

**POSTAL REGULATORY COMMISSION****39 CFR Part 3020****[Docket No. CP2008–5; Order No. 86]****Administrative Practice and Procedure; Postal Service****AGENCY:** Postal Regulatory Commission.**ACTION:** Direct final rule.

**SUMMARY:** The Commission is adding the Postal Service's negotiated agreement with Global Expedited Package Services to the competitive product list. This action is consistent with changes in a recent law governing postal operations. Re-publication of the lists of market dominant and competitive products is also consistent with new requirements in the law.

**DATES:** Effective July 24, 2008.**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** *Regulatory History*, 73 FR 32365 (June 6, 2008).

**I. Background**

On May 20, 2008, the Postal Service filed two notices announcing price and classification changes for competitive products not of general applicability. The notice in Docket No. CP2008–4 informed the Commission that “the Governors have established prices and classifications for competitive products not of general applicability for Global Expedited Package Services (GEPS) Contracts.”<sup>1</sup> The Postal Service attached a proposed revision of the draft Mail Classification Schedule (section 2610.2) concerning GEPS contracts to the Notice.<sup>2</sup> Docket No. CP2008–4 was filed pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5 and 3020.90. In support of that filing, the Postal Service also filed materials under seal, including the Governors' decision.

The notice in Docket No. CP2008–5, announced an individual negotiated service agreement, namely, a specific GEPS contract the Postal Service entered into with an individual mailer.<sup>3</sup> Docket No. CP2008–5 was filed pursuant to 39 CFR 3015.5. In support

<sup>1</sup> Notice of United States Postal Service of Governors' Decision Establishing Prices and Classifications for Global Expedited Package Services Contracts, filed on May 20, 2008 (Governors' Decision Notice).

<sup>2</sup> The draft MCS remains under review. The Commission anticipates providing interested persons an opportunity to comment on the draft MCS in the near future.

<sup>3</sup> See Notice of United States Postal Service of Filing a Global Expedited Package Service Contract (Pricing Notice).

of that docket, the Postal Service also filed materials, including the contract and supporting materials, under seal. Given the interrelationship between the two dockets, the Commission consolidated the proceedings for purposes of review under Docket No. CP2008–5. See PRC Order No. 78.

In Order No. 78, the Commission reiterated its position that each negotiated service agreement, such as the GEPS contract submitted by the Postal Service, will initially be classified as a separate product, while acknowledging the possibility of grouping functionally equivalent agreements as a single product if they exhibit similar cost and market characteristics. *Id.* at 2–3. This, in effect, invoked the filing and review requirements of 39 CFR part 3020, subpart B, along with the requirements of rule 3015.5 for competitive products.

**II. Postal Service Supplemental Filing**

On June 10, 2008, the Postal Service filed material responsive to Order No. 78 and 39 CFR part 3020, subpart B.<sup>4</sup> In its response, the Postal Service states that it does not oppose making GEPS contracts' expiration dates publicly available, but continues to maintain that the names of specific GEPS customers must be kept confidential. The Postal Service also states that all previous GEPS contracts, but one, have expired. It states that the one remaining GEPS contract that would not meet the new eligibility requirements expires on July 31, 2008. Furthermore, the Postal Service clarifies in its response that an actual mailing of 5,000 pieces or actual payment of \$100,000 is not required under the GEPS contracts shell classification, but rather that the mailer must merely be capable of meeting those thresholds. The material responsive to 39 CFR part 3020, subpart B includes a statement of supporting justification sponsored by Frank Cebello, Executive Director, Global Business Management for the Postal Service. See Postal Service Response, Attachment A.

**III. Comments**

Order No. 78 also provided an opportunity for public comment on the Postal Service's proposals. Comments were received from the Public Representative and United Parcel Service (UPS).<sup>5</sup> Neither the Public

<sup>4</sup> United States Postal Service Response to Order no. 78 and Notice of Filing Information Responsive to Part 3020 of the Commission's Rules of Practice and Procedure, June 10, 2008 (Postal Service Response).

<sup>5</sup> Public Representative Comments in Response to United States Postal Service Notice of Global Expedited Packages Services Contract (Public

Representative nor UPS expresses opposition to the GEPS contract shell classification or the specific GEPS contract proposed by the Postal Service. The Public Representative states in his comments that both the GEPS shell classification and the individual GEPS contract comport with the provisions of title 39. The Public Representative and United Parcel Service both discuss issues encompassing the provision of materials under seal. Public Representative Comments at 2–3; UPS Comments at 1–3.

**IV. Commission Analysis****A. Statutory Requirements**

The statutory responsibility of the Commission, in this instance, is to assign a new product to either the market dominant list or the competitive product list. 39 U.S.C. 3642. As part of this responsibility, the Commission also will preliminarily review the proposal for compliance with the requirements of the Postal Accountability and Enhancement Act (PAEA) of 2006. For proposed competitive products, this includes a review of the provisions applicable to rates for competitive products. 39 U.S.C. 3633.

The Postal Service contends that adding the shell classification (GEPS contracts) as a product will improve the Postal Service's competitive posture. It argues that this can be accomplished while allowing verification that each contract covers attributable costs, does not result in subsidization of competitive products by market dominant products, and increases contribution from competitive products. Alternatively, the Postal Service states that adding the individual agreement as a product also will improve its competitive posture, but to a lesser degree. Postal Service Response, Attachment A, at 2.

The Commission has reviewed the financial analysis provided under seal that accompanies the agreement and finds that the specific GEPS contract submitted should cover its attributable costs (39 U.S.C. 3633(a)(2)); should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and should have a positive effect on the collective competitive products' ability to provide their appropriate share of institutional costs (39 U.S.C. 3633(a)(3)). Thus, a preliminary review of the GEPS contract indicates that it comports with the

Representative Comments); Comments of United Parcel Service in Response to Order Concerning Prices Under Global Expedited Package Services Negotiated Service Agreements (UPS Comments); both filed June 16, 2008.

provisions applicable to rates for competitive products.

In determining whether to assign the GEPS contract as a product to the market dominant product list or the competitive product list the Commission must consider whether:

\* \* \* 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.

39 U.S.C. 3642(b)(1). If this is the case, the product will be categorized as market dominant. The competitive category of products shall consist of all other products.

The Commission is further required to consider the availability and nature of enterprises in the private sector engaged in the delivery of the product, the views of those that use the product, and the likely impact on small business concerns. 39 U.S.C. 3642(b)(3).

The Postal Service asserts that its bargaining position is constrained by the existence of other shippers who can provide similar services. Thus, the market precludes the Postal Service from taking unilateral action to increase prices or decrease service without the risk of losing volume to private companies in the international shipping industry. Postal Service Response, Attachment A, at 2–3. The Postal Service contends that private consolidators and freight forwarders may offer international shipping arrangements under similar conditions. *Id.* at 3. The Postal Service has no specific data on the views of those that use the products on the regulatory classification. *Id.* at 4. Finally, the Postal Service states that large shippers serve the market under consideration, and that there should be little impact upon small business other than adding an additional option for shipping articles from the United States to foreign destinations. *Id.*

The Commission previously assigned Outbound International to the competitive product list under Negotiated Service Agreements.<sup>6</sup> The Postal Service contends that the proposed GEPS contract falls within this designation. The Commission has not received public opposition to the proposed regulatory classification during the comment period. Having considered the statutory requirements, the argument put forth by the Postal

Service, and the public comment, the Commission finds that GEPS contract is appropriately categorized as a competitive product and should be added to the competitive product list. The revisions to the competitive product list are shown below the signature of this order, and shall become effective upon publication in the **Federal Register**.

#### B. Mail Classification Schedule

The Postal Service previously proposed applicable draft Mail Classification Schedule language for Global Expedited Package Services (GEPS) Contracts.<sup>7</sup> Attachment A to the Governors' decision Notice filed in Docket No. CP2008–4 puts forward changes to that previously proposed language laying out the newly proposed eligibility requirements for GEPS contracts. The MCS remains in draft form. The language filed by the Postal Service will be deemed illustrative until such time as the MCS is finalized.

#### C. Updating the Mail Classification Schedule

The GEPS contract contains a provision for early termination of the contract. The Postal Service shall promptly notify the Commission of an early termination, but in no event later than the actual termination date. The Commission then will remove the contract from the Mail Classification Schedule at the earliest possible opportunity. The Postal Service also shall notify the Commission of any renewal of the contract 15 days prior its occurrence. Otherwise, the Commission will assume that the contract has lapsed at its designated expiration date and remove the contract from the Mail Classification Schedule without notice.

#### D. Additional Agreements

As of now, the GEPS contract submitted in Docket CP2008–5, represented as “GEPS 1” in the competitive product list, is the product. In the future, the Postal Service may enter into other GEPS contracts substantially similar to the one submitted in Docket CP2008–5. When this occurs, GEPS 1 will be considered the product and the included individual contracts will be treated as price categories under the product.<sup>8</sup>

If the Postal Service determines that it has entered into an agreement substantially equivalent to GEPS 1 with

another mailer, it may file such a contract under rule 3015.5. In each case, the individual contract must be filed with the Commission, and each contract must meet the requirements of 39 U.S.C. 3633. The Postal Service shall identify all significant differences between the new contract and the pre-existing product group, GEPS 1. Such differences would include terms and conditions that impose new obligations or new requirements on any party to the contract. The Commission will verify whether or not any subsequent contract is in fact substantially equivalent. Contracts not having substantially the same terms and conditions as the GEPS 1 contract must be filed under 39 CFR part 3020, subpart B.

#### E. Confidentiality of Information

The Commission is aware that the treatment of information as confidential is a sensitive issue. The Postal Service, the Public Representative, and United Parcel Service all express valid concerns that the Commission will address in the future on a broader level.

In this docket, the Commission will take a limited first step to add transparency and facilitate the process of reviewing future agreements of this style. The Commission has reviewed the Governor's decision supporting the request provided as required by rule 3020.31(b), and has determined that most of the document does not pose a risk of competitive harm if disclosed. In fact, the Postal Service disclosed similar information associated with Docket Nos. CP2008–8, CP2008–9, and CP2008–10. The Postal Service is directed to file a redacted version of the Governor's decision provided under seal in Docket No. CP2008–4.<sup>9</sup>

#### V. Ordering Paragraphs

##### *It is Ordered:*

1. The GEPS contract filed in Docket No. CP2008–5 is added as a product not of general applicability to the competitive product list under Negotiated Service Agreements, Outbound International, as Global Expedited Package Services (GEPS) Contracts, GEPS 1 (CP2008–5).

2. The Postal Service shall file with the Commission a redacted version of the Governors' decision provided under seal in Docket No. CP2008–4 by July 23, 2008.

<sup>6</sup> PRC Order No. 43, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2008, para. 4004, Appendix A, at 9.

<sup>7</sup> See United States Postal Service Submission of Additional Mail Classification Schedule Information in Response to Order No. 43, November 20, 2007.

<sup>8</sup> This may require future modification of the GEPS 1 descriptive language.

<sup>9</sup> The redacted version should be filed under Docket No. CP2008–5. The Commission anticipates the redacted version will be similar in nature to what the Postal Service provided associated with Docket Nos. CP2008–8, CP2008–9, and CP2008–10, on June 16, 2008.

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

By the Commission.

Issued: June 27, 2008.  
**Steven W. Williams,**  
*Secretary.*

**List of Subjects in 39 CFR Part 3020**

Administrative practice and procedure; Postal Service.

■ For the reasons stated in the preamble, under the authority at 39 U.S.C. 503, the Postal Regulatory Commission amends 39 CFR part 3020 as follows:

**2000 COMPETITIVE PRODUCT LIST**

■ 1. The authority citation for part 3020 continues to read as follows:

**Authority:** 39 U.S.C. 503; 3622; 3631; 3642; 3682.

■ 2. In Appendix A to Subpart A of Part 3020—Mail Classification Schedule revise part B, Competitive Products, section 2000 to read as follows:

\* \* \* \* \*

**Part B—Competitive Products**

- Express Mail
  - Express Mail
  - Outbound International Expedited Services
  - Inbound International Expedited Services
  - International Expedited Services 1 (CP2008–7)
- Priority Mail
  - Priority Mail
  - Outbound Priority Mail International
  - Inbound Air Parcel Post
- Parcel Select
- Parcel Return Service
- International
  - International Priority Airlift (IPA)
  - International Surface Airlift (ISAL)
  - International Direct Sacks—M-Bags
  - Global Customized Shipping Services
  - Inbound Surface Parcel Post (at non-UPU rates)
  - International Money Transfer Service
  - International Ancillary Services
- Negotiated Service Agreements
  - Domestic
  - Outbound International
    - Global Expedited Package Services (GEPS) Contracts
    - GEPS 1 (CP2008–5)
  - Global Plus Contracts
    - Global Plus 1 (CP2008–9 and CP2008–10)