

POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. CP2008–8, CP2008–9, and CP2008–10; Order No. 85]

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 Plus 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 June 23, 2008.

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SUPPLEMENTARY INFORMATION: *Regulatory History*, 73 FR 33465 (June 12, 2008).

I. Background

On June 2, 2008, the Postal Service filed three notices, which have been assigned to Docket Nos. CP2008–8, CP2008–9 and CP2008–10, announcing prices and classification changes for competitive products not of general applicability. The notice in Docket No. CP2008–8 indicates that “the Governors have established prices and classifications for competitive products not of general applicability for Global Plus Contracts.”¹ The Postal Service attached a proposed revision of the draft Mail Classification Schedule (MCS) (section 2610.5) concerning Global Plus contracts to the Notice.² Docket No. CP2008–8 has been filed pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5 and 3020.90. In support of this docket, the Postal Service has also filed materials under seal, including the Governors' decision. The Postal Service claims that “[c]ontract prices are highly confidential in the business world * * * [and that its] ability * * * to negotiate individual contracts would be

severely compromised if prices for these types of agreements were publicly disclosed.” *Id.* at 1–2.

The notices in Docket Nos. CP2008–9 and CP2008–10 announce individual negotiated service agreements; namely, specific Global Plus contracts that the Postal Service has entered into with individual mailers.³ In support of these dockets, the Postal Service has also filed materials, including the contracts and supporting materials, under seal. The Postal Service asserts that “[t]he names of customers who enter into respective contracts and the related contract prices are highly confidential business information.” Docket No. CP2008–9 Pricing Notice at 1; Docket No. CP2008–10 Pricing Notice at 1.

In Order No. 81, the Commission gave notice of the three dockets, requested the Postal Service to address certain issues, appointed a Public Representative, and provided the public with an opportunity to comment.⁴

II. Postal Service Supplemental Filing

In response to Order No. 81, the Postal Service filed a pleading,⁵ which (1) stated that the Postal Service intended that the Docket No. CP2008–8 shell classification would be the template product, and that the agreements submitted in Docket Nos. CP2008–9 and CP2008–10 would be functionally equivalent agreements within the Docket No. CP2008–8 product; (2) provided additional supporting materials under part 3020, subpart B of the Commission's rules in support of adding Global Plus as the shell classification to the competitive products list; *see id.*, Attachment A; (3) stated that there are no existing Global Plus contracts that fail to fit within the revised Global Plus proposed MCS language; (4) indicated that the Postal Service believes that the expiration dates of Global Plus contracts could be made publicly available; (5) filed a redacted version of the Governors' decision with respect to Docket No.

CP2008–8;⁶ and (6) discussed why the Postal Service believes that certain provisions in the Docket Nos. CP2008–9 and CP2008–10 agreements which provide for price incentives prior to regulatory approval for such rates are appropriate.

III. Comments

Comments were filed by United Parcel Service (UPS), the Public Representative, Parcel Shippers Association (PSA), and International Mailers' Advisory Group (IMAG).⁷

UPS urges the Commission to require public disclosure of the proposed contracts subject to adequate safeguards to allow meaningful public insight. It also suggests that the Commission resist any “presumption” that markets for international services are perfectly competitive markets since private carriers face more burdensome customs and brokerage requirements than postal administrations. UPS Comments at 1–2.

The Public Representative comments on several aspects of the Postal Service's filings in these cases: (1) Confidentiality; (2) compliance with part 3020, subpart B of the Commission's rules; (3) the Governors' decision with respect to the shell classification; (4) the specific agreements; and (5) the retroactivity provisions. With respect to confidentiality, the Public Representative argues that the Postal Service should justify the limits of all confidentiality requests to comport with the spirit of Federal Rules of Civil Procedure 26(c). Public Representative Comments at 3. With respect to the Postal Service's filings under part 3020, subpart B, the Public Representative believes that the Postal Service should provide as much information as possible to assist the Commission in performing its statutory functions. *Id.* at 3–4. The

⁶ United States Postal Service Notice of Filing Redacted Copy of Governors' Decision No. 08–8, June 16, 2008.

⁷ Docket No. CP2008–8, Comments of United Parcel Service in Response to Order Concerning Prices Under Global Plus Negotiated Service Agreements; Docket No. CP2008–9, Comments of United Parcel Service in Response to Order Concerning Prices Under Global Plus Negotiated Service Agreements; Docket No. CP2008–10, Comments of United Parcel Service in Response to Order Concerning Prices Under Global Plus Negotiated Service Agreements (collectively UPS Comments); Public Representative Comments in Response to United States Postal Service Notice of Global Plus Services Contracts (Public Representative Comments); Comments of Parcel Shippers Association in Response to Order No. 81 Concerning Prices Under Global Plus Negotiated Service Agreements (PSA Comments); Comments of International Mailers' Advisory Group Pertaining to Competitive Product Prices—Global Plus Negotiated Service Agreements, PRC Docket No. CP2008–10 (IMAG Comments), all filed on June 19, 2008.

¹ Notice of United States Postal Service of Governors' Decision Establishing Prices and Classifications for Global Plus Contracts, June 2, 2008, at 1 (Notice).

² The draft MCS remains under review. The Commission anticipates providing interested persons an opportunity to comment on the draft MCS in the near future. Modifications to the MCS, such as proposed in Docket No. CP2008–8, should, in the future, be filed in the dockets designated by the “MC” prefix. Contracts executed pursuant to those requested classifications are appropriately filed as “CP” dockets.

³ Docket No. CP2008–9, Notice of United States Postal Service of Filing a Global Plus Contract, June 2, 2008 (Docket No. CP2008–9 Pricing Notice); Docket No. CP2008–10, Notice of United States Postal Service of Filing a Global Plus Contract, June 2, 2008 (Docket No. CP2008–10 Pricing Notice).

⁴ PRC Order No. 81, Notice and Order Concerning Prices Under Global Plus Negotiated Service Agreements, June 6, 2008 (Order No. 81).

⁵ United States Postal Service Response to Order No. 81 and Notice of Filing Information Responsive to Part 3020 of the Commission's Rules of Practice and Procedure, June 13, 2008; United States Postal Service Notice of Erratum to Response to Order No. 81 and Notice of Filing Information Responsive to Part 3020 of the Commission's Rules of Practice and Procedure, June 16, 2008 (collectively, Postal Service Response).

Public Representative submits that the formula proposed in the Governors' decision comports with the provisions of title 39. *Id.* at 5. With respect to the specific agreements, the Public Representative recognizes that the agreements in Dockets Nos. CP2008–9 and CP2008–10 are not identical, but does not take a position as to whether they should be classified as separate products. The Public Representative does contend, however, that the agreements satisfy the requirements of title 39. *Id.* at 6. With respect to retroactivity, the Public Representative believes that the Postal Service should be provided with the same authority as competitors in their customary business practices. *Id.* at 7.

PSA addresses three points. It endorses the Postal Service's suggestion that the Global Plus contracts under the shell classification be treated as one "product." PSA Comments at 2–3. It argues that confidentiality is extremely important and disclosure would keep the Postal Service from successfully competing in competitive markets. *Id.* at 3. Lastly, PSA contends that the level playing field envisioned by the Postal Accountability and Enhancement Act (PAEA) of 2006 requires the Commission, not Postal Service competitors, to review and examine the terms of the contracts to ensure there is no cross-subsidization. *Id.*

IMAG focuses on (1) the need to afford the Postal Service maximum flexibility for competitive contract rates not of general applicability through expedited and predictable Commission proceedings; (2) the importance of protecting the confidentiality of commercially sensitive information; and (3) the justification for the retroactive pricing provisions. IMAG Comments at 1–4.

IV. Commission Analysis

A. Part 3020, Subpart B Requirements

The Postal Service appears to argue that filing under 39 CFR part 3020, subpart B is unnecessary in this instance because the Commission has already listed all negotiated service agreements concerning outbound international mail as competitive products on the product list. Therefore, the Postal Service contends, a determination by the Commission under section 3642(b) is unnecessary. Postal Service Response at 4–5.

Under the PAEA, the term "product" is defined as "a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be applied." 39 U.S.C. 102(6). The Commission noted in Order

No. 43 that "each negotiated service agreement (NSA) is a separate product," but may, "upon proper showing, be grouped as one product." Order No. 43, paras. 1003, 2177–78. Additionally, for the classification of each product, the Commission must consider the impact on the private sector, the views of those that use the product, and the likely impact on small business concerns. 39 U.S.C. 3642(b)(3). The Commission must take these factors into consideration when evaluating new rate or classification proposals. Therefore, until the Postal Service makes an adequate showing under the statutory definition and section 3642, including subsection (b)(3), that separate negotiated service agreements should be grouped together as one product, each negotiated service agreement will be treated as a separate product and will be assigned to the product list in accordance with section 3642.

With respect to the Global Plus contracts, the Postal Service has filed the Governors' decision and a statement of Frank Cebello in support of its proposal to add the Docket No. CP2008–8 shell classification to the competitive product list. The Postal Service contends that adding the shell classification as a competitive product will improve the Postal Service's competitive posture, while allowing verification that each agreement covers attributable costs and satisfying applicable statutory requirements. Postal Service Response, Attachment A, at 2. The draft MCS includes a provision requiring each agreement to cover its own attributable costs. *See* Notice, proposed MCS language § 2610.5. Alternatively, adding the individual agreements as separate products will also improve the competitive posture of the Postal Service, but to a lesser degree. Postal Service Response, Attachment A, at 2. In the alternative, the Postal Service sought to add the contracts filed in Docket Nos. CP2008–9 and CP2008–10 to the competitive product list. *Id.* at 1–2. The Commission has reviewed this supplemental information as well as the materials filed by the Postal Service and commenters in Docket Nos. CP2008–9 and CP2008–10, including that submitted under seal. These contracts provide services that, under the criteria of section 3642(b), are properly classified as competitive.

B. Functionally Equivalent Agreements

Whether the shell or the actual agreements should be added to the competitive product list is a fundamental issue in these cases. The Commission seeks to strike an appropriate balance between the Postal

Service's need for flexibility with the need for adequate regulatory oversight. Consideration of a shell classification as a product may work in instances where the shell narrowly defines the particular product.

With respect to these cases in particular, the Commission has concerns with the breadth of the proposed Global Plus MCS language (concerning a variety of different services), and that it does not identify principal contract provisions as prerequisites for functional equivalency. Thus, the Commission does not believe that the Docket No. CP2008–8 shell classification, on its own, provides enough specificity to be categorized as a product at this time.⁸

An examination of the contracts, however, reveals that they are functionally equivalent in all pertinent respects, notwithstanding different revenue thresholds. As a consequence, the Commission concludes that it is appropriate to group these contracts as one product, which for purposes of the Mail Classification Schedule, will be listed on the competitive product list and grouped under the Global Plus classification as "Global Plus 1". Revisions to the competitive product list are shown below the signature line of this order and shall become effective upon publication in the **Federal Register**. Any future Global Plus contracts having substantially the same terms and conditions as the Global Plus 1 contracts may be filed under section 3015.5 of the Commission's rules. Global Plus contracts not having substantially the same terms and conditions as the Global Plus 1 contracts must be filed under part 3020, subpart B of the Commission's rules.⁹ The Commission will process such contracts as expeditiously as practicable consistent with the requirements of title 39.¹⁰

Under section 3015.5 of the Commission's rules, the explanation and justification for the rate or class not of general applicability must also

⁸ The Governors' decision in Docket No. CP2008–8, however, may properly authorize more than one Global Plus contract type.

⁹ Future Global Plus contracts having different terms and conditions from Global Plus 1 contracts but functionally equivalent with one another would be grouped similarly, e.g., as "Global Plus 2". The Postal Service may request such treatment when it files such agreements with the Commission. It should support any such request with a statement justifying that approach.

¹⁰ In the future, if and when the Postal Service files a Governors' decision under seal, it shall also file a redacted copy of that decision. In addition, the Postal Service shall notify the Commission no later than the termination date of each Global Plus contract if such contract is terminated pursuant to an early termination clause.

include the contract. When filing a new (or changed) Global Plus contract that it seeks to have classified as functionally equivalent with an existing product, e.g., Global Plus 1, the Postal Service shall identify all significant differences between the new contract and the pre-existing product group. Such differences would include terms and conditions that impose new obligations or new requirements on any party to the agreement.

The Global Plus classification language submitted by the Postal Service includes the requirement that each agreement executed pursuant to that shell classification (and the accompanying Governors' decision) cover its attributable costs. This is a key provision and the classification language adopted for all competitive negotiated service agreements will include the same provision.¹¹

The Commission reviews competitive product filings for compliance with section 3633 of title 39 and the Commission's implementing regulations which require each product to recover its attributable costs, bar cross-subsidization by market dominant products, and require competitive products collectively to recover an appropriate share of the Postal Service's total institutional costs.

The Commission has reviewed the materials filed by the Postal Service under seal, including the Governors' decision, the contracts submitted in Docket Nos. CP2008–9 and CP2008–10, and the financial analysis accompanying the contracts, and finds, based on the filed materials, that the Docket Nos. CP2008–9 and CP2008–10 agreements should cover their attributable costs, should not lead to the subsidization of competitive products by market dominant products, and should contribute to the recovery of an appropriate share of institutional costs by competitive products collectively.

C. Retroactive Contract Provisions

In Order No. 81, the Commission directed the Postal Service to provide statutory justification for allowing customers to receive certain price incentives prior to regulatory approval

of such rates, subsequent to collection of the difference in the full price if regulatory approval is not obtained.¹² The Postal Service contends that "[t]he retroactivity provisions are not inconsistent with any statutory or regulatory authority." Postal Service Response at 8. In support of this, the Postal Service argues that (1) pragmatic factors justify the arrangement and that, in any event, weigh strongly against construing the statute to forestall the reimbursement provisions, and (2) the mailer remains responsible for payment of the published rates if the contracts are not approved.

Section 3642(e) of title 39 states that "no product that involves the physical delivery of letters, printed matter, or packages may be offered by the Postal Service unless it has been assigned to the market-dominant or competitive category of mail * * *". This provision means that new products, such as a new negotiated service agreement or product group not listed in the MCS, may not be offered by the Postal Service until such time as the Commission assigns the proposed product to the appropriate product list. Additionally, even if the rate or class involves a pre-existing product, Commission rule 3015.5, which implements section 3632(b)(3) of title 39, requires that notice be filed "at least 15 days before the effective date of the change." Effectively, this means that any new (or revised) contract must be filed prior to the date that the new (or revised) rates become effective.

The Commission understands the Postal Service's pragmatic concerns and the need to maintain the status quo. As experience is gained with the filing requirements under the PAEA, the parties should be better equipped to address such exigencies. If and when such situations arise, the Commission stands ready to act quickly on requests for temporary relief based on extenuating circumstances.

V. Ordering Paragraphs

It is Ordered:

1. The contracts submitted in Docket Nos. CP2008–9 and CP2008–10 will be added to the competitive product list as one product under Negotiated Service Agreements, Outbound International as

Global Plus Contracts, Global Plus 1 (CP2008–9 and CP2008–10).

2. The Secretary shall arrange for publication of the amended product list 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:

■ 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:

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PART B—COMPETITIVE PRODUCTS

2000 Competitive Product List

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 Plus Contracts
Global Plus 1 (CP2008–9 and CP2008–10)

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¹¹ The Postal Service filing included proposed classification language governing Global Plus 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.

¹² PRC Order No. 81, Notice and Order Concerning Prices Under Global Plus Negotiated Service Agreements, June 6, 2008, at 4 (Order No. 81).