the other hand, it could be argued that a contract for provision of universal service in the United States would have to be vastly more complicated than in New Zealand and that such complexity would necessarily would require substantial effort by the government—presumably the Department of the Treasury—to oversee and enforce. In the end, a contractual USO could devolve into something not too different from a politically-directed Post Office Department in which an executive department would be forced to provide much the same oversight function as the Commission but with less independence and expertise.

³⁷ See 1998 Deed of Understanding, pars. 19-21.

3 Options for Defining the Components of the USO

Whether defined by Congress, the Commission, or government contract, a legally specified USO must be expressed in terms of the specific services to be guaranteed. Postal services may be described according to various features, or service elements, such as price, delivery frequency, accessibility, transit time, and so on. In this appendix, seven features or service elements will be used to describe universal postal service: (i) geographic scope; (ii) range of products; (iii) access; (iv) delivery; (v) prices; (vi) quality of services; and (vii) protection of the rights of users. While one could argue that universal postal service should be characterized by more or fewer features, these seven service elements appear sufficient to describe what is meant by "universal service" in section 702 of the Postal Accountability and Enhancement Act.

A legal USO would consist of specific minimum requirements for each of the seven elements of universal postal service. In some cases, there may be several possible sub-elements to consider. Consider delivery, for example. The USO might set a minimum delivery frequency of a certain number of days per week, and this standard might apply to all delivery points or only some delivery points. The USO might include requirements for delivery to the door, or curbside box, or cluster box, or general delivery. The USO could even address time of delivery. This chapter identifies plausible options for each of the seven service elements of universal service. It is impossible to list every conceivable option that Congress might consider, but the following discussion tries to illustrate the range of possibilities.

3.1 Geographic scope of universal services

3.1.1 Status quo

Section 403 of Title 39 obliges the Postal Service to provide postal services "throughout the United States, its territories and possessions" and to serve "as nearly as practicable the entire population of the United States." Section 101(a) enjoins the Postal Service to "bind the Nation together" and serve patrons "in all areas and shall

render postal services to all communities." Section 101(b) stresses that the Postal Service "shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining." At the same time, however, Title 39 implicitly limits the obligation of the Postal Service to be omnipresent by requiring the Postal Service to maintain "reasonable economies" and "to maintain an efficient system" (§ 403(b)). Although the general intent of Congress seems reasonably evident, the specific obligation imposed on the Postal Service is not. As the Postal Service says succinctly, "Title 39 gives the Postal Service broad discretion over these aspects of its operations."³⁸ If Congress or the Commission sought to clarify the geographic scope of universal service, there are several options which appear from a consideration of foreign approaches to defining the USO and the historical development of the universal service in the United States.

3.1.2 Option 1. To all points in the United States

Considering the vast geographical scope of the United States—encompassing national parks, wilderness areas and large bodies of water, and thinly settled regions—it may seem implausible define the scope of the universal service obligation as including "all points in the United States." It is obviously impossible for the Postal Service to provide collection and delivery services at every physical location in the United States. And if the word "point" is interpreted to mean "every collection and delivery point," the requirement is a mere tautology. Nonetheless, this formulation is included as a possible option because it could be argued that the United States is already legally obliged to provide universal service to "all points in the United States" by virtue of Article 3(1) of the Universal Postal Convention (or will be after January 1, 2010).

3.1.3 Option 2. To the home or premise of every natural or legal person.

A second option for defining the geographic scope of universal service is presented by approach of the EU Postal Directive. The Directive specifically requires that universal service must include delivery to "the home or premise of every natural or

³⁸ Postal Service, *Report on Universal Postal Service* 29.

legal person" except in extraordinary circumstances.³⁹ The geographic scope of universal service in the European Union is thus substantially broader than the traditional practice in the United States. In the U.S., the Postal Service has never brought the mail to every farm house and village home. In the 1970s, the Postal Service strongly objected to Congressional proposals requiring door or curbside delivery to every residence.

3.1.4 Option 3. To cities, villages, and along principal routes of public transportation in rural areas.

A third option could be to specify the geographic scope of universal service by making explicit the traditional postal practices in the United States. Historically, the Post Office provided three types of delivery services: city carrier service, village delivery, and rural delivery. City carrier service was provided to homes and business premises in cities above certain size. In smaller communities, a village delivery service was provided that might require residents to collect the mail from the post office if they lived nearby. In rural areas, postal services were provided along main lines of travel so that the rural resident had to travel to a convenient point on the main road to collect his mail. Although this traditional idea of the geographic scope of postal service has become obscured in the reenactments and consolidations of earlier laws, it would be possible to clarify the law by returning to original concepts and defining terms such as "city," "village," and "rural delivery."

3.1.5 Option 4. Exceptional circumstances

Any definition of the geographic scope of the universal service obligation will require some provision for exceptions. The broader the basic definition of geographic scope the greater the need for rule for exceptions. Historically, the geographic extent of postal service was limited by the funds appropriated by Congress. Under current U.S. law, the Postal Service is self-financing and the threshold for exceptional

³⁹ Postal Directive, art. 3(3) ("Member States shall take steps to ensure that the universal service . . . one delivery to the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations.")

circumstances is not spelled out, although exceptions may be implied by phrases like "as nearly as practicable," "reasonable economies," and "efficient system." By allowing the Postal Service to determine for itself what constitutes an exceptional circumstance, the obligatory nature of the "universal service obligation" is obviated.

A legal USO could, however, clarify the concept of exceptional circumstances. For example, although the EU Postal Directive requires delivery to every home or premises in principle, it also permits delivery to "appropriate installations" at the discretion of the regulator.⁴⁰ In the United States, a legal USO could require the Commission to approve delivery to points other than required by the general standard. Alternatively, a legal USO standard could specify circumstances in which alternative delivery is acceptable: for example, to the central mail facilities of universities, hospitals, prisons, hotels, and apartments. A legal USO could also clarify circumstances in which "general delivery" to the nearest post office (or the nearest main post office) is acceptable. Such a standard could clarify the rights of homeless persons, itinerant workers, and persons living in very remote places.

3.2 Range of universal service products

The range of products within the universal service obligation is significant. This range identifies which products are subject to the government service guarantee and which are potentially eligible for government support. At the same, such products are, again potentially, subject to more intense government regulation. For products within the scope of universal service, it is possible that prices will have to be increased for some mailers as a trade-off for achieving public interest benefits.

3.2.1 Status quo

Title 39 does not distinguish between products which the Postal Service is obliged to offer as "universal services" and products which the Postal Service may offer on a less-than-universal basis. In some cases, for purposes of discussion or calculation, this study has assumed that all market dominant products of the Postal Service must be

⁴⁰ Postal Directive, art. 3(3).

offered as universal services, but this is no more than a plausible interpretation of a statute that in fact offers no specific indications of Congressional intent.

3.2.2 Option 1. All postal products provided by the Postal Service

If the Postal Service is a public service intended to "bind the Nation together" and provide "a maximum degree of effective and regular postal services to rural areas, communities, and small towns," then it might follow that all services offered by the Postal Service should be available to all citizens. Such a philosophy is suggested by the Commission's position in R90-1. In that case, the Commission concluded that the Postal Service was obliged by its universal service obligation to provide parcel post service—a service based on the availability of truck transportation—to all points in Alaska even if truck transportation was unavailable. Indeed, universal availability of all Postal Service products could be implied by considering the converse proposition. It might be argued that it would be inconsistent with the public service nature of the Postal Service for it to develop products for sale in only a few locations where there is money to be made.

To define all products of the Postal Service as USO products could imply significant consequences for the development of the Postal Service. Requiring the Postal Service to provide all services on a universal basis would limit the Postal Service to those services for which there is universal demand. It would be difficult, perhaps impossible, for the Postal Service to add new products because almost any new product must be begun in a few locations before being expanded to the nation as a whole. For some policymakers concerned about fair competition, however, such constraints might be considered appropriate.

More generally, there is no obvious public interest justification for defining the universal service obligation in terms of items transmitted by the Postal Service. What society needs, presumably, is reliable and affordable transmission services for at least some documents and parcels. In principle, such needs could be met by a private delivery firm whose services are as good as or better than those provided by the Postal Service. While the Postal Service may be the only likely supplier of certain universal postal services in the foreseeable future, the legal objective should be

grounded in the needs of society rather than the set of services currently provided by the Postal Service. Otherwise, the universal service obligation is not a government guarantee of the continued availability of a set of delivery services but a government guarantee of the continuation of the Postal Service itself. A legal guarantee of the continued existence of the Postal Service may be desirable on its own merits, but it should be stated explicitly rather than disguised as a universal service obligation grounded in the needs of the public.⁴¹

3.2.3 Option 2. Market dominant products provided by the Postal Service

Another approach would be limit the scope of USO products to market dominant products.

A product is "market dominant" if "the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products."⁴² The rationale for including all market dominant products is straightforward. If the mailer has no practical alternative, the Postal Service should be obliged to provide the service. On this basis, the Postal Service itself favors equating the range of the USO with market dominant products.⁴³

Upon closer examination, however, the link between market dominance and obligatory service is less clear. If the Postal Service is market dominant in providing a product in part of the country, should the Postal Service be obliged to provide the product to entire country or only to the area where it is market dominant? Suppose the

⁴¹ In some jurisdictions, the government has adopted the position that the only way, or the best way, to satisfy the public interest in the reliable and affordable transmission of certain items is to designate a single "universal service provider" to provide all universal services nationwide. Since the public postal operator is the only delivery service able to provide many of the required services in many areas of the country, the concept of a universal service provider effectively transforms a universal service obligation, which is not explicitly linked to the services of the public postal operator, into a government guarantee of the public postal operator. In the European Union, the latest amendment to the Postal Directive appears to discourage conflation of the universal service obligation and the concept of a nationwide universal service provider.

⁴² 39 U.S.C.A. § 3642(b)(2) (2007).

⁴³ Postal Service, *Report on Universal Postal Service* 18.

Postal Service has a market dominant position in the distribution of, say, advertising catalogs in the 48 contiguous states. Why should this fact imply the federal government must guarantee distribution of catalogs throughout Alaska and Hawaii? Should not the guarantee turn on the public interest in distribution of catalogs rather than on the fact of market dominance? Even within the area of dominance, suppose the Postal Service's exit from a market will likely spur new entry. Should the Postal Service be obliged to remain in the market? Suppose the Postal Service is market dominant in the supply of a product because it fails to charge economically reasonable rates (e.g., long distance books and films). Should the universal service obligation be drawn in a manner that locks the Postal Service into unprofitable services? Then, too, as noted above, there is no logical reason why society's need for certain delivery services should be limited to services provided by the Postal Service.

3.2.4 Option 3. Postal products covered by the postal monopoly law

The logic of including postal monopoly products in the set of USO products appears straightforward. With some exceptions, the postal monopoly forbids regular private carriage of letters over any public road or other post route. Since there is no possible alternative to the Postal Service, the Postal Service must be obliged to provide the service. While this reasoning may not imply limiting the USO products to postal monopoly products, it would certainly seem to require that the USO must include *at least* all postal monopoly products.

And yet, upon examination, the correctness of this reasoning again seems open to question. Suppose the Postal Service were to be granted a monopoly over the transmission of a class of items for which distribution throughout the United States was not necessary or appropriate. Suppose, for example, that the Postal Service were granted a monopoly over what is referred to "Alaska bypass mail." Should the Postal Service then be required to provide bypass mail services throughout the United States? The answer would seem to be negative. Alaskan bypass mail services are limited to Alaska because there is no need for such services in the United States generally.

The public interest or lack of public interest in universal availability of a given product thus depends on the nature of the product and not on the scope of the postal monopoly. While the postal monopoly currently covers the distribution of a product, letters, for which universal service is manifestly appropriate, it is the nature of the item, not the fact of the monopoly that impels universal service.⁴⁴

3.2.5 Option 4. Transmission of items of certain physical characteristics

The EU Postal Directive provides an example of a universal service obligation defined by the physical characteristics of the items to be transmitted and not by the identity of the carrier or the existence of a postal monopoly. The Directive lists two categories of items: "postal items up to 2 kilograms" (4.4 pounds) and "postal packages up to 10 kilograms" (22 pounds). A "postal item" generally includes any mailable matter;⁴⁵ "postal package" is undefined. Universal service also includes services for the registration and insurance of such items while in transit.

A universal service obligation that is defined by physical characteristics of the items to be transmitted may or may not require the availability of different classes of postal services. For example, if the USO covers transmission of letters, the USO could be defined to guarantee the availability of bulk letter services as well as retail service for single-piece letters or it could be limited to provision of single-piece letter services. In the European Union, member states have addressed this issue in different ways. In the Netherlands, the USO includes only basic retail services for the distribution of single-piece postal items and packages. The Dutch government

⁴⁴ Implications of the mailbox monopoly law on the universal service obligation are still less clear. The mailbox monopoly is not limited to items within the postal monopoly but includes "any mailable matter . . . on which no postage has been paid . . . with intent to avoid payment of lawful postage." 18 U.S.C. § 1725 (2000 & Supp. V). The mailbox monopoly law does not prevent private delivery of items outside the postal monopoly; it just makes private delivery more expensive than delivery by the Postal Service. Indeed, if for some reason the Postal Service were to decline to provide transmission services for a certain category items, presumably a private delivery service could deliver such items to the mailbox. Delivery would not then be "with intent to avoid payment of lawful postage." In short, the mailbox monopoly law does not seem to imply anything about the range of products to be included within the USO.

⁴⁵ Postal Directive, art. 3(4). A "postal item" is defined as "an item addressed in the final form in which it is to be carried by a postal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal parcels containing merchandise with or without commercial value." *Id.*, art. 2(6).

observes that this obligation is sufficient to ensure collection and delivery of all items defined by the physical characteristics of the European USO since any item can be mailed at single-piece rates. Whether large mailers and the provider of universal single-piece services (the Dutch public postal operator is TNT) can agree on discounts for bulk mail is considered a matter for commercial negotiations between them, although antitrust authorities can intervene if TNT is found to have abused its dominant position in the market. In the United Kingdom, the postal regulator, Postcomm, has designated some bulk mail services to be part of the universal service obligation but left other bulk mail services to commercial negotiation. In still other EU member states, the universal service covers all single-piece and bulk services.

Definition of the range of USO products by reference to items of certain physical characteristics has some obvious advantages. Such an approach would clearly define which types of services are covered by the USO and which are not. It would also obviate the need for an illogical link between services presently provided by the Postal Service and the scope of the universal service generally. On the other hand, a USO defined by the physical characteristics of items transmitted may result in more extensive regulation than required to protect the public interest. Suppose, for example, that the USO includes distribution of parcels weighing up to 70 pounds. Is it really necessary for the federal government to oversee, in some manner, the distribution of all parcels weighing up to 70 pounds in order to protect the availability of, say, single-piece parcel services?

3.2.6 Option 5. Transmission of items necessary to bind the Nation together

Another approach to defining the range of USO products could be derived directly from the public interest considerations raised by the distribution of different types of objects. Historically, U.S. postal policy has emphasized the public interest in the distribution of newspapers and magazines (in the early nineteenth century) and letters (after the mid-nineteenth century). Congress has also introduced preferential rates for certain items—in-county newspapers, classroom and nonprofit publications; certain agricultural publications, nonprofit standard mail, and library mail. One might argue as well that nationwide and affordable distribution of parcels was recognized as a

public interest objective when parcel post was established in 1912. In the early twenty-first century, universal distribution of some or all of these items might be still considered to be required by the public service. Or in some cases, it might be argued that universal distribution is no longer so necessary as to require a federal guarantee or regulation.

Defining the range of USO products based on public interest considerations appears logical. Public resources, which could be needed to redeem a government guarantee, should be expended only for the public good. A government-backed universal delivery system for "public interest items" would effectively guarantee the availability of a delivery system that could also deliver other types of items, but mailers of non-public interest items would have to rely upon normal commercial negotiations in buying such services. Restrictions on the managerial discretion of the Postal Service (or other providers of universal services) would be minimized since their legal obligation would be limited to maintaining delivery services suited to the distribution of public interest items. In other respects, postal managers would be free to meet the needs of their customers.

German postal law offers an interesting example of a USO focused on the distribution of a single category of public interest items, letters. Under German law, anyone who engages in the carriage of letters weighing less than 1 kilogram must obtain a license from the regulator. The German law then defines "universal service" as follows:

Universal services are a minimum set of postal services . . . provided in specified quality throughout the Federal Republic of Germany at an affordable price. *Universal service shall be limited to postal services subject to licence and to such postal services as can, at least in part, be provided using conveyance means of postal services subject to licence.* It shall only include such services as are generally deemed indispensable.⁴⁶

The first and third sentences declare that universal service should include only a minimum set of indispensable postal services provided at a specified quality and

⁴⁶ German Post Act, Art. 11(1) (emphasis added).

affordable price. The middle sentence expresses another important idea: that universal service is limited to services within the licensed area and "such postal services as can, at least in part, be provided using conveyance means of postal services subject to licence." Since the licensed area is the letter post service,⁴⁷ "universal service" refers to postal services for the conveyance of parcels and heavy documents only to the extent that such services are provided in conjunction with the regular letter post. The German definition substantially limits the scope of regulation. In essence, the attention of the regulator is focused on the letter post "backbone" and directed away from services which specialize in the delivery of parcels, newspapers, and other non-letter items.

3.3 Access to universal services

Mailers access universal postal services by one of three methods: (i) tendering mail at a post office or postal facility, (ii) depositing mail in a public collection box, or (iii) placing mail in a personal mailbox for collection by a carrier.

3.3.1 Status quo

Current law obliges the Postal Service to provide "ready access to essential postal services" that is "consistent with reasonable economies."⁴⁸ The only specific statutory obligation with respect to access is an obligation to consult affected parties before closing a post office. According to the Postal Service, however, consultation is required only before closing a retail postal facility that it officially classifies as a "post office," meaning a facility supervised by a "postmaster" and not including other retail postal facilities such as "stations," "branches," "contract postal units," "community post offices," and "nonpersonnel units." Since 1985, an annual appropriations provision has prohibited the Postal Service from using funds provided in such acts to close or consolidate small and rural post offices, but the Postal Service

⁴⁷ German Post Act, Art. 5.

⁴⁸ 39 U.S.C.A. § 403(b)(3) (2007) requires the Postal Service "to establish and maintain postal facilities of such character and in such locations, that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services."

has continued to close or consolidate post offices, apparently using other funds. The Postal Service has said that the appropriations provisions discourage closure of small and rural post offices. Overall, there is no obligation for the Postal Service to maintain a specific number or distribution of post offices, collection boxers, or other access facilities. The Postal Service suggests that this legal flexibility is highly desirable and should be maintained:

For good reason, the Postal Service is given broad authority over the number, type and locations of access to its products and to its facilities. The mix of facilities necessary to support the Postal Service mission of binding the nation together will continue to change over time, and the Postal Service must be allowed to continue to exercise its broad authority unencumbered by local or other parochial interests.⁴⁹

In 2007, the Postal Service operated 32,695 post offices and branch offices and 4,026 postal agencies operated by contractors.⁵⁰ This represents about one post office or agency for every 11,058 residents (90 per million residents). The ratio of retail facilities to residents has declined steadily since the 1900 and is now at the lowest level since 1794 when there was one facility for every 9,842 residents (102 per million residents). The Postal Service does not reveal the number or location of public collection boxes; however, it appears from complaint proceedings before the Commission that the Postal Service has been reducing the number of collection boxes for the last decade or more.

3.3.2 Option 1. Standards for location of post offices and postal agencies.

One way to specify retail access to universal services is to set standards for the location of post offices and postal agencies, i.e., retail postal facilities operated under contract with the Postal Service and are not manned by Postal Service employees. The European Union offers several examples of such standards. In the EU, member states are required "to ensure that the density of the points of contact and of the access points takes account of the needs of users." Member states have adopted a variety of

⁴⁹ Postal Service, *Report on Universal Postal Service* 24.

⁵⁰ 2007 *Postmaster General Ann. Rept.* 20.

standards pursuant to this requirement. For example, the British regulator requires Royal Mail to locate offices or agencies so that "in all postcode areas the premises of not less than 95% of users or potential users of postal services are within 10 kilometers of such an access point."⁵¹ The German universal services regulation and the New Zealand Deed of Understanding require the public postal operator to maintain a minimum number of post offices operated by its staff and a minimum of total post offices and postal agencies.⁵² In the United States, the 1976 amendment to Postal Reorganization Act prohibited the Postal Service from closing "any post office where 35 or more families regularly receive their mail" although this prohibition lasted only a year.⁵³

For the future, Congress may wish to prohibit outright the closure or consolidation of small or rural post offices. This appears to be the original intent of the appropriations act provisions and may still reflect the intent of Congress. Language in current appropriations riders does not appear to be accomplishing this purpose, however. As a matter of legislative clarity, the standard appropriations provision should either be omitted or reworded so that it is effective. Of course, the disadvantage of making this provision effective is that it could freeze into place a pattern of postal facilities that becomes increasingly ill-suited to the needs of the public. For this reason, the President's Commission recommended repeal of this appropriations provision and elimination of all constraints on disposition of post offices.⁵⁴

Alternatively, policymakers may wish to adopt minimum standards for the location of post offices and postal agencies similar to those adopted in other countries. Such standards could assure that all residents have reasonable access to universal services.

⁵¹ Postcomm, "Amended Licence Granted to Royal Mail Group Plc" at 12, Condition (3)(2)(b) (May 25, 2006). The license condition does not refer explicitly post offices and postal agencies but to "access points capable of receiving the largest relevant postal packets and registered mail."

⁵² German government, "Postal Universal Service Ordinance," sec. 2(1) (1999) [?? To be updated].

⁵³ Postal Reorganization Act Amendments of 1976, § 2, Pub. L. 94-421, 90 Stat. 1303.

⁵⁴ President's Commission, *Embracing the Future* 82 ("Existing statutes limiting the Postal Service's flexibility with respect to the disposition of post offices should be repealed and similar provisions in annual appropriations should be avoided").

An objective standard could help shield the Post Office from political objections and allow to Postal Service to close inefficient post offices and make greater use of postal agencies. The President's Commission strongly endorsed extending access to universal services by expanding the network of postal agencies— what it called "freeing postal services from the post office"—through "new partnerships with grocery stores, pharmacies, banks, convenience stores, and small businesses to sell stamps and other postal products at their facilities and to place automated postal centers in convenient locations."⁵⁵

3.3.3 Option 2. Standards for location of public collection boxes

In the European Union, the Postal Directive's requirement to ensure a reasonable density of access points has been translated by some member states into minimum requirements for the placement of collection boxes. For example, Royal Mail's license requires, "in each postcode area where the delivery point density is not less than 200 delivery points per square kilometre not less than 99% of users or potential users of postal services are within 500 metres of a post office letter box."⁵⁶ Less elaborately, the German regulation requires "There shall be sufficient letter boxes that customers in urban areas will not need, as a rule, to travel more than 1,000 metres to reach one."⁵⁷

In the United States, the Postal Service has apparently been conducting for several years a surreptitious program to reduce the number of collection boxes. The inconvenience of fewer collection boxes is offset to some extent by the Postal Service's practice of collecting mail left in private mailboxes. Nonetheless, policymakers might consider that the public interest in the United States, as the EU, would be served by minimum standards for the location of public collection boxes. The tradeoff between the convenience of public collection boxes and their cost cannot be evaluated without more study.

⁵⁵ President's Commission, *Embracing the Future* 82-83.

⁵⁶ Postcomm, "Amended Licence Granted to Royal Mail Group Plc" at 12, Condition (3)(2)(a) (May 25, 2006).

⁵⁷ German government, "Postal Universal Service Ordinance," sec. 2(2) (1999) [?? To be updated].

3.4 *Delivery of universal services*

3.4.1 **Status quo**

The postal law authorizes the Postal Service "to provide for the . . . delivery . . . of mail"⁵⁸ and obliges the Postal Service to "deliver throughout the United States . . . written and printed matter, parcels, and like materials."⁵⁹ Beyond this, however, the postal law is silent on the mode or frequency of delivery which the Postal Service is obliged to provide. The Postal Service appears to have discretion to deliver mail to addressees by one of several methods, including door delivery, curbside delivery, cluster box delivery, roadside delivery, post office box delivery, or general delivery (collection from the counter of a post office). Since fiscal 1981, appropriations acts and reconciliation acts have prohibited reductions in delivery frequency. Under the current appropriations law, the Postal Service is obliged to maintain "six-day delivery and rural delivery" at not less than 1983 levels. The Postal Service says that it does not know what levels of service were provided in 1983, so it is unclear whether the Postal Service is today providing service at 1983 levels because it is required to do by the appropriations act or exceeding 1983 levels voluntarily.

In 2007, the Postal Service provided delivered to 134 million residential delivery points and 14 million business delivery points. About 16 million residences received "delivery" at a post office box; hence, about 118 million households received physical delivery.⁶⁰ The Postal Service has stated that about only 1.4 million residential post office boxes are assigned to residences to whom the Postal Service declines to deliver the mail,⁶¹ so it appears that 14.4 million households prefer post office box delivery to physical delivery to the household. Of the 118 million residences receiving physical delivery, the Postal Service states that it provides six-day service to all but 25,000 residences, 0.02 percent.⁶² According to the Postal Service, physical delivery in 2007

⁵⁸ 39 U.S.C.A. § 404(a)(1) (2007).

⁵⁹ 39 U.S.C.A. § 403(a) (2007).

⁶⁰ 2007 *Postmaster General Ann. Rept.* 56.

⁶¹ Postal Service, *Report on Universal Postal Service* 28.

⁶² Postal Service, *Report on Universal Postal Service* 27.

was divided by mode of delivery as follows: 27 percent to the door or non-curbside box; 42 percent to a curbside mailbox; 13 percent to cluster boxes located in neighborhoods; and 27 percent to centralized residential delivery points such as apartment house mailboxes, delivery centers, or mail room receptacles.⁶³

3.4.2 Option 1. Standards for delivery mode

In most industrialized countries, items transmitted by universal services are delivered to the door of the addressee so there is no need for standards relating to delivery mode.

Over the years, the delivery mode issue that has raised the most public controversy in the use of neighborhood cluster boxes. Since the 1970s, the Postal Service has expanded use of cluster box delivery points by agreeing with developers of new neighborhoods to install cluster box units at the expense of the Postal Service. New owners are presented with the cluster box units as a *fait accompli*. Unlike curbside boxes, the Postal Service's use of cluster boxes does not seem to have gained acceptability with use even after three decades. While cluster boxes reduce the costs of delivery for the Postal Service, they increase the burden and inconvenience for recipients. From a societal perspective, cluster boxes have the further disadvantage that they limit the potential value of the mailbox delivery system because they cannot easily be used by other delivery services.

Reasonable persons might also question whether the public interest is served by other delivery practices of the Postal Service such as (1) declining to deliver mail to households within a certain distance of village post offices, (2) limiting delivery to centralized facilities in large institutions like colleges and universities, and (3) policies relating to general delivery service for migrant workers and homeless persons. Each of these practices has provoked litigation and controversy over the years.

The Postal Service has argued against legal standards for delivery mode as follows,

⁶³ Data provided by the Postal Service in connection with this study.

As for whether, as in the EU, delivery to all addresses in the nation should be mandated, the much more varied terrain in the Postal Service's domestic service area than exists in the densely populated EU effectively precludes such a mandate, at least absent some additional means of paying for it. While residents of certain parts of the U.S. live in environments similar in many respects—including population density—to the EU, there is a great deal of land in this country where population density verges on zero persons per square mile. Given these geographic realities, and the leveling of the playing field for residential customers by the provision of Group E Post Office box service, no additional mandate for carrier delivery is necessary.⁶⁴

However, since the Postal Service apparently does deliver daily to almost all residents in the wide open spaces of America and declines delivery only in particular situations in more densely populated areas, the implications of "geographic realities" for possible delivery mode standards is unclear.

In light of such considerations, some policymakers may or may not consider that standards for the mode of delivery would protect the public interest and ensure a more uniform quality of universal service across the country.

3.4.3 Option 2. Standards for frequency of delivery

It seems evident that the role of mail in society has changed since 1983. If the Postal Service is being required by appropriations acts to maintain 1983 service levels when a lesser frequency of delivery would better suit the needs of the American public, then some policymakers might support a more flexible approach to delivery frequency.⁶⁵ Since the 1983 service levels are unknown, however, it is unclear whether current appropriations acts require the Postal Service to provide more

⁶⁴ Postal Service, *Report on Universal Postal Service* 28.

⁶⁵ In contrast, the EU Postal Directive requires "every working day and not less than five days a week, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities." Postal Directive, art. 3(3).

delivery frequency than it otherwise would or whether the Postal Service is exceeding 1983 levels as a matter of discretion.⁶⁶

Looking to the future, the Postal Service has emphasized the need for flexibility in standards for delivery frequency, citing, *inter alia*, the practices of private companies.

Varying frequency according to volume or geographic density of mailing patterns, or according to particular content (letter communications, advertising, etc.), are options that should be open for consideration. In fact, private couriers deliver 2 to 5 days a week dependent upon volume and geography. Universal service does not dictate any level or mix of frequency. The key is to find the most efficient combination of operations, finances, and service that maximize achievement of universal service goals. The particular market responses of mailers to such specific approaches have not been studied extensively, and should be explored through well-conducted research in appropriate circumstances.⁶⁷

The Postal Service argues that such considerations imply that there should be no legal USO standard for definition, i.e., that delivery frequency should be left to the discretion of the Postal Service: "any construction of the legal standards governing universal service . . . should allow the Postal Service the flexibility to meet future needs for delivery frequency, in accordance with a careful balancing of the various considerations discussed above".⁶⁸

While the Postal Service makes a strong case for operational flexibility, such flexibility could also be built into legally prescribed USO standards for delivery frequency. A USO standard, however, would be directed not so much at "the most efficient combination of operations, finances, and service" as the *minimum* delivery

⁶⁶ Another possible indication that the current level of delivery frequency is voluntary is provided by the fact that the Postal Service does not accept appropriations intended to support unprofitable service levels in rural areas. From fiscal 1986 to fiscal 2007, the Postal Service has apparently declined to request \$460 million in annual public service subsidies that are permanently appropriated by statute unless the Postal Service determines that the amounts appropriated are "no longer required to operate the Postal Service in accordance with the policies of this title." Requests for the clarification by the Postal Service have not been answered.

⁶⁷ Postal Service, *Report on Universal Postal Service* 21 (emphasis added).

⁶⁸ Postal Service, *Report on Universal Postal Service* 21.

frequency required by the public interest. Some policymakers might consider that an impartial agency, independent of commercial considerations, is best placed to set minimum USO standards to protect the public interest.

As a policy matter, the first question to be evaluated would seem to be: Whose interests are being protected by a minimum standard for delivery frequency? For mailers, it is clear that daily service is required by the small number of mailers who send out postal items each day such as daily newspapers and persons in daily postal communications with one another. Some mailers may require delivery on a particular day of the week (many advertisements aim for Friday deliver to stimulate weekend sales) although collective delivery frequency requirements of this group of mailers is unknown. For other mailers, the need for daily delivery is not self-evident.⁶⁹

Looking at delivery frequency from the standpoint of recipients, it seems that less-than-daily delivery would most affect recipients of daily newspapers and persons who are in daily postal communications with other correspondents. The extent and needs of this group could be explored. It seems plausible that, for other recipients of mail, their *need* for universal services might be satisfied by two to five deliveries per week.⁷⁰ In the GMU survey of households, 68 percent of households agreed that they would be little or not affected by five-day delivery, and 41 percent could manage with three-day service. Given the fact that delivery is essentially a free service from the standpoint of recipients, these numbers suggest that less frequent delivery may be acceptable to large segments of the household population. Indeed, households living in urban areas (where newspapers are delivered outside the mail) with broadband internet access (which is likely to transmit time-sensitive correspondence) seem

⁶⁹ It is sometimes argued that mailers of time-sensitive invoices would be hurt by lack of daily delivery. However, it would seem possible to avoid the transit time delays implied by less-than-daily delivery by aligning bill preparation and posting with postal delivery schedules. Return of payments would be significantly delayed only in cases in which the householder (1) pays the bill by mail immediately and (2) depends upon the delivery carrier to collect the return payment (as opposed to using a public collection box). It is unknown what percentage of bill payments would be affected by such a delay.

⁷⁰ In 1976, the Postal Service informed Congress that its market research suggested three-day delivery would meet the demand for over 90 percent of the market. H.R. Comm. Print No. 26, 94th Cong., 2d Sess., at 24 (Dec.10, 1976) (USPS staff study, "Necessity for Change").

especially independent of daily mail delivery. Counter-intuitively, perhaps, it may be that recipients living in relatively rural areas (where daily newspapers are delivered in the mail) and relatively poor districts (without broadband internet access) could be considered in relatively greater need of daily delivery than their fellow citizens who live in wealthier suburbs and receive more mail.

The need for delivery frequency may vary with types of mail. As the Postal Service points out, parcel delivery companies deliver two or three times per week in some areas. This may be due in part to the fact they do not deliver letters. Appropriate minimum delivery frequency standards may not be the same for all types of mail.

In addition to the needs of mailers and recipients, USO standards for delivery frequency will also need to consider costs. In cases where the Postal Service provides physical delivery (rather than post office box delivery or general delivery), frequency of delivery is one of the most costly and easily adjusted parameters of postal service. Given the possibilities of much lower mail volumes in the future and much higher percentages of advertisements, some policymakers may consider that savings that could be realized by reducing minimum delivery frequency obligations would allow better protection of other features of universal service.

3.5 Prices of universal services

3.5.1 Status quo

Although current law is vague with respect to the specific obligations associated with most of the elements of universal service, requirements imposed on the Postal Service with respect to the pricing of *market dominant* products are specific, substantial, and multiple. Section 404(d) broadly obliges the Postal Service to maintain rates that are "reasonable and equitable and sufficient to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States." Other statutory provisions add requirements relating to non-discrimination, transparency, cost-based pricing,

preferential rates for specific products, uniform rates for specific products, statutory price caps, workshare discounts, and inbound international mail.

The most fundamental obligation is posed by statutory price caps for all market dominant products. In effect, increases in the average price of market dominant postal items within each class of mail as defined in 2006 may not rise faster than the Consumer Price Index.⁷¹

A second fundamental issue is geographically uniform rate requirements. The precise meaning of the two statutorily defined uniform rate rules is very important for national postal policy because of the potential financial and ecological implications. Section 404(c) requires "uniform rate" for each class of letter mail, as follows:

(c) The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. *The rate for each such class shall be uniform throughout the United States, its territories, and possessions.* One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service.

Legal analysis suggests that the most plausible interpretation of section 404(c) is that this provision does *not* require geographically uniform rates for letters but only rate schedules that are the same for all Americans. In contrast, section 3683, does require that geographically uniform rates for certain library materials, books, and media mail; such rates must be "uniform for such mail of the same weight, and shall not vary with the distance transported."

Current law also constrains the pricing of *competitive* products of the Postal Service, but to a lesser degree than for market dominant products. Prices for each competitive product must cover attributable costs. Prices for all competitive products must cover a reasonable share of institutional costs. Price changes must be announced in advance, either publicly or by notice to the Commission. Prices must comply with statutory prohibitions against discrimination. Detailed information about the

⁷¹ See 39 U.S.C.A. § 3622(d) (2007); 72 Fed. Reg. 63662, 63691 (Nov. 9, 2007), *adding* 39 C.F.R. Part 3010.

definition of new competitive products must be filed with the Commission in advance.⁷²

In general, the Postal Service seems to argue for relief from uniform rates constraints without clearly recognizing what those constraints are:

The current statute requires that one class of mail be provided at prices uniform throughout the domestic service area. Additional restrictions should be evaluated carefully to determine whether the burdens of complying with those restrictions are vital to the USO.

The USO should focus on what minimum level of service is provided without adding unnecessary restrictions on how that service is provided. Varying prices by the cost of delivery or transportation from origin (zoned prices) are tools that are used today to ensure that the USO continues to be provided at affordable prices. However, the decision on how to use these tools should be left to the discretion of the Postal Service. Mandating (or forbidding) specific pricing structures runs the risk of codifying price relationships that may not be appropriate over the long run and may ultimately threaten the ability to meet the USO.⁷³

Obligations with respect to pricing are necessarily related to other elements of the universal service obligation. By prescribing specific constraints on pricing while leaving other elements of the universal service obligation vague, current law requires the Postal Service to adjust the quality of other service elements as needed to keep within price caps. If policymakers were to adopt some of the optional elements of the USO discussed in other sections of this chapter, it could be necessary to reconsider current constraints on prices as well. For example, adding a standard for delivery modes or post office locations and quality of service could imply that the Postal Service would have to raise rates or decrease delivery frequency or eliminate collection boxes. The following options are therefore not presented as stand-alone options but as potential components of a complete definition of a legal USO.

⁷² See 39 U.S.C.A. §§ 3631-33 (2007).

⁷³ Postal Service, *Report on Universal Postal Service* 19 (footnotes omitted). While section 404(c) only requires the Postal Service to provide *one* class of mail for transmission of letters sealed against inspection, it requires "uniform rates" for "each such class."

3.5.2 Option 1. Statutory price caps limited to single-piece products.

By imposing statutory price caps on all market dominant products of the Postal Service, current law makes it difficult to adjust, or even define, other elements of the USO. Total revenue of the Postal Service is limited by the combined effect of price caps on market dominant products and competitive pressures on competitive products. If, due to the costs of meeting other universal service obligations or other factors, the Postal Service's costs increase faster than revenues can be increased under the price caps, the Postal Service must either incur a deficit or file an "exigency" rate case. No other industrialized country constrains all market dominant revenues of the public postal operator by statutory price caps. By allowing some pricing flexibility, these countries can insist on compliance with non-price elements of the USO. If policymakers decide to define a legal USO, it may be desirable to introduce more flexibility in the definition of the price caps.

In most industrialized countries reviewed, price caps are set by the regulator or minister after a review of costs that have been or will be incurred in providing universal services that comply with the USO. In other words, the postage rates *follow* other elements of the USO, they do not *determine* other elements of the USO. Moreover, in most countries, strict price controls are effectively limited to single-piece prices. For example, in Germany, increases in single-piece prices must be approved by the regulator before going into effect (the regulator has adopted a price cap formula for this purpose). In Sweden, the regulator limits increases in single-piece rates to changes in inflation. In the Netherlands, as well, only single-piece rates are regulated. The underlying principle is that control of single-piece rates effectively places a ceiling on bulk rates, since bulk items may be posted at single-piece rates. Beneath the ceiling on single-piece rates, public postal operators may have a significant level of pricing flexibility for bulk products. In general, in these countries, bulk rates have tended to fall (or increase more slowly) relative to single-piece rates. Thus, in light of the experience of other industrialized countries and the need to allow some flexibility in price controls in order to accommodate other elements of a legal USO, policymakers may wish to consider limiting the statutory price caps in current law to single-piece market dominant items.

Price caps for bulk market dominant products could still be established by the Commission in accordance with the principles of the modern system of regulation. An administrative approach could allow the Commission and the Postal Service flexibility to redefine the baskets for price cap purposes (current law adopts the classes as defined in December 2006 as the definition of baskets for price cap purposes). It seems plausible that, in the foreseeable future, flexibility to revise the basket definitions will be important for improving the efficiency of the Postal Service.

3.5.3 Option 2. Geographically uniform prices for single-piece first class letters

The Postal Reorganization Act introduced the rule that rates for each class of letters should be "uniform throughout the United States, its territories, and possessions."⁷⁴ This requirement was not based on traditional policy principles.⁷⁵ In development of the Postal Reorganization Act, there were no hearings, committee analyses, or congressional debates on the topic of uniform letter rates. While it is uncertain how a court would interpret this provision, the most plausible interpretation seems to be that the Postal Service may introduce first class letter rates which vary with distance provided all Americans have the same schedule of rates.

In the European Union, the Postal Directive permits, but does not require, member states to introduce geographically uniform rates for single-piece postal services, parcels as well as letters. Geographically uniform rates for bulk mail may not be required by member states. As matter of practice, the major public postal operators in Europe are moving away from geographically uniform rates for bulk mail. Rates vary not only by distance but also according to delivery area. For example, the British Royal Mail has introduced higher rates for delivery of bulk mail in high-cost areas and lower rates for delivery of bulk mail in low-cost areas.

⁷⁴ 39 U.S.C.A. § 404(c) (2007).

⁷⁵ The Post Office maintained different rates for local and long distance first class letters between 1933 and 1944. In the 1950s, a local-nonlocal rate schedule for first class letters was advocated by the Eisenhower Administration and approved by both houses of Congress, although on different occasions so that it was not enacted into law.

In the United States, as well, a uniform tariff for bulk letter mail seems difficult to justify. With modern computers, a postage rate that varies with destination seems unlikely to impose a significant administrative burden on bulk letter mailers. Moreover, for the average bulk mailer, the total cost of a national mailing is unlikely to change much since higher rates to some destinations will be offset by lower rates to other destinations. More fundamentally, to require the Postal Service to charge a uniform tariff for bulk letter mail would be equivalent to requiring the Postal Service to charge zero for transportation of bulk letter mail. In effect, the USO would require a subsidization of the physical transportation of bulk letter mail across the continent when the same mail could be, possibly less expensively, transmitted by telecommunications and printed at a location closer to the recipients. Given increasing concerns over the environmental effects of transportation, it hardly seems appropriate to encourage unnecessary and uneconomical transportation of bulk letter mail around the nation.

A mandatory uniform rate limited to single-piece letter mail could be considered a more plausible USO requirement. Its primary justification would probably be the convenience that it provides single-piece mailers who would be relieved of the burden of looking up the postage rate to a given destination. This does not seem a large gain in convenience, however. Single-piece mailers will likely learn quickly the postage rates to regular correspondents. On the other hand, it is also true that the Postal Service, like private carriers, will likewise maintain a uniform national rate for retail letters voluntarily because a geographically differentiated rate is too expensive to administer. Hence, the burden of a geographically uniform rate requirement for single-piece letters is likely to be small or nonexistent. Some policymakers may consider a relatively small gain in public benefits to be worth a relatively small cost in USO burden.

Even so, it must be noted that even for single-piece letters, reasonable persons may question the desirability of a mandatory geographically uniform rate. "To bind the Nation together through the personal, educational, literary, and business

correspondence of the people,"⁷⁶ it seems that the primary objective should be to ensure the *affordability*, rather than the *uniformity*, of rates for single-piece letters. A statutory price cap on rates for single-piece first class letters would accomplish this objective. Suppose, for example, that the first class stamp price were statutorily limited to the current rate, 42¢, plus adjustments for inflation. Every citizen would then be guaranteed the ability to post a letter to every other citizen for a real (inflation-adjusted) price of 42¢ for so long as the law is in effect. Suppose, then, that the Postal Service were to propose a discounted stamp for first class letters posted and delivered in the same zip code because such letters require limited sorting and transportation. If the ability of each citizen to send letters to all points in the country at a real price of 42¢ is protected by statute, is the public interest truly advanced by prohibiting the Postal Service from introducing a discounted first class stamp for local letters? Assuming discounts for local letters are cost-based, there does not appear to be a strong public interest in forcing the Postal Service to overcharge local mailers. At the same, there is a manifest public interest in allowing the Postal Service to adapt prices to costs (promoting allocative efficiency) and respond to competition (whether from other delivery services or other media). If a geographically uniform rate rule were applied only to the Postal Service and the postal monopoly were repealed, the Postal Service could be placed at an unfair disadvantage relative to competitors. Thus, a geographically uniform rate rule could conflict with other, desirable policy options.

In sum, a statutory requirement to maintain uniform rates for single-piece first class letters appears to be a plausible policy option, but only barely so. The main argument for this option appears to be a widespread but dubious interpretation of current law and a reluctance to depart from a practice that people have become accustomed to. An alternative approach, which seems better grounded in public interest considerations, would be to adopt a statutory price cap for first class letters without prohibiting the Postal Service from introducing discounts from this maximum rate.

⁷⁶ 39 U.S.C.A. § 101(a) (2007).

3.5.4 Option 3. Revise uniform rate rule for library and media mail

Public policy considerations raised by the uniform rate rule for library and media mail are essentially the same as for letter mail. A mandatory uniform rate rule raises economic, environmental, and competitive concerns that, in an age of widespread broadband access, may no longer be offset by public interest benefits. On this basis, some policymakers may wish to reconsider whether uniform rates should be required for some or all of the library mail and media mail items included section 3683.

At a minimum, it would seem that any uniform rate rule should be limited to competitive products. Library mail and media mail are now categorized as market dominant products. Since they are essentially parcel services, it is possible to imagine that some or all of these services may one day be classified as competitive products. If so, the Postal Service should be not handicapped from competing with private parcel companies by the requirement to charge geographically uniform rates. The result of such a rule would only be to deprive the Postal Service of short distance traffic, not to impose to rate uniformity on a competitive market.

3.5.5 Option 4. Commercial flexibility for Postal Service pricing competitive products

Current law imposes significant constraints on the ability of the Postal Service to price competitive products. If such products are not considered USO products, then the justification for such controls appears to rest on concerns about anticompetitive conduct. In such case, it would appear appropriate to eliminate USO-based pricing controls such the anti-discrimination prohibition, advance notice requirements, and perhaps, a significant measure of product definition regulation. Remaining controls on competitive products should be clearly derived from the need to protect fair competition.

3.6 *Quality of universal services*

3.6.1 Status quo

Section 403(a) of Title 39 requires the Postal Service to provide "adequate and efficient postal services." Subsection 101(a) declares that the Postal Service "shall provide prompt, reliable, and efficient services." Other parts of Title 39 require a particularly high quality of service for letter mail, but it is open to question whether these provisions today refer to first class or expedited mail.

Two provisions in Title 39, impose more specific obligations with respect to the quality of universal services. Section 3661 requires the Postal Service to seek an advisory opinion from the Commission before making a change in service on "nationwide or substantially nationwide basis." Section 3691, added by the PAEA, requires the Postal Service to promulgate "modern service standards." The Postal Service has interpreted this provision to require publication of its "stated goals" for transit times of different products.

3.6.2 Option 1. Quality of service standards for some or all universal services

The EU Postal Directive requires member states to set quality of service standards for domestic universal services and to ensure independent monitoring of actual performance. The British regulator, Postcomm, has established especially detailed standards. For example, on an annual basis Royal Mail must deliver at least 93 percent of first class mail by the first business day after mailing, and a mailer is entitled to compensation for substandard performance.⁷⁷ In contrast, Germany has a more relaxed approach to quality of service. The Ministry's Universal Postal Service Ordinance merely requires that 80 percent of domestic single-piece letter post items must be delivered by the first working day after posting; at least 95 percent of single-

⁷⁷ Postcomm, "Amended Licence Granted to Royal Mail Group Plc" at 14-26, Condition 4 (May 25, 2006). Similar national standards have been established for each universal service, including retail second class, bulk first class, bulk second class, bulk third class, standard parcels, European international delivery, and special delivery. Postcomm can and has levied substantial fines failure to meet quality of service standards.

piece letter post and 80 percent of parcels must be delivered by the second day.⁷⁸ Deutsche Post has met quality of service standards with relative ease.

These European examples exemplify one option for defining specific and enforceable quality of service standards in an American USO. Under such an approach, the Commission might be authorized to set quality of service standards for some or all universal services and to monitor actual performance. The contrast between the British and German examples suggests that the objective of such standards must be clearly defined. Is the purpose of quality of service standards to stimulate better quality of universal services (as in the U.K.) or to identify the minimum standard of universal service that society truly needs (as in Germany)? In the former case, it would seem that there must a very clear demarcation of the role the USO standards so that they do not usurp managerial authority vested in the Board of Governors. On the other hand, the Commission's independent evaluation of the minimum needs of society could be of substantial assistance to the Postal Service in resisting calls to invest in unnecessary levels of service quality.

3.6.3 Option 2. Criteria for quality of service standards set by the Postal Service

Another approach would be to give the Commission authority to determine the *format* of quality of service standards while leaving the Postal Service authority to establish the standards themselves. For example, the Commission might determine that quality of service standards should be set for letters sent and received within a state or region and between states and regions.⁷⁹ Postal Service management would then publish quality of service target in accordance with the format prescribed by the Commission. In this manner, the Commission would exercise authority over the level

⁷⁸ Universal Postal Service Ordinance (PUDLV), Secs. 2(3), 3(2). Newspapers and magazines must be delivered within "operationally reasonable constraints."

⁷⁹ The U.K. offers an example. In addition to the national quality of service standard, Royal Mail must set and comply with service standards for letters posted (1) within each of the 121 postcode areas and (2) from each postcode area to other postcode areas. Postcomm, "Amended Licence Granted to Royal Mail Group Plc" at 14-26, Condition 4 (May 25, 2006).

of transparency for quality of service reports without determining actual operational targets.

In developing this option, as well, it must be clear whether the resulting standards are "bare-minimum standards" that the Postal Service must meet or "stated goals" standards towards which the Postal Service is expected to strive with best efforts. In principle, the Commission could establish the format for either. The Commission could even set the substantive "bare-minimum standards" (as described in option 1, above) and determine the format for the "stated goals" standards for especially important products (in effect, requiring the Postal Service to explain to mailers specifically what quality of service is being offered).

3.6.4 Option 3. Expanded Commission review of changes in universal services

Section 3661 already provides a procedure which allows the Commission to review and issue a public report on proposed changes in the quality of national postal services. As set out in current law, however, this procedure has been largely ineffective. The House adopted a proposal to expand the coverage of section 3661 in 1976, but this provision was deleted by a conference committee. In connection with establishment of a legal universal service obligation, some policymakers might consider expanded scope for Commission review appropriate for changes in the quality of universal services.

3.7 Protection of the rights of users of universal services

3.7.1 Status quo

Under current law, neither complaint procedures before the Commission nor judicial review offer an individual a feasible means of enforcing universal service obligations as they may apply in specific situations. In the PAEA, Congress revised the complaint procedure to exclude from the Commission's jurisdiction most of the provisions which relate to universal service except for those limiting the Postal Service's rate setting authority.

3.7.2 Option 1. Transparent procedures for complaint handling and redress by the Postal Service (and other providers of universal service)

Article 19 of the EU Postal Directive specifically ensures users of universal services certain rights. EU member states must ensure that "transparent, simple and inexpensive procedures are made available by undertakings providing postal services for dealing with postal users' complaints, particularly in cases involving loss, theft, damage or noncompliance with service quality standards (including procedures for determining where responsibility lies in cases where more than one operator is involved)." Redress procedures must include "where warranted, for a system of reimbursement and/or compensation." Moreover, providers of universal services must publish an annual report on the resolution of users' complaint. Some policymakers may consider similar measures appropriate with respect to universal services in the United States.

3.7.3 Option 2. Right of appeal of complaint case to an independent body

Article 19 of the EU Postal Directive likewise requires member states to provide for appeal to a "competent national authority . . . where users' complaints to undertakings providing postal services within the scope of the universal service have not been satisfactorily resolved." In the United States, persons affected by a Postal Service decision to close a post office have a very limited right of appeal to the Commission. Some policymakers may consider that a more extensive right of appeal may be appropriate to permit enforcement of a legal universal service obligation.

4 Options for the Postal Monopoly

The "postal monopoly" is the exclusive right of the Postal Service to carry "letters and packets" under certain circumstances. A "packet" is an ancient term for a letter of several pages. The monopoly is created by a series of criminal and civil laws that make it a crime for anyone other than the Postal Service to collect and delivery letters in certain circumstances. The postal monopoly law is ancient, obscure, and complicated. The postal monopoly statutes can be traced directly to an act of the English Parliament in 1660. The postal monopoly law has not been substantially amended since 1872.

Like any monopoly law, the postal monopoly law limits the freedom of buyers of postal services and private delivery companies and creates a certain amount of economic distortion. For these reasons, some have called for reduction or repeal of the postal monopoly. Most industrialized countries have either repealed their postal monopolies or are committed to doing so. On other hand, supporters of the postal monopoly argue that it should be continued in the United States because it is necessary to sustain universal postal service or fund other government obligations. This chapter summarizes the pros and cons of the postal monopoly and plausible options for change.

4.1 Pros and cons of a postal monopoly

This section briefly, and by no means comprehensively, summarizes the common arguments for and against continuation of postal monopoly. The justifications, or absence of justifications, for the continuing the postal monopoly constitute the context for the options that follow.

4.1.1 Justifications for the postal monopoly

It is difficult to rationalize continuation of the postal monopoly generally or of a specific definition for the postal monopoly based upon the original objectives of Congress. The American government inherited the idea of a postal monopoly from

British postal law, which established a monopoly when the post office was first established more than a century before the American Revolution. Since adoption of the Constitution in 1788, Congress has substantially revised the postal monopoly law on seven occasions (depending on what is considered "substantial"): in acts adopted in 1792, 1794, 1825, 1827, 1845, 1861, and 1872. On only one occasion, in 1845, did Congress debate the scope of postal monopoly at any length. At this time, the Senate (the House had little input on this topic) took it for granted that a law prohibiting private lines of posts (relay stations) for transmitting letters between cities should be extended to prohibit intercity private express services (messengers carrying letters via railroads or steamships). The Senate specifically debated and rejected the proposition that the monopoly should prohibit private carriage of newspapers and magazines because it feared that such a monopoly might lead to government control of the press. From a modern perspective, the most important extension of the monopoly law was the decision by Congress in 1861 to prohibit private carriage of intracity items. This change, adopted just as southern states were seceding from the Union, was neither reviewed by Congressional committees nor subject to general debate. Today, while 1845 monopoly over long distance transportation has long since atrophied, the 1861 monopoly over the "last mile" forms the cornerstone of whatever monopoly power the Postal Service enjoys.

Obviously the purpose of the postal monopoly law was to protect the Post Office from competition but how and to what end? At no point did Congress identify the economic or social considerations that were thought to justify the postal monopoly, nor explain why the monopoly should include one thing or activity but not another (other than in the Senate debate in 1845). Without a record of the specific reasons underlying adoption of the postal monopoly laws, it is impossible to justify continuation of the postal monopoly in the twenty-first century based upon the reasoning of Congress in the nineteenth century.⁸⁰

⁸⁰ It should be noted, however, that despite the absence of legislative history documenting the intent of Congress in adopting the key postal monopoly laws, the Postal Service often refers to the purpose of postal monopoly laws. *See, e.g.,* Postal Service, *Report on Universal Postal Service 2* ("To ensure funding of the USO, Congress and the President established the Private Express Statutes (PES) and the

Instead, in recent times, efforts to justify the postal monopoly have usually been grounded in current economic or social considerations. In the twentieth century, there was no serious debate about the continuation or scope of the postal monopoly until the 1970s. In 1973, at the request of Congress, the Board of Governors of the Postal Service issued a report that offered an explicit justification for the postal monopoly. In essence, the Board declared that the postal monopoly should be continued because it protected the ability of the Postal Service to provide a national postal system with geographically uniform rates for letter mail.⁸¹ The Governors suggested that geographically uniform letter rates were rooted in longstanding American postal policy and mandated by the 1970 Postal Reorganization Act. On the facts, however, this justification fails to withstand scrutiny.⁸² There was no longstanding American postal policy requiring geographically uniform rates for letters. The Postal Reorganization Act apparently does not require the Postal Service to maintain geographically uniform rates for letters. And the Postal Service's legal interpretation of the monopoly statutes did not limit the monopoly to letters posted at geographically uniform rates.

On the other hand, it may be noted that such factual inconsistencies do not address the underlying reasoning of the Board. *If* the postal law did mandate a geographically uniform rate for a class of postal items, then there may be a justification for a monopoly over the carriage of that class of items. If a producer charges a uniform rate for services which cost significantly different amounts to produce in different areas, then there may be opportunities for "cream skimming." A new entrant competing only in areas where costs of production are lowest might gain a cost advantage over

mailbox access rule, which together comprise the postal monopoly"); 3 ("The purpose of the PES and the mailbox rule for over one hundred years has been to fund and support the various obligations"); 15 ("Congress's primary motive in enacting and maintaining the PES was to ensure revenue for the Postal Service's fulfillment of the USO and for the maintenance of the post road infrastructure necessary to that fulfillment").

⁸¹ Postal Service, Board of Governors, *Restrictions on the Private Carriage of Mail: A Report of the Board of Governors of the United States Postal Service* 3-7 (Jun. 29, 1973).

⁸² In a recent report, the Postal Service recalls the defense of the postal monopoly set out in the Board of Governors' report but avoids mentioning that central argument of the Board was the perceived need to protect geographically uniform rates. See Postal Service, *Report on Universal Postal Service* 49.

the incumbent, and this cost advantage may or may not be sufficient to allow the new entrant to take substantial business away from the incumbent.⁸³

Another modern justification for the postal monopoly is that postal service is a "natural monopoly." However, in an industry with natural monopoly characteristics, the largest enterprise always has a cost advantage over smaller producers. Hence, it is very difficult for a new entrant to gain much business unless the incumbent is bound by a uniform rate rule that prevents it from meeting the prices of "cream skimmers." The "natural monopoly" justification is thus, at bottom, based on the potential problems presented by a uniform rate rule.⁸⁴

In 2007, the Postal Service presented to the Federal Trade Commission (FTC) another possible justification for the postal monopoly. The FTC, at the request of Congress, reviewed the competitive effects of laws that apply differently to the Postal Service's competitive products and private delivery services providing similar services. In comments to the FTC, the Postal Service argued that the Postal Reorganization Act and other federal laws impose a number of economic burdens on the Postal Service. Of \$ 7.6 billion in annual costs added by federal laws (10.5 percent of total costs in 2006), only about \$ 1.5 billion was traced to the obligation to produce universal postal services. The largest item, \$ 5.6 billion, was due to an alleged requirement⁸⁵ to pay postal employees substantially more than comparable private sector employees.⁸⁶ To the extent that Congress imposes non-USO burdens on the Postal Service, it could be argued that the postal monopoly is justified because it

⁸³ Whether or not a new entrant could successfully compete depends on many factors including the economies of scale enjoyed by the incumbent and the relative efficiency of the two competitors.

⁸⁴ In its recent report, the Postal Service cites the natural monopoly justification offered by the Commission on Postal Service, and then interprets it as a variation of the cream-skimming problem posed by the uniform rate rule. Postal Service, *Report on Universal Postal Service* 50.

⁸⁵ It should be noted that the FTC did not identify which provisions of law require the Postal Service to pay a wage premium to postal employees. Moreover, postal unions dispute the existence of excess wage payments. The only objective evidence cited by the FTC was an arbitrator's report relating to the wages for one postal union for the period 2000 to 2003 period; the arbitrator concluded that there was a wage premium but that could not be quantified. *Id.* at 39.

⁸⁶ Federal Trade Commission, *Accounting for Laws* 56. *See also id.* at 39 ("Further, the Postal Service concludes that differences between the statutes that govern its relationship with its employees and the statutes that govern private employer relationships with their employees mean that it must pay its employees substantially more per hour than private sector employees receive").

allows the Postal Service to cover such additional costs through collection of higher postage rates than could be charged in a competitive market. In short, the postal monopoly might be considered a tax on mailers to support statutory objectives largely unrelated to universal service.

In 2008, the Postal Service prepared a report on universal service and the postal monopoly that offered a somewhat different justification for the postal monopoly. The report concluded that the postal monopoly and mailbox monopoly should be continued and reasoned as follows:

The PES ["private express statutes" or postal monopoly law] and mailbox access rule [mailbox monopoly law] should be preserved as is. As mentioned above, any obligation must be matched by the financial capability to meet that obligation and the Postal Service requires adequate funding for the USO even at its current levels. . . . Eliminating or reducing the PES or mailbox rule would have a devastating impact on the ability of the Postal Service to provide the affordable universal service that the country values so highly.⁸⁷

The argument advanced by the Postal Service seems to be as follows. Legal obligations require the Postal Service to provide a level of universal service which is, or might be, in excess of what the Postal Service would provide if it operated on "purely a business-like basis."⁸⁸ The Postal Service offers two specific statutory obligations to generate illustrative calculations of the elevated costs required by the USO: a requirement to provide of six-day delivery to all delivery points and a requirement to maintain several thousand small and rural post offices. With respect to delivery frequency, for example, the Postal Service notes:

As part of its USO, the Postal Service is required to deliver mail virtually everywhere in the country six days a week. While there may be some benefits from "ubiquity" (going everywhere) as a general matter, observation of delivery frequency by private sector

⁸⁷ Postal Service, *Report on Universal Postal Service* 3.

⁸⁸ Postal Service, *Report on Universal Postal Service* 53 ("The USO is a set of public policy restrictions on the actions of a post that keep it from making its decisions on purely a business-like basis").

firms reveals that delivery frequency is a choice for those firms. For example, they do not deliver six days a week. This is not true for the Postal Service, as its delivery frequency is set by public policy, not business rules.⁸⁹

Although the Postal Service does not say that it would reduce national service to five days per week if it acted on a purely business-like basis, the Postal Service implies that it might do so but for the legal obligation to maintain six-day service.⁹⁰

In short, the Postal Service seems to say that postal monopoly is justified by the fact that Congress has obliged the Postal Service to provide a level of universal service which exceeds that which could be sustained in a competitive market. Unless alternative delivery services are prohibited by the postal monopoly, a substantial fraction of mailers would likely choose a reduced level of service (for example, five-day delivery) at lower rates, and the Postal Service itself would either have to operate on "purely a business-like basis" or face financial ruin. Assuming that letter mailers can be prevented from fleeing to other communications channels,⁹¹ this rationale seems offer an additional justification for continuing the postal monopoly.⁹²

4.1.2 Considerations against continuing the postal monopoly

The basic argument against continuation of the postal monopoly over the long term appears to be the claim that, within a legal framework designed to protect the public interest and universal service, a competitive market will likely produce postal and delivery services that are more efficient, more innovative, more flexible, and fairer to buyers and producers than an alternative approach driven by political consensus or

⁸⁹ Postal Service, *Report on Universal Postal Service* 54.

⁹⁰ The Postal Service urges elimination of the statutory requirement to maintain six-day service. Postal Service, *Report on Universal Postal Service* 21.

⁹¹ The Postal Service does maintain, however, that "While the Postal Service may have a limited statutory monopoly, the reality is that there are alternatives to every piece of mail." Postal Service, *Report on Universal Postal Service* 2.

⁹² The presentation of the Postal Service is long and complex. The two-paragraph summary provided in the text is offered only for purposes of providing an overview of arguments for and against the postal monopoly and cannot reproduce the full range of points made by the Postal Service.

the self-interest of a single producer. The FTC summarized this general view in its recent study on the postal laws:

In general, competition provides consumers lower prices, better quality, and more variety. Therefore, restrictions on competition should be put in place only when they are necessary to provide consumers a benefit that the market cannot. Such restrictions, moreover, should be narrowly drawn to displace competition only as much as needed to provide this benefit. Because the postal monopoly distorts market outcomes in the competitive products sector, this approach would assure that consumers are not unnecessarily deprived of the benefits of competition.⁹³

The Commission itself conducted a public inquiry on the theory of the postal monopoly in 1983. In that inquiry, a conservative think tank led by a James C. Miller, III, a prominent economist and now a Governor of the Postal Service, filed a analysis that summarized the economic case against the postal monopoly as follows:

[R]ecent developments in economic theory and extensive analysis of the available data undercut the notion that the Postal Service alone should provide letter delivery service. Indeed, this notion can be attacked on several grounds. First, the Postal Service has not met the "burden of proof" which economic theory suggests should be met whenever proposals are made to restrict competition. Second, recent developments in economic theory undercut the traditional theories of natural monopoly on which the Postal Service bases its arguments. Third, even if letter delivery is a natural monopoly, recent economic developments question whether the government should provide the service. Fourth, the evidence does not support the notion that letter delivery is a natural monopoly even by traditional meanings of the term. Fifth, the Postal Service has developed an economic argument with respect to "cream skimming" that is either internally inconsistent or does not support its case. Sixth, equity considerations, such as subsidies for rural delivery, do not justify the postal monopoly both because more efficient ways of providing subsidies

⁹³ Federal Trade Commission, *Accounting for Laws* 93.

exist and because rural customers would probably also benefit from competition. And, seventh, many of the derogatory claims about what a deregulated letter-delivery market would look like can easily be debunked. Therefore, the preponderance of the evidence suggests that allowing competition in the letter-delivery market would benefit consumers.⁹⁴

George L. Priest, professor of economics and law at Yale University and author of the most detailed history of the postal monopoly to date, has criticized the postal monopoly as an inhibitor of innovation: "The strongest argument in favor of elimination of the monopoly and of privatization of the Postal Service is that the citizenry and thus democracy in America can be made better off by freeing the forces of innovation and experimentation to empower the discovery of new methods of delivery that advance communications."⁹⁵

Another approach is provided by a public inquiry conducted by the British regulator, Postcomm. Postcomm conducted a two-year public inquiry into the question of whether repeal of the postal monopoly would be consistent with ensuring universal service, Postcomm's its overriding statutory obligation. In the end, Postcomm concluded that the monopoly should be ended after an orderly transition:

Postcomm . . . is satisfied both that its market opening policy will not undermine the universal postal service and that users will benefit from the choice and innovation that competition will stimulate over time. Moreover, the introduction of competition—by encouraging Consignia [now, Royal Mail] to become more efficient—will, in itself, help to safeguard the universal postal service. Postcomm also has regulatory controls to prevent adverse impacts on those customer groups identified in the Postal Services Act as meriting particular consideration.⁹⁶

⁹⁴ PRC, "Monopoly Theory Inquiry," Docket RM89-4, at 12-13 (1989) (comments of Citizens for a Sound Economy). A classic exposition of the economic arguments against the postal monopoly may be found in Haldi, *Postal Monopoly*. (1974).

⁹⁵ Priest, "Socialism, Eastern Europe, and the Question of the Postal Monopoly," at 58. Priest's article is a chapter in Sidak, *Governing the Postal Service*. Several other chapters in this book likewise recommend against continuation of the postal monopoly from various perspectives.

⁹⁶ Postcomm, "Promoting Effective Competition in UK Postal Services: A Decision Document," at 3 (May 2002).

Consequently, Postcomm ended the postal monopoly in the U.K. on January 1, 2006. A special government panel is now reviewing developments in the U.K. postal market.

Governments of most industrialized countries have agreed with Postcomm and decided to terminate their postal monopolies. Among the 30 member countries of the Organization for Economic Co-operation and Development, twenty-three have either repealed the postal monopoly or are committed to doing so: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, and the United Kingdom. OECD countries which had not made a decision to terminate the postal monopoly are Australia, Canada, Japan, Korea, Mexico, Switzerland, Turkey, and the United States. Of these, however, two are substantially more liberalized than the United States (Australia and Switzerland).

The lessons to be learned from abroad may be limited, however. In a recent report prepared for the Postal Service, Accenture concludes that decisions of governments in other industrialized countries to terminate their postal monopoly laws have little relevance to the United States. Accenture's evaluation is based in part on the difficulty of comparing different countries' postal markets and in part on its assessment the U.S. postal market has less to gain and more to lose from competition than other countries.

This study shows that it is challenging to make one-to-one comparisons of the various liberalized or liberalizing developed countries. Each country is in a unique situation and uses specific measures to address challenges and opportunities. This analysis shows the US to be no exception. Given the lower potential upside and the higher exposure of the USPS relative to other national postal services, the US postal market can be considered as "high risk" with respect to postal liberalization.⁹⁷

⁹⁷ Postal Service, *Report on Universal Postal Service* App. E. at 8.

The findings of the Accenture study are consistent with the Postal Service's support for continuation of the postal monopoly, but its premises may be open to question.⁹⁸

4.2 *Status quo*

Today the postal monopoly is defined by seven sections of the criminal law, Title 18 of the United States Code, and six sections of the postal law, Title 39. Sections 1693 through 1699 of Title 18 make it a crime to provide or use private delivery services for the regular transmission of letters or to assist would-be competitors of the Postal Service. The scope of the postal monopoly is modified by exceptions included in these provisions and in section 601 of Title 39. Altogether, there are nine statutory exceptions to the postal monopoly. These permit, for instance, a person to include a letter of instructions with cargo, a company to transport its own correspondence, and express companies like FedEx and UPS to transport urgent letters. Sections 602 through 606 of Title 39 include additional postal monopoly provisions, primarily relating to enforcement of the monopoly.

Rarely illuminated by judicial opinion, the monopoly statutes have been elaborately interpreted by lawyers for the Post Office Department and, after 1971, the Postal Service. These interpretations were codified into regulations adopted by the Postal Service in 1974. In 1979, in virtually the only major judicial opinion on the postal monopoly in modern times, a divided federal appellate court upheld a key portion of these regulations as a valid exercise of the Postal Service's rulemaking authority. Nonetheless, in light of a careful review of the history of the postal monopoly statutes (including information unavailable to the court), reasonable persons could question whether these regulations represented a correct or appropriate administration of the law.

⁹⁸ For example, Accenture's assessment of the risk that the U.S. would face due to repeal of the postal monopoly is grounded in part its conclusion that the U.S., which has few statutory obligations with respect to universal service, "is at the upper end of the USO scope requirements for many parameters." *Id.* at 35. While Accenture concludes that "the upside potential [of competition] appears relatively lower for the US postal market" (*id.* at 7), the FTC reports "From a market-wide perspective, the federally-imposed restrictions that impose economic burdens on the USPS and the implicit subsidies that provide the USPS an economic advantage should be viewed as two distortions that compound each other and negatively affect the provision of competitive mail products." Federal Trade

The Postal Accountability and Enhancement Act of 2006 did not reexamine the postal monopoly per se, but it added or revised several important peripheral provisions and paved the way for resolving many of the legal issues surrounding the 1974 regulations. The PAEA revised section 601 of Title 39 by adding new statutory exceptions and repealing former subsection (b), the provision the Postal Service cited for authority to "suspend" the postal monopoly and thus the legal keystone to the 1974 postal monopoly regulations. Congress also revised the Postal Service's rulemaking authority, apparently repealing its authority to adopt regulations defining the scope of the postal monopoly. The PAEA also vested the Commission with authority (1) to adopt regulations necessary to implement the exceptions to the postal monopoly set out in section 601 of Title 39; (2) to adopt regulations necessary to implement section 404a of Title 39, a new section which forbids the Postal Service from adopting regulations which preclude competition in a way that creates an unfair advantage; and (3) to require the Postal Service to comply with the more limited scope of its ratemaking authority, section 401(2). The full legal implications of these revisions are unknown at present. The Postal Service has continued to maintain its postal monopoly regulations to the present day. The Commission has not issued regulations under sections 601 or 404a.

Some policymakers may consider the current state of the postal monopoly statutes is satisfactory and should be continued without change. The Postal Service has argued, "The PES ["private express statutes" or postal monopoly statutes] and mailbox access rule should be preserved as is."⁹⁹ Other policymakers, however, may consider that after 136 years, the postal monopoly statutes are due for a fundamental review and modernization or even, following the lead of other industrialized countries, termination over the long term. Some seemingly plausible alternatives to the status quo are described below.

Commission, *Accounting for Laws* 9.

⁹⁹ Postal Service, *Report on Universal Postal Service* 3.

4.3 *Option 1. Clarify the scope of postal monopoly*

The President's Commission of the United States Postal Service concluded that a major difficulty with current postal monopoly was lack of clarity.

The lack of a straightforward and circumscribed definition of the postal monopoly was a common complaint heard by the Commission. Legislation governing the postal monopoly has gone largely unchanged for more than a century. As a result, regulatory interpretations of the monopoly have grown increasingly muddled.

In light of this confusion, the nation would be best served by a modern, straightforward definition that reflects the postal monopoly as the nation knows it and relies on it today. . . .¹⁰⁰

As a first step, at least, the postal monopoly could be defined clearly. Indeed, since the postal monopoly is a criminal law, clarity might be considered to required by fundamental fairness.

4.3.1 **Define the term "letters and packets" as used in current law**

The most important step that the Commission can take on its own with respect to the postal monopoly would be adopt a clear definition of the term "letters and packets" as used in the current postal monopoly statutes. An administrative definition implementing current law could be set out in regulations issued by the Commission pursuant to section 601(c).¹⁰¹ A well-reasoned Commission regulation adopting a definition of "letters and packets" for purposes of section 601 would likely, but not necessarily, be accepted by the courts and the Department of Justice as an authoritative definition of the term for purposes of criminal postal monopoly statutes

¹⁰⁰ President's Commission, *Embracing the Future* 22.

¹⁰¹ Section 601 sets out several exceptions to the postal monopoly and authorizes the Commission to adopt regulations necessary to carry out that section. 39 U.S.C.A. § 601 (2007). The FTC suggests that section 601(c) may authorize the Commission to adopt regulations "to further limit the scope of the postal monopoly." *See* Federal Trade Commission, *Accounting for Laws* 91. Section 601(c) does not, however, appear to authorize the Commission to do more than administer section 601 as enacted by Congress. Vesting the Commission with authority to place additional limits on the postal monopoly may be considered an additional option and is discussed in section 4.5, below.

as well. Alternatively, Congress itself could adopt a statutory definition of the term "letters and packets."

What would a regulatory clarification of the postal monopoly statutes provide? Of course, this would be for the Commission to determine, so it is possible only to offer speculations. Since it appears that the Postal Service no longer has substantive rulemaking authority over the postal monopoly, it seems likely that the Commission will seek to ascertain the intent of Congress in adopting the postal act of 1872. Although Postal Service lawyers have argued otherwise, the Congressional intent in 1872 was probably to establish a monopoly over the carriage of letters and packets of letters. In light of an Attorney General's opinion in 1881 and other evidence, it could be argued that the term "letters and packets" was understood to include correspondence wholly or partly in writing (in contrast to printed material) but not to include other first class items of a commercial nature such as, for example, manuscripts for publication, deeds, transcripts of record, or insurance policies. On the other hand, after more than century of inconsistent and often opaque administrative interpretations and regulations and a handful of less-than-fully informed judicial opinions, the path towards a correct interpretation of the original intent of Congress is hardly uncluttered. The Postal Service will likely argue that the intent of Congress was in 1872 was to adopt a much broader monopoly than just indicated. Moreover, the Postal Service will probably make the case that Congress has implicitly ratified its administrative interpretations and regulations and that the Commission should defer to the Postal Service's broad interpretation of the postal monopoly laws for this reason.

4.3.2 Define the monopoly to cover first class mail

For some policymakers, an historical approach to the definition of "letters and packets" may seem too out of date or difficult to administer. To adopt a new definition of the scope of the monopoly, rather than merely an interpretation of current law, would seem to require legislation.

Perhaps the most plausible alternative to current law would be to equate the scope of the postal monopoly with that of first class mail. In the development of postal

reform in the European Union, the European Commission struggled to express in modern language the idea of the traditional postal monopoly over "letters." The European Commission opined that the basic requirement of modern postal communications was the reliable exchange of "individualized communications" and this was the essence of "letter-ness." According to this approach, the letter monopoly could be deemed to include invoices, contracts, and other commercial documents which were likely not considered "letters" in 1872.¹⁰² The European Commission's concept of a "letter" as an individualized communication is similar to the Postal Service's definition of what must be mailed as first class or express mail: "Mail containing personal information must be mailed as First-Class Mail (or Express Mail). Personal information is any information specific to the addressee."¹⁰³

Equating the scope of the postal monopoly with first class has the advantages of simplicity and traditional acceptance. The scope of first class mail is well understood. The idea that the postal monopoly covers first class mail is still widely prevalent in society despite the efforts of Postal Service lawyers to promote a broader view. On the other hand, some policymakers may consider that any expansion of the postal monopoly would be a step in the wrong direction. On the third hand, so to speak, a somewhat more expansive definition of the postal monopoly might be rendered acceptable if it serves as a first step towards more fundamental postal monopoly reforms.

4.3.3 Monopoly over carriage of textual communications recorded on paper

The President's Commission proposed a more extensive definition of the postal monopoly. It recommended that the monopoly include "hardcopy communications"

¹⁰² European Commission, "Green Paper on the Development of the Single Market for Postal Services," COM(91) 476 final, at 201-03 (1992). This passage offers an insightful discussion of how changing commercial practices and methods of mail production have affected the concept of letter.

¹⁰³ Postal Service, Domestic Mail Manual, at §§ 133.3.3 (Jan. 6, 2006 ed.). *See generally* id., at §§ 133.3.1- 133.3.6. This administrative definition of first class mail is based on the pre-1970 statutory definition: "First class mail consists of mailable (1) postal cards, (2) post cards, (3) matter wholly or partially in writing or typewriting, except as provided in sections 4365, 4453, and 4555 of this title [providing of permissible writing on second, third, or fourth class matter], (4) bills and state of account, and (5) matter closed against postal inspection." See 39 U.S.C. § 4251(a) (H.R. Comm. Print, 1973) (pre-Postal Reorganization Act version of Title 39).

weighing less than 12 ounces and transmitted for a charge of less than six times the basic stamp price.

With the on-line world blurring the meaning of "correspondence," the Commission proposes clarifying that the postal monopoly applies only to hard-copy communications. The Commission also strongly recommends that a bright line be drawn between the postal monopoly and the competitive mail market. In its Transformation Plan, the Postal Service itself acknowledges the absence of a clear border, noting that "there is no precise line that distinguishes protected volumes from unprotected volumes."

The basic uncertainty in the scope of the postal monopoly derives from the way it is defined. In the nineteenth century, the postal monopoly was declared to include the carriage of "letters," but not other types of postal items. While this standard may have been clear enough in simpler times when there were only a few types of mail, it is extremely difficult to apply to the variety of items posted today. In some other industrialized countries, postal reform laws have abandoned efforts to define the postal monopoly by the content of what is transmitted and have instead extended the monopoly to all envelopes falling within certain weight and price limits.¹⁰⁴

In the Commission's report, the term "hardcopy communications" seems to refer to textual communications recorded on paper, and not only to a printout on paper of data recorded in the memory of a computer, the usual meaning of the term "hardcopy."

The President's Commission did not offer any reason for the scope of the postal monopoly proposed. It did not, for example, undertake an analysis of the value of the monopoly to be conferred on the Postal Service or the economic distortions that would result. The genesis of the President's Commission's recommendation seems to have been an attempt to restate the monopoly claimed by the Postal Service in its 1974 regulations in simpler, more understandable terms. This is the probably the main

¹⁰⁴ President's Commission, *Embracing the Future* 22-23. The President's Commission also proposed to retain the traditional statutory exceptions for letters of the carriers, cargo letters, etc., as well as the exceptions recognized in the postal monopoly regulations of the Postal Service. All of these exceptions, as well as the price and weight limits proposed by the President's Commission, were added by the postal monopoly by the PAEA.

advantage of the approach of the President's Commission, that it is more or less similar to the Postal Service's administrative definition of the monopoly. On the other hand, since this definition of monopoly does not conform to the mail classification scheme it will be more difficult to administer than a "first class" monopoly. In addition, some policymakers may consider that the President's Commission's proposal represents too much of an extension of the 1872 monopoly provisions and is an inappropriate codification of the questionable administrative practices.

4.3.4 Repeal obsolete statutory provisions

Many of the postal monopoly provisions are obsolete by almost anyone's standard. Most have not been enforced in court since they were adopted in 1872. Of the six provisions in the criminal code, five can probably be repealed outright without affecting the substantive scope of the postal monopoly (§§ 1693, 1695, 1697, 1698, 1699). Sections 1694 and 1696 are usually interpreted today in a consolidated manner. For example, exceptions found in section 1684 are considered to apply to section 1696. A clearer and more logical approach would be to combine both sections into a single section based on current section 1696. In Title 39, section 602 is obsolete and can be repealed (logically, it should have been included in Title 18 in the first place). Sections 603 through 606 are archaic and should be replaced with single, clearer provision defining the authority of the Postal Service to search for and seize letters transported in violation of the postal monopoly.

4.4 Option 2. Provide for an orderly phase out of the postal monopoly and related legal constraints on the Postal Service

Policymakers in the United States, as in other industrialized countries, may conclude that the postal monopoly should be terminated over the long run in light of considerations summarized above. Most industrialized countries have chosen to provide a substantial period of transition before termination of the postal monopoly. In addition to allowing postal management time to retool, Congress should reconsider two types of legal constraints affecting the ability of the Postal Service to operate in a competitive market. First, Congress will need to ensure that any universal service

obligation is "competition friendly," that is, that is defined in a manner that protects the public interest without hamstringing the Postal Service. Second, the Congress will need to make sure that the Postal Service is "competition capable," that is, relieved of legal requirements that limit the ability of the Postal Service to operate with the efficiency and commercial flexibility of a private company. At the same time, Congress must ensure that the Postal Service cannot abuse a government created market dominant position and compete unfairly against private delivery services.

4.4.1 Options for phasing out the postal monopoly

In other industrialized countries, the most common method for phasing out the postal monopoly has been to enact decreasing weight and price limits for the postal monopoly. In the European Union, the 1997 Postal Directive limited the postal monopolies in member states to items weighing 350 grams (12.5 oz.) or less and priced at 5 times the stamp price or less. In 2003, the limits were reduced to 100 grams (3.5 oz.) and 3 times the stamp price; in 2006, to 50 grams (1.76 oz.) and 2.5 times the stamp price. It is doubtful, however, whether such a phase-in mechanism produces a significant increase in competition prior to complete termination of the monopoly. This approach does not seem to prepare the postal monopolist for competition other than by affording time for contemplation.

A second approach is to permit competition for an increasingly wide range of services. In the United Kingdom, the British regulator decided to phase out the postal monopoly by allowing competition for very large bulk mailings, then for smaller bulk mailings, and then for all mail. In Germany, the Deutsche Post got a taste of competition before liberalization in 2008 by exempting from the monopoly a broadly defined set of "value-added" services. In Australia, in 1994, in addition to lowering weight and price limits, Parliament liberalized intracorporate and outbound international mail services.¹⁰⁵

¹⁰⁵ The plan of the British regulator has additional features and was later modified in light of experience.

The periods of transition from the date of legislation clearly setting a goal of ending the postal monopoly to the date of final repeal have varied from about five to ten years, in some cases due to interim delays in implementation. Some examples: Sweden (no transition, 1994); New Zealand (10 years, 1988 to 1998); Germany (10 years, 1998 to 2008); United Kingdom (6 years, 2000 to 2006); European Union (9 years, 2002 to 2011).

4.4.2 Developing a "competition-friendly" universal service obligation

If Congress decides to terminate the postal monopoly and wishes to ensure continuity of a minimum level of postal and delivery services, then adoption of a legal USO is likely required. At same time, any USO must defined so that it is compatible with a competitive market. The USO should not deviate so far from the reasonable commercial demands of mailers that the system becomes impossible to administer.

Maintaining a minimum level of universal service might remain solely the responsibility of the Postal Service. If so, the USO should be defined and implemented in such a manner that the Postal Service suffers no competitive disadvantage (or advantage) from the responsibility. Where the Postal Service is legally required to provide a non-commercial service at a loss, it must be compensated fairly. Alternatively, the USO might be defined in such a way that the Commission is authorized to contract with the best available public or private operator to provide necessary universal services that will not otherwise be provided. While the Postal Service is likely to be the best available postal operator in most cases, there may be occasions when the Commission would choose to contract with a private company (much like the Postal Service today contracts with private delivery services to provide delivery in some rural areas). In such case, it will be necessary for the Commission to ensure that delivery services interconnect with one another to provide mailers with a universal service that is seamless.

Since a "competition-friendly" USO implies that the Postal Service and other operators should be reasonably compensated for losses incurred when providing noncommercial universal services, the Commission, or possibly some other

government agency independent of the postal operators, will have to administer the compensation program. Funding for the compensation program could come from public funds, as contemplated by the Postal Policy Act of 1958. Alternatively, funding could come from a tax on letters carried by private operators that mimics the funding presently generated by the postal monopoly.¹⁰⁶

4.4.3 Making Postal Service more "competition capable"

In other industrialized countries, aside from adjusting the USO, the task of preparing the public postal operator for termination of the postal monopoly is viewed primarily as a management problem. For example, it is often noted the public postal operator needs to improve productivity, rationalize tariffs, restructure transportation and retail networks, expand outsourcing, and diversify its business base.¹⁰⁷ On the other hand, public postal operators in other industrialized countries have often begun the liberalization process with fewer statutory restrictions and a more corporatized business structure than the Postal Service. Taking into account the experiences of other industrialized countries and the FTC's report on the "burdens" imposed on the Postal Service outside of the USO (including the comments of the Postal Service), it appears plausible that Congress may wish to consider, as part of a program to terminate the postal monopoly, a number of revisions in the legal organization of the Postal Service to make it "competition capable." Since such organizational changes will be the subject of a forthcoming report by the General Accounting Office, it will suffice to note a few illustrative possibilities:

¹⁰⁶ In principle, the postal monopoly today permits the Postal Service to charge more than a cost-justified rate for transmission of some letters and use the excess profits to underwrite losses incurred in transmission of other first class items or possibly in the provision of other services. Since the effect of terminating the postal monopoly is to allow private operators to compete for the carriage of letters, the price of letter services will tend to fall to cost-justified levels and excess profits will no longer be available to the Postal Service for cross-subsidizing non-commercial universal services. By imposing a correctly designed tax on the carriage of all letters, whether carried the Postal Service or private operators, it should be possible to recapture the excess profits that were made available by the monopoly. Indeed, a "universal service" tax could be apportioned among mailers in a much fairer manner than the burden of excess profits generated by the postal monopoly.

¹⁰⁷ See generally Pricewaterhouse Coopers, "The Impact on Universal Service of the Full Market Accomplishment of the Postal Internal Market in 2009" (May 2006). This study was prepared for the European Commission and sought to identify legal and commercial strategies that assure continuation of universal service after termination of all EU postal monopolies.

- government assumption of pension costs of the Postal Service that exceed the normal costs in the private sector (if any);
- revision of laws that require the Postal Service to pay employees more than comparable wages in the private sector (if any);
- revision of laws that treat the Postal Service differently from the private sector in respect to pension plans and health care;
- revision of laws that treat the Postal Service differently from the private sector in respect to contracting for goods and services;
- termination of restrictions on compensation of Postal Service executives;
- termination of restrictions on the authority of the Postal Service to modernize its sorting and transportation networks;
- transfer of police-like responsibilities of the Postal Inspection Service to the Department of Justice; and
- reorganization of the Postal Service as a corporation owned by the government and/or allowing the Postal Service to establish its own corporate subsidiaries.¹⁰⁸

4.5 Option 3. Authorize the Commission to limit the postal monopoly where unnecessary to sustain universal service

The Postal Service has argued the purpose and effect of the postal monopoly is to provide funds that compensate the Postal Service for losses that it is forced to incur by virtue of a legal obligation to provide universal service.

[A]ny obligation must be matched by the financial capability to meet that obligation and the Postal Service requires adequate funding for the USO even at its current levels. The purpose of the PES and the mailbox rule for over one hundred years has been to fund and support the various obligations. Eliminating or reducing

¹⁰⁸ See, e.g., Federal Trade Commission, *Accounting for Laws* 93-97.

the PES or mailbox rule would have a devastating impact on the ability of the Postal Service to provide the affordable universal service that the country values so highly.¹⁰⁹

The validity of this assertion depends upon a number of technical evaluations involving the scope of the USO, the cost of the USO, and the value of the postal monopoly. As a practical matter, the only independent body capable of verifying the correctness of the scope of the postal monopoly by undertaking and updating such analyses is the Commission.

One option for reforming the postal monopoly follows from this rationale for continuation of the postal monopoly. The Commission could be charged with monitoring the cost of universal service and the value of the postal monopoly on an ongoing basis and limiting the scope of the postal monopoly wherever it finds that such limitations will not affect universal service. That is, some policymakers may agree with the Federal Trade Commission that "the postal monopoly should be only as broad as needed to satisfy the statutory requirement of universal service."¹¹⁰ The President's Commission strongly endorsed the idea that the Commission should narrow the postal monopoly over the long run where it was found unnecessary to sustain universal service.

The Commission also believes that there must be a reasoned and impartial administrative procedure for reviewing and updating the scope of the postal monopoly. The Postal Service has itself adopted a number of administrative exceptions to the postal monopoly. This process of continual review of the costs and benefits of the postal monopoly is important, but is best carried out by an independent entity. The Postal Regulatory Board should therefore be vested with authority to modernize the law by narrowing the postal monopoly if and when the evidence shows that suppression of competition is not necessary to the

¹⁰⁹ Postal Service, *Report on Universal Postal Service* 3.

¹¹⁰ Federal Trade Commission, *Accounting for Laws* 93.

protection of universal service without undue risk to the taxpayer.¹¹¹

A similar approach has been pursued in the United Kingdom. In 2000, the Postal Services Act 2000 directed the British regulator, Postcomm, to grant licenses to private companies to compete with Royal Mail only to the extent that such competition was consistent with ensuring universal postal service. After a two-year investigation, Postcomm ultimately concluded that the postal monopoly was unnecessary to sustain universal service in the United Kingdom and adopted a plan for orderly termination of monopoly.¹¹²

It is an open question whether the Commission would arrive at a similar conclusion in the United States. As noted above, Accenture has recently prepared a study for the Postal Service that concludes that the circumstances supporting termination of postal monopoly in other industrialized countries do not apply in the United States. The main advantage of vesting the Commission with authority to align the scope of the postal monopoly with the scope of the universal service obligation is that it would help to minimize the economic distortions caused by the postal monopoly. On the other hand, this option probably requires a clearer specification of the universal service obligation.

The three options outlined above could be combined. The scope of the postal monopoly could be clarified and then terminated after a statutorily defined transition period. The Commission could be authorized to limit the postal monopoly where unnecessary to sustain universal service during the course of the transition period. Alternatively, the Commission could be authorized to prune unnecessary portions of the postal monopoly in preference to a statutory termination of the monopoly.

¹¹¹ President's Commission, *Embracing the Future* 65.

¹¹² Postcomm, "Promoting Effective Competition in UK Postal Services" (May 2002).

5 Options for the Mailbox Monopoly

The "mailbox monopoly" is a criminal law that prohibits anyone but the Postal Service from depositing mailable matter in a private mailbox. The mailbox monopoly statute was enacted in 1934 during a major downturn in mail volume due to the Great Depression (total volume fell 26 percent from 1929 to 1934). The purpose of the statute was to protect the revenues of the Post Office by inhibiting the ability of private companies to compete in the business of transporting and delivering "statements of accounts, circulars, sale bills, or other like matter" sent out by public utility companies, department stores, and other, primarily local, business concerns. The mailbox monopoly not only reinforces the postal monopoly over the carriage of "letters and packets" but also gives the Postal Service a competitive edge in delivery of all other mailable matter to households and businesses with mailboxes. In addition to the statutory mailbox monopoly statute, the Postal Service may be authorized create its own mailbox monopoly by regulation.

The mailbox monopoly law is unique to the United States. There is no equivalent in other industrialized countries. The mailbox monopoly limits the freedom of mail recipients and private delivery companies and creates a certain amount of economic distortion. Some have called for its reduction or repeal. On other hand, supporters of the postal monopoly argue that it should be continued in the United States because it is necessary to sustain universal postal service or fund other government obligations. This chapter summarizes the pros and cons of the mailbox monopoly and plausible options for change.

5.1 Pros and cons of a mailbox monopoly

The 2007 FTC report on the postal laws offered a complete and concise description of the pros and cons of granting the Postal Service a monopoly over access private mailboxes. The remainder of this section, but for the last paragraph, reproduces the

analysis of the FTC, set in normal type rather than as a block quotation, to make it easier to read.¹¹³

Begin excerpt from FTC report. Modifying the mailbox monopoly to allow consumers to choose to permit private express companies to leave deliveries in their mailboxes would eliminate an important legal constraint on the USPS's competitors. As discussed in Chapter III [of the FTC report], the mailbox monopoly imposes costs on the USPS's competitors to deliver a subset of competitive products to the majority of U.S. mailboxes that the USPS does not bear. Although we lack data to determine the exact proportion of competitive products that private express carriers could deliver to mailboxes absent the mailbox monopoly, confidential data submitted to the FTC suggest that between 20 and 33 percent of competitive mail products delivered to consumers may fit into a mailbox. Further, UPS and Federal Express both contend that the mailbox monopoly increases their costs. By increasing the cost and reducing the convenience of non-USPS carriage, the mailbox monopoly likely causes the USPS to become a relatively more attractive option for delivery. In this manner, the mailbox monopoly effectively expands the postal monopoly beyond the scope defined by the PES. Indeed, preventing diversion of mail not otherwise covered by the PES from the USPS's network was the primary rationale behind Congress' creation of the mailbox monopoly in 1934.

The mailbox rule also restricts consumers' use of their mailboxes, which they typically own. As one commenter notes, "Because consumers generally purchase their mailboxes at their own expense, it logically follows that they ought to have the right to dictate the terms under which their property is utilized." A 1997 GAO survey found that 58 percent of consumers favored allowing express mail companies to place deliveries in their mailboxes, and a plurality (48 percent) of consumers favored allowing companies to leave items such as utility bills in their mailbox. Thus, it appears that not only would relaxation of the mailbox monopoly enhance consumer choice, but a majority of consumers may favor it.

¹¹³ This section is taken from Federal Trade Commission, *Accounting for Laws* 86-90. Footnotes by the FTC have been omitted.

It also appears that the United States is the only country that reserves the mailbox only for the deliveries from the postal service. In a GAO survey of eight EU countries, none answered that lack of exclusive access to mailboxes caused a significant loss in postal revenue, and six reported either minor or no problems with mailbox theft. GAO, however, noted that some of these countries have a higher proportion of door slot or locked mailboxes than does the U.S., and only one service reported that it generally collected mail from customers' mailboxes.

The USPS has raised some valid concerns associated with relaxing the mailbox monopoly. For example, sorting outgoing stamped mail from non-stamped competitive products that have been delivered by a private carrier may reduce letter carrier efficiency. Further, the USPS explains that if a mailbox were full of non-USPS matter, the carrier delivering to a curbside box may have to leave his or her vehicle to deliver directly to the consumer's door, further reducing efficiency. The USPS notes that such reductions in efficiency may harm consumers by delaying delivery times. If consumers become dissatisfied with mail service to their mailbox (due to clutter or security concerns), moreover, it may reduce demand by mailers for USPS products, ultimately leading to a diversion of mail from the USPS's network to other competing forms of communication like the Internet. To the extent that elimination of the mailbox rule diverts mail from the USPS's network, it would reduce revenue and may compromise universal service.

The USPS also has expressed several significant concerns related to the enforcement of prohibitions on mail fraud, mail theft, mail obstruction, and other federal prohibitions on mailing obscene or hazardous materials. The USPS has explained that elimination of the mailbox monopoly could make investigations into suspected violations of these criminal provisions more difficult by jeopardizing the use of surveillance and electronic devices to identify suspects. For example, the USPS notes that the identification of suspects is made more difficult if others than postal customers and the Postal Service have regular access to the mailbox. Similarly, the Justice Department noted in connection with the 1997 GAO report that "without the mailbox restriction it would be more difficult to identify and apprehend violators delivering [sexually explicit and obscene material] because almost anyone could

legally open mailboxes and not be a suspect." The Justice Department also told GAO, however, that these problems could be tempered somewhat if only large delivery companies had access to mailboxes. Further, the USPS worries that repeal of the mailbox monopoly could make it more difficult to establish federal jurisdiction to protect postal customers from child pornography and mail fraud schemes that are intrastate in nature. The USPS also notes that relaxation of the mailbox monopoly could increase vulnerability to explosive materials and other non-mailable hazardous materials and firearms.

The USPS also expressed concern related to allowing access to locked cluster boxes, explaining that it would be inappropriate to give keys "to any and all who claim that they need access to locked boxes." Further, within a given cluster box unit, even if some customers granted private carriers access to their box, others within the same cluster may not have done so. However, because cluster box units are opened from the back to expose multiple mailboxes, any private carrier would have access to all mail boxes within a given unit, whether or not all customers within the cluster box unit opted to permit private carriers to deliver to their specific mailbox within the cluster.

Further, relaxation of the mailbox rule implicates privacy issues. Identity thieves often steal mail from residents' mailboxes to harvest invoices and bills, credit card statements, financial records, and the like. They use this information to open new accounts and to access existing accounts. All told, identity theft causes billions of dollars of losses, and disrupts the lives of millions of Americans every year. Protecting mailboxes therefore is of critical importance in the efforts to stem this troubling crime. Allowing non-USPS deliverers access to mailboxes could make it more difficult to identify instances where an unauthorized person has access to a residential mailbox. Currently, one can easily spot an instance where someone other than an authorized USPS carrier accesses a mailbox. Expanding legal access to others could provide "cover" for identity thieves to work without detection.

There are likely means to relax the mailbox monopoly that simultaneously address the valid concerns expressed above. For example, the mailbox monopoly could be

modified to allow consumers to permit only those carriers that satisfy certain criteria to deliver to their mailboxes. If the universe of those who have access to a mailbox is increased to only a few additional large private express companies, it is unclear that this would greatly decrease the ability to identify those who do not have legal access to a mailbox. Further, if a condition of certification to deliver to the mailbox was an agreement to cooperate with the USPS to investigate and prevent crimes involving the mail, this could reduce concerns about negative effects on enforcement capability. Waiver of the mailbox monopoly only for carriers that have been certified could reduce concerns related to losing federal jurisdiction; accessing the mailbox without certification would still constitute a violation of federal law, even if it involved the delivery of purely intrastate matter. Further, a relaxation of the mailbox monopoly could be crafted to retain federal jurisdiction over those carriers who qualify for certification to deliver to mailboxes. Additionally, exclusive USPS access could be preserved for locked cluster boxes to eliminate privacy or security issues relating to allowing private carriers to have access to the mailboxes of consumers who do not want anyone other than the USPS to access their mailboxes. *End of excerpt from FTC report.*

There is one point related to security of the mail and the mailbox monopoly law of the mail that is not completely clear from the FTC report. The mailbox monopoly law, section 1725 of Title 18, only prohibits a person from *depositing* mailable matter in the mailbox. The law that prohibits a person other than the addressee from *removing* mailable matter from the mailbox or otherwise obstructing the mail is section 1702 of Title 18.¹¹⁴ For a violation of the mailbox monopoly law, an organization may be fined up to \$10,000 for each offense (\$ 5,000 for an individual).¹¹⁵ However, for unlawfully taking a letter or package out of a mailbox, an

¹¹⁴ 18 U.S.C. § 1702 (2000 & Supp. V) ("Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined under this title or imprisoned not more than five years, or both").

¹¹⁵ 18 U.S.C. § 1725, 3571 (2000 & Supp. V).

organization may be fined up to \$500,000 and responsible persons may be imprisoned for up to five years (for an individual, \$250,000 and up to five years).¹¹⁶ Without minimizing the possibility that allowing more access to the mailbox may complicate enforcement, it should be noted that the penalties for unlawfully removing mail from a mailbox are extremely severe and unrelated to the milder penalties which create the mailbox monopoly.

5.2 *Status quo*

The mailbox monopoly statute, section 1725 of Title 18, imposes a criminal fine on any person who "deposits . . . in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter" any "mailable matter . . . on which no postage has been paid . . . with intent to avoid payment of lawful postage." In addition to the mailbox monopoly statute, in the 1973 *Rockville Reminder* case a federal appeals court held that, under section 101 of Title 39, the Postal Service may "regulate the uses to which mail receptacles may be put"¹¹⁷ and bar a householder from allowing a private delivery services to make use of a mailbox in any way. Thus, the Postal Service may be authorized to establish a mailbox monopoly by administrative order without depending upon the authority of the mailbox monopoly statute. In the Domestic Mail Manual, the Postal Service has adopted regulations which declare that "no part of a mail receptacle may be used to deliver any matter not bearing postage, including items or matter placed upon, supported by, attached to, hung from, or inserted into a mail receptacle" and appear to exempt newspapers from the mailbox monopoly prohibitions in limited circumstances.¹¹⁸

The Postal Accountability and Enhancement Act of 2006 limited the Postal Service's rulemaking authority in certain respects. The PAEA apparently repealed the authority of the Postal Service to adopt regulations defining the scope of the mailbox monopoly law in Title 18. In addition, new section 404a prohibits the Postal Service

¹¹⁶ 18 U.S.C. §§ 1702, 3559, 3571 (2000 & Supp. V).

¹¹⁷ *Rockville Reminder, Inc. v. United States Postal Service*, 480 F.2d 4, 7 (2d Cir. 1973).

¹¹⁸ Domestic Mail Manual §§ 508.3.2.1, 508.3.2.10, 508.3.2.11 (May 12, 2008, ed.).

from adopting regulations which preclude competition in a way that creates an unfair advantage. The Commission is authorized to adopt such regulations to implement this prohibition. The Commission has not issued regulations under section 404a. Despite the PAEA's limitations on its rulemaking authority, the Postal Service has continued to maintain regulations implementing the mailbox monopoly statute and regulating use of the mailbox.

Some policymakers may consider the current mailbox monopoly law is satisfactory and should be continued without change. The Postal Service has argued, "The PES ["private express statutes" or postal monopoly statutes] and mailbox access rule should be preserved as is."¹⁹ Other policymakers, however, may consider it appropriate to reexamine whether the Depression Era conditions that motivated the mailbox monopoly law are still applicable today. Some policymakers may also consider it appropriate to reconsider the authority of the Postal Service to limit access to the mailbox on its own, i.e., without depending the mailbox monopoly statute. Some seemingly plausible modifications to the status quo are described below.

5.3 Option 1. Authorize the Commission to regulate access to the mailbox

The system of private mailboxes is a public asset in the sense that it was built by the people at the request of, indeed the requirement of, the federal government. While the system of private mailboxes was originally built to facilitate delivery of items delivered by the Postal Service, the United States is now bound together by a network of public and private delivery services. As the FTC explains, allowing the network of public and private delivery services access to the private mailbox system would generate economic benefits by reducing the cost of delivery by private companies. At the same time, permitting private companies to deliver to mailboxes could raise a number of foreseeable problems.

These competing considerations appear to imply that the public interest would be advanced by authorizing the Commission to weigh the risks and benefits of allowing

private operators access to the mailbox in appropriate circumstances and with suitable safeguards. As outlined by the FTC, these safeguards might include some or all of the following:

- allowing consumers to decide whether or not private carriers may deliver to their mailboxes;
- requiring consumers to take relatively simple and inexpensive actions (such as inserting a divider into their mailbox to create a separate section for outgoing USPS mail) to alleviate any increase in the cost of USPS collection;
- limiting access to private express carriers that satisfy certain criteria;
- requiring private carriers to cooperate with the Postal Inspection Service in investigating mail-related crimes;
- retaining exclusive access for the Postal Service to locked cluster boxes.¹²⁰

5.4 Option 2. Authorize the mailbox owner to control the mailbox

The case for allowing the owner of a mailbox unfettered control over his mailbox rests squarely on the view that "a man's home is his castle" or should be. In his dissent in the only Supreme Court case to consider the mailbox monopoly, Justice John Paul Stevens eloquently supported the rights of the mailbox owner as follows:

The mailbox is private property; it is not a public forum to which the owner must grant access. If the owner does not want to receive any written communications other than stamped mail, he should be permitted to post the equivalent of a "no trespassing" sign on his mailbox. A statute that protects his privacy by prohibiting unsolicited and unwanted deposits on his property would surely be valid. The Court, however, upholds a statute that interferes with the owner's receipt of information that he may want to receive. If the owner welcomes messages from his neighbors, from the local

¹¹⁹ Postal Service, *Report on Universal Postal Service* 3.

¹²⁰ Federal Trade Commission, *Accounting for Laws* 90.

community organization, or even from the newly arrived entrepreneur passing out free coupons, it is presumptively unreasonable to interfere with his ability to receive such communications. The nationwide criminal statute at issue here deprives millions of homeowners of the legal right to make a simple decision affecting their ability to receive communications from others.

The Government seeks to justify the prohibition on three grounds: avoiding the loss of federal revenue, preventing theft from the mails, and maintaining the efficiency of the Postal Service. In my judgment, the first ground is frivolous and the other two, though valid, are insufficient to overcome the presumption that this impediment to communication is invalid.

If a private party—by using volunteer workers or by operating more efficiently—can deliver written communications for less than the cost of postage, the public interest would be well served by transferring that portion of the mail delivery business out of the public domain. I see no reason to prohibit competition simply to prevent any reduction in the size of a subsidized monopoly. In my opinion, that purpose cannot justify any restriction on the interests in free communication that are protected by the First Amendment.

To the extent that the statute aids in the prevention of theft, that incidental benefit was not a factor that motivated Congress. . . .

Mailboxes cluttered with large quantities of written matter would impede the efficient performance of the mail carrier's duties. . . .

But as Justice Marshall has noted, the problem is susceptible of a much less drastic solution. . . . There are probably many overstuffed mailboxes now—and if this statute were repealed, there would be many more—but the record indicates that the relatively empty boxes far outnumber the crowded ones. If the statute allowed the homeowner to decide whether or not to receive unstamped communications—and to have his option plainly indicated on the exterior of the mailbox—a simple requirement that overstuffed boxes be replaced with larger ones should provide the answer to most of the Government's concern.

. . . Conceivably, the invalidation of this law would unleash a flow of communication that would sink the mail service in a sea of paper. But were that to happen, it would merely demonstrate that this law is a much greater impediment to the free flow of communication than is presently assumed. To the extent that the law prevents mailbox clutter, it also impedes the delivery of written messages that would otherwise take place.¹²¹

Similarly, in 2003, the President's Commission on the United States Postal Service indicated its sympathy with rights of the mailbox owner: "the Commission firmly believes that individual customers should have the final say over access to their mailbox, and that such access should be granted only with their express consent and only if it in no way jeopardizes universal service."¹²²

The concept that the owner of a mailbox should be able to control his own mailbox extends beyond the scope of the mailbox per se. The objective of allowing recipients control over what they receive is also reflected in the movement to limit delivery unwanted advertisements.¹²³ Lack of control over the mailbox may have simple but serious consequences. Consider, for example, the householder who is going away for few days and wishes first class mail to collect in her mailbox without accepting advertising mail that clogs the mailbox and results in non-delivery of first class mail.

¹²¹ United States Postal Service v. Council of Greenburg Civic Associations, 453 U.S. 114, 152-55 (1981) (J. Stevens, dissenting).

¹²² President's Commission, *Embracing the Future* 26.

¹²³ See e.g., <http://www.catalogchoice.org/>; https://www.directmail.com/directory/mail_preference.

6 Final Observations

This chapter offers final observations of the team of experts assembled by the George Mason University School of Public Policy. A review of the history, status, and future need for a universal service obligation, postal monopoly, and mailbox monopoly opens a Pandora's box of postal policy issues. In these several studies, we have tried, pursuant to the requirements of the Commission, to identify and evaluate the historical, legal, and economic factors presented by such a review. We were not asked to integrate this material into final recommendations, and this chapter should not be mistaken as such.

Nonetheless, we recognize that a full statement of the issues and the arguments can become so cumbersome and complex that it is difficult to discern the forest for the trees. This is unfortunate because, amidst the proliferation of technical and sometimes arcane detail, the fundamental reality is our national postal system—a great American institution—now faces clear and present challenges. To assist the Commission and other policymakers in further deliberations, therefore, this last chapter offers a few summary observations on the big picture that seems to emerge from our diverse analyses.

6.1 Role of a USO

The public post office in the United States was founded as a public service. In this respect the American Post Office was fundamentally different from its British predecessor, which was born in the troubles of seventeenth century England as way of allowing government to control and inspect personal communications. The original mission of American Post Office was to join widely scattered parts of the country by spreading news of current events. In the first decades of the nation's history, the Post Office was the television and radio and Internet of the day. In this period, outside a small circle of wealthy individuals, letter mail in the United States was mainly a means of conducting business. In the middle of the nineteenth century, the Post Office acquired a second crucial public service function, as the conduit of personal correspondence. After the final triumph of “cheap postage” in 1851, the Post Office

united the populace into a single national community by providing an affordable means for the exchange of correspondence. It was the telephone and cell phone and email system of that day. In 1912, the role of the Post Office was extended a third time, to include distribution of parcels to rural America. Parcel post became, it might be said, the FedEx and UPS of that still later day.

As these analogies suggest, however, the public post office of today is none of these things. Today, the U.S. Postal Service is both less and more than the public post office of early twentieth century America. It is less in the sense that the Postal Service is not the only or even the primary supplier of critical news and communications services, even though it may still be a very important supplier of very important services. The Postal Service of today is more than its twentieth century forebear in the sense that much of its activities now fall outside the realm of central infrastructure services and more in the realm of commercial business services. Since 1971, the Postal Service has developed into a more business-like enterprise. It is, moreover, only one of several enterprises providing national transmission of textual communications (physical and nonphysical), envelopes, and small parcels.

The question posed by consideration of a universal service obligation is: what *public services* do the American people need and expect from the postal and delivery services sector other than to operate in an efficient manner guided by the demands of customers, the offerings of competitors, and institutional self-interest? Much of sections 101 and 403 of Title 39 requires that the Postal Service to provide postal services in an efficient, competent, and business-like fashion. Given the increasingly competitive and commercial environment in which the Postal Service operates, efficiency and business-like competence do not seem to be “public services.” They are virtues that the Postal Service must cultivate in its own self-interest. There is no reason to doubt that the Postal Service will operate in as efficient and business-like manner as possible within its special regulatory framework. Indeed, a good case could be made that the Postal Service should be given more freedom to respond to its changing environment. This is, of course, the general position of the Postal Service.

One can make a plausible case that there are no public services that will be needed by the American people beyond those that would be supplied by the Postal Service operating in an efficient and business-like manner unhindered by specific legal obligations. Unlike in the early days of the nation, the national transportation infrastructure and the delivery services sector are well-developed. There is no reason to believe that any portion of the country will lack some sort of access to the national community. Large private parcel and express companies have developed into innovative and ubiquitous delivery systems without legal compulsion. Food and medicine are distributed to every part of the nation without a universal service obligation. If Congress were to end the service requirements in the appropriations riders and the price caps adopted in the PAEA, the Postal Service would still, we are confident, exercise its discretion in a reasonable and competent manner. The government, as owner, could still ensure high quality of leadership and a public-spirited orientation through its selection of Governors. The role of the Commission could be focused on monitoring the results. In many ways, such an approach would represent the logical extension of the Postal Reorganization Act of 1970.

Traditionally, however, the American people have asked for more from the postal system than efficient business-like operations. Congress tried to articulate the something more in criteria set in sections 101 (postal policy), 403 (general duties), 3622 (rates), and 3623 (classes) of the Postal Reorganization Act. The specific text of these sections was cobbled together from diverse sources: a 1958 act that was, in essence, a guide for setting postage rates; a 1916 appropriations provision that resulted from Congressional frustration with the Wilson Administration's approach towards the rural free delivery program; and new provisions without specific postal antecedents. These provisions of the 1970 act should not be interpreted more literally than they were intended; they expressed a general philosophy, not a specific set of obligations.

In broad terms, the more-than-commercial public services envisioned by the Postal Reorganization Act might be boiled down to two fundamental goals. First, the public post office was expected to provide key services at affordable rates with a higher level of reliability, continuity, and uniformity than might be expected from a normal

commercial market. Second, the public post office was expected to provide more service to some portions of society than would be provided by a normal commercial market. The first goal was systemic; it represented governmental intervention to shape the overall quality of postal services. The second goal was supplemental; it represented extension of the postal system to portions of the population that would not otherwise be served or not served as well.

A formal “universal service obligation” could serve to define the core of public services which government would continue to require from the national postal system, a distillation of this longstanding public service tradition. A USO would represent a government commitment that the national postal system will provide more than efficient, business-like services. At the outset, however, it should be accepted that a USO commitment could be costly and that the money will have to come from somewhere. The source could be either general taxes or fees assessed to users of the postal system by means of a monopoly or specific charges.

The Postal Service has argued, in effect, that it should be entrusted to define and provide the public services core of the modern delivery services infrastructure as a matter of its own discretion. In our view, this does not seem to be the best way for government to ensure provision of public services. The commitment of the Postal Service to public service is not in doubt. However, as the Postal Service itself notes, “the reality is that there are alternatives to every piece of mail.” In the increasingly competitive and interdependent world of delivery and communications services, it seems likely that the Postal Service will be, and should be, motivated to operate in as efficient and business-like manner as possible. If government concludes that postal services—whether provided by the Postal Service or other operators—should deviate from efficient, business-like operations to achieve public service goals, then the surest way to achieve this end would seem to be to define the public service requirements clearly and to provide for compensation commensurate with those requirements.

6.2 Administration of a USO

If Congress wishes to introduce a USO in the postal sector, then the most appropriate course would appear to be to define the public policies to be pursued and to delegate

to the Commission the responsibility for implementation. Congress is not well-equipped to define and administer a specific universal service obligation. Specification of the universal service obligation will necessarily involve trade-offs that raise complex accounting and costing issues. Since the postal sector is evolving rapidly, the details of the USO will have to be updated periodically. While Congress could create and equip specialized subcommittees to perform these tasks, it is doubtful whether this would be the best use of Congressional resources. Congress has already established the Commission as an expert body to administer a portion of the public service responsibilities imposed on the postal system, the requirement to maintain affordable, cost-based, non-discriminatory rates. The Commission has discharged this responsibility well for more than three decades. If Congress wishes to adopt a fuller specification of the universal service obligations associated with the postal sector, then the most practical course—in our view, the only practical course—would be administration by the Commission.

The obvious approach for administration is to adapt the model of remedial regulation explicitly employed in the telecommunications sector and implicitly adopted in other sectors. The Federal Communications Commission today ensures universal telecommunications service by designating one or more telecommunications operators as providers of universal services in appropriate areas and ensuring these operators are compensated for the cost of maintaining universal services where necessary. Similarly, the Department of Transportation supports nationwide airline services by contracting with private air carriers to provide services to small communities. Without suggesting that either system is perfect, both ensure universal services by means of a transparent and impartial administrative process. Such precedents would have to be adapted with care to the specific characteristics of the postal industry. Nonetheless, the advantages of building upon well known and tested administrative concepts seem clear.

6.3 The scope of the USO

If Congress wishes to introduce a USO in the postal sector, then what should be the appropriate scope of the USO? In the modern world of delivery and communications

services, what is the “public services core” that should be assured in addition to the array of services that may be expected from public and private operators acting in an efficient and business-like manner?

At the outset, it appears useful to keep in mind the distinction between systemic and supplemental public services. As a general proposition, we believe that government should be cautious about commitments to ensure systemic public services, that is, services that are broadly and significantly better than or different from what the market will produce on its own. For example, six-day delivery may seem a desirable attribute of the postal system in the abstract, but if the market demand is for a lesser level of service, then it does not seem feasible for government to try to force American mailers to buy more postal service they really want or need. Likewise, expensive overnight service should not be mandated if mailers would generally prefer the lower costs associated with two-day service. Overall, the postal system should meet, not exceed, the needs of mailers, and the best way to accomplish this end is to allow the Postal Service and other providers of delivery services to manage their businesses efficiently.

This is not to say that there is no role for public service regulation at the system level. The Commission can facilitate the market by requiring transparency concerning prices, access, delivery features, and quality of services. Protection of users’s rights is another system-wide public service attribute that might be administered by the Commission. If universal postal services are provided by private companies as well as the Postal Service—perhaps on a contract basis—then system-wide public service requirements could be extended to them as well. Likewise, the Commission could require suppliers of universal services to interconnect and interact in a cooperative manner. The role of the Commission would to consider long term improvements to the system that might fall outside the short term interest of operators.

The second general category of public services involves extension of services to portions of the population that might not otherwise be served. This is the notion implicit in “the postal principle” cited by economists and political theorists of the early twentieth century. For most of the last two centuries, the government supported

an extra measure of postal services in rural areas. This focus is now largely inappropriate, because, while there are exceptional circumstances (mainly in Alaska and Hawaii), in general, rural areas are not significantly more costly to serve than urban areas. Today, the portions of the system that might be considered appropriate for extra service are those with relatively higher unit delivery costs because they have relatively little mail. These tend to be poorer neighborhoods, whether urban or rural. A second group that might be considered eligible for more-than-commercial protection are individual households, both as mailers and receivers of mail.

With this preliminary distinction in mind, how could the public services core of the modern postal system be described in terms of the seven service elements of universal services described earlier? Without trying to answer all issues, we will try to list some key points that, it seems to us, may be useful to orient further discussions.

It seems reasonably clear the geographic scope of universal services should be described in realistic terms. These should probably build upon the historical practices of the Post Office Department and Postal Service.

The issue of what services should be afforded a USO guarantee is a difficult question. Given the possibility of committing government funds, the changing nature of the postal market, and the difficulties of withdrawing USO status once conferred, it seems likely that the list of USO products should be drawn cautiously.

The one product for which USO status seems clearly appropriate is single-piece first class mail. While collection and distribution of letters is not as vital as it once was, it remains an critical element of the communications infrastructure. Most people would likely agree that it is still important that the letter distribution system should be affordable and have a higher-than-commercial level of reliability, continuity, and uniformity. Even a sharp drop in the demand for single-piece first class mail would not likely affect the need for government to ensure this service. Moreover, the first class mail system—if priority mail is considered an extension of first class mail— can provide timely distribution of all types of postal items.

The next most important service from a public service perspective is likely the distribution of periodical publications regarded as a special class, i.e., at a discount

compared to first class mail. The first crucial public service contribution of the Post Office was distribution of news about current events. For two centuries, Congress has continued to emphasize the importance of postal distribution of the news embodied in “periodical publications.” Since the development of radio in the 1920s, distribution of news has gradually shifted to electronic media. Broadcast electronic media, however, is not well suited to the dissemination of all types of news. Information gathered by the Commission in the public proceedings associated with this study argues strongly for the continuing importance of postal distribution of (1) news of interest to small communities and rural residents and (2) to a small but widely scattered audience for which the broadcast media were not well suited. Looking ahead, it must be said, the future role of periodical publications is less clear as the capabilities of the Internet expand.

The third most important public service product may be single-piece parcel post. Here, the question is whether the government should guarantee, on a nationwide basis, a low priority, low cost product for transmitting individual parcels in addition to priority mail. There is no readily apparent answer to this question. According our survey, 60 percent of households send fewer than 10 parcels per year. Many of these are likely sent by priority mail rather than parcel post. In the future, a government guarantee of priority mail service may suffice to ensure the needs of the American people for single-piece parcel services. Alternatively, a government guarantee of single-piece parcel post might obviate the need for ensuring single-piece priority mail service for parcels above certain weight. This question seems appropriate for more investigation.

A fourth product whose universal availability might be considered essential to society is express services. For many people, it could be that the availability of express service is now more important than the availability of periodical publication services. The main argument against considering express service as a USO product is that there no evidence that society needs more-than-commercial service levels or extension to a more-than-commercial service coverage. If the market supplies the needs of society, then express services should not be listed as a USO product.

Nonetheless, the case of express services well illustrates how the changing landscape of delivery services and the evolving needs of society.

The case for including other products in the list of universal services is even less apparent. As distribution of news has gradually shifted to electronic media, publishers made the case that the postal privileges traditionally extended to news publications should cover all “educational” materials. The high-water mark of this effort was the report of the Senate Advisory Committee in 1954. Educational materials are undoubtedly important, but it is not evident that the needs of society for the transmission of such material exceed what can be expected from a commercial delivery services market. Likewise, nonprofit organizations play in key role in society, but their postal needs do not appear to differ from advertising mail in general. (This is not to suggest the discounted rates for nonprofit items should be discontinued, but it does suggest that revenue forgone for such discounts should be paid from public appropriations as originally provided in the Postal Reorganization Act.)

These considerations imply that a definition of the range of universal services should not follow the European approach of defining a class of objects by physical characteristics alone. The universal service obligation should take into account as well the type of service to be provided and public need for such service.

The access and delivery elements of universal service pertain almost entirely to the extent to which there is a public interest in giving individual mailers and mail recipients a level of service protection that exceeds that which Postal Service is likely to provide in its own interest. The general tendency over the last three decades has been for the Postal Service to reduce the quality of access and delivery, thereby increasing the burden on individual mailers and mail recipients in the sending and receiving of mail. The Postal Service would like to reduce further the number of post offices and is increasingly tailoring access and delivery systems so that they are unique to services of the Postal Service. At the same time, the Postal Service is also, as it points out, keeping down the cost of postal services for the mailer. The appropriate policy towards access and delivery services involves a number of related

issues, including the degree to which the Postal Service should substitute postal agencies for post offices; the appropriate procedural constraints on post office closings; the role of private post offices; the appropriate policy towards public collection boxes; the mailbox monopoly rule; the availability on electronic alternatives by neighborhood; the discretion of the Postal Service to limit physical delivery to various groups (persons living near a post office, persons living in communities like universities, homeless and itinerant persons, etc.); and the appropriate degree of cooperation between different delivery services in the neighborhood. We are reluctant, therefore, to offer even tentative conclusions in this area except to suggest that, before defining universal service obligations with respect to access and delivery, it would be desirable to undertake in-depth review of the long term implications of the interface between householders on the one hand and the national system of postal and delivery services, on the other hand.

The price element of the universal services should, in our view, be weighed against other elements of the USO. The goal of USO regulation should not be to determine the optimum price/service combination for USO products. The goal should be to identify the minimum quality of services that will, based on objective evidence, meet the needs of the public and the maximum prices that will, based on objective evidence, still be reasonable and affordable. Price limits for universal services should not displace the authority of postal management to make informed marketing decisions about their products. Our sense is that in the future price caps for universal service products should be managed by the Commission as a component of defining the universal service obligation rather than fixed by statute.

Whether the Commission should also, as now, be charged with regulating the prices of non-USO but market dominant product products is, in our view, a separate issue. This is not so much a question ensuring universal service as controlling abuse of a dominant position. As such, this topic is outside the scope of this study.

One traditional element of pricing universal services, geographically uniform rates, is, we believe, an idea whose time is over. Geographically uniform tariffs were originally introduced in the postal sector in 1840 in England. They resulted from the

insights of a British reformer, Rowland Hill, whose analysis demonstrated that the cost of transportation represented a very small part of the total cost of postal service between cities and towns. He concluded that the cost of setting and collecting different rates far outweighed actual differences in the costs of service. Subsequently, governments disregarded Hill's economic insights and required uniform tariffs for services with very different costs in the name of national unity. This use of uniform tariffs has become more and more misaligned with actual economic considerations and the long term public interest. Today, for a large mailing, the cost of assessing different rates of postage for different services is trivial because of availability of computers. For an ordinary household, too, the costs are trivial, because so little household income is spent on postage that a single national stamp could be used for all mail even if local discounts are available. Meanwhile, by failing to charge mailers the cost of transportation where the cost of transportation is a significant element of total cost, the law is artificially encouraging the transportation of large quantities of paper that might be more economically printed out closer to the point of delivery. This fosters not only a misallocation of resources but unnecessary damage to the environment.

Whether or not the quality of service standards (i.e., transit time standards) should be adopted for universal services is unclear. Our tentative conclusion is that in the future the primary need of Americans will be for a clear understanding of the quality of service that may be expected from universal services rather than the assurance of performance standards set by regulation. Evidence could demonstrate otherwise. For now, however, it seems to us that Commission should be authorized to establish the format of quality of service standards for USO products—including if the Commission deems appropriate penalties for substandard performance—while leaving the Postal Service or other providers of universal services the responsibility for determining actual service commitments.

Protection of users' rights is an area that has received almost no attention in the postal sector in the United States. Generally, it seems that a universal service obligation means little if there is no way for an average citizen way to enforce it. We believe that this, too, is an area that requires further investigation before even

preliminary suggestions can be offered. In addition to examining the experiences of postal systems in other countries, the Commission might wish to consult the experiences of consumer protection programs in other industries in the United States.

6.4 *Postal monopoly*

In our view, the case for the postal monopoly must stand or fall on modern economic and policy considerations. It is exceedingly difficult to find direct links between the multiple and virtually undocumented legislative origins of the postal monopoly laws in the eighteenth and nineteenth centuries and the origins of legislative concepts which, in the last decade, have flowered into modern concepts like “universal service” and the “universal service obligation.”

In modern times, the usual justification, in the U.S. and other countries, is that the postal monopoly is necessary to preserve the ability of the post office to provide nationwide services at a geographically uniform rate. In the absence of a rule requiring geographically uniform rates, and the resulting possibilities for inefficient cream-skimming, it is very difficult to identify an economic justification for the postal monopoly. For reasons summarized above, we believe that requiring geographically uniform rates is no longer an appropriate national postal policy and therefore not a plausible justification for the monopoly.

The Postal Service has also suggested or implied that a postal monopoly may be necessary for two other reasons: (1) to compensate the Postal Service for added costs resulting from laws unrelated to universal service and (2) to protect the ability of the Postal Service to offer a level of service substantially in excess what the market demands (e.g., six-day service when five-day service is all that is needed). The first suggestion seems to us adequately answered by the argument of the Federal Trade Commission that two economic wrongs do not make an economic right.¹²⁴ The second suggestion is answered by our view that the USO should not be used to mandate

¹²⁴ Federal Trade Commission, *Accounting for Laws*, 9 (“From a market-wide perspective, the federally-imposed restrictions that impose economic burdens on the USPS and the implicit subsidies that provide the USPS an economic advantage should be viewed as two distortions that compound each other and negatively affect the provision of competitive mail products”).

postal services that are, on a system-wide basis, substantially better than or different from what mailers actually want. We agree with the President's Commission and the Postal Service that the annual appropriations provision requiring service at no less than 1983 levels has served its purpose and should be discontinued.

At the outset, we believe that the scope of the postal monopoly should be clarified. The simplest solution would be legislation that equates the monopoly with the category of textual items that are presently required to be posted as first class mail (not everything that *may* be posted as first class mail for that would all mailable matter). In terms of administration, the benefits of aligning the scope of the monopoly with a well-understood concept from mail classification are obvious. A Commission exegesis of the intent of Congress in enacting the postal act of 1872 would be welcome as well, but it would likely be more difficult to administer and could provoke litigation. We also agree with the President's Commission's recommendation that the Commission should be empowered to create exemptions in cases where the Commission finds the postal monopoly plainly unnecessary to sustain universal service.

In the longer run, without attempting a complete exposition of a complex subject, our view is that the postal monopoly is unnecessary to fund or protect an appropriately defined universal service obligation and that its repeal would, as in the other industrialized countries, significantly strengthen incentives for the Postal Service to reduce costs, improve productivity, pursue innovation, and attend to customers. It is simply not credible to suggest, as some have, that American mailers and consumers have less to gain than citizens in other industrialized countries from a more responsive postal system motivated by the possibility of a choice in suppliers. It should be emphasized, however, that this conclusion does not call into question the continuing need for a national Postal Service. As we have noted, a further study ordered by Congress will examine the most appropriate institutional framework for the Postal Service of the future, and we offer no opinion on that subject.

6.5 *Mailbox monopoly*

The Federal Trade Commission explained clearly the reasons for allowing private carrier delivery to the mailbox and the potential problems that must be solved before doing so. Our survey suggests that a substantial portion (40 percent) of householders would accept delivery to mailboxes by private carriers licensed by the Commission. While there should be no question of requiring householders to allow delivery by private companies, there seem to be significant savings which could be reaped by authorizing private carriers to access to private mailboxes. Whether these savings can be realized in a manner that is consistent with the public interest is, at this stage, uncertain. Commission regulation of access to mailboxes appears to strike the right balance between economy and protection of the public interest.

6.6 *The way forward*

Despite an operational proficiency that daily conveys almost 40 percent of the world's mail with celerity, certainty, and security and a technical virtuosity in rate regulation that is the model for authorities in other countries, national postal policy in the United States has rested largely on dubious history, vague generalization, and unproven assumption. In the Postal Accountability and Enhancement Act, in addition to introducing major improvements in the existing regulatory framework, Congress wisely ordered a series of basic studies that could lay the groundwork for an informed reconsideration of long term national postal policy. The December 2007 report of the Federal Trade Commission—the first systemic review of how the laws apply differently to the Postal Service and private competitors—represented an important contribution in this effort. The Commission's report on the bases and future options for a universal service obligation and the monopoly laws will provide original analyses of two more key issues (to which we hope to have made a useful contribution). The report of the Government Accountability Office identifying options for the institutional framework of the Postal Service is an equally fundamental study which, we believe, should be undertaken as soon as possible. The GAO study should certainly give due consideration to the many public service

contributions of the Postal Service and its employees that have come to light in this study but that are not specifically related to provision of universal postal service.

While each of these studies will suggest the benefit of additional analysis—a process of refinement to be encouraged—the time for study and debate is not unlimited if the ultimate goal is to preserve the Postal Service as a viable contributor to our national life. First class mail volume has been in decline since 2000, a trend that has accelerated alarmingly during the recent economic difficulties. As the main function of the Postal Service shifts from the exchange of letters to the distribution of advertisements, it is manifest that the future cannot be like the past. The Postal Service will never again unite the nation's predominant broadcast medium, the main conveyor of messages, and the leading parcel delivery service under one roof, as it did in the early twentieth century. But the Postal Service can play a key role in a mixed public/private physical and electronic communications infrastructure that binds the Nation together in the twenty-first century.

Bibliography

- Haldi, John. *Postal Monopoly: an Assessment of the Private Express Statutes*. Washington, D.C.: AEI, 1974.
- Priest, George L. "Socialism, Eastern Europe, and the Question of the Postal Monopoly." In *Governing the Postal Service*, edited by J. Gregory Sidak. Washington, D.C.: AEI Press, 1994.
- Sidak, J. Gregory, ed. *Governing the Postal Service*, edited by J. Gregory Sidak. Washington, D.C.: AEI Press, 1994.
- U.S. Federal Trade Commission, Accounting for Laws That Apply Differently to the United States Postal Service and Its Private Competitors. Dec. 2007. Available from <http://www.ftc.gov>.
- U.S. Postal Service. *Report on Postal Service and the Postal Monopoly*. Oct. 2008. <http://www.usps.com/postallaw/universalpostalservice.htm>.
- U.S. President's Commission on the United States Postal Service. *Embracing the Future: Making Tough Choices to Preserve Universal Mail Service*. Washington, DC: GPO, 2003. Available from <http://www.treas.gov/offices/domestic-finance/usps/index.html>.