

ORDER NO. 4973

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Amendments to Market Test Rules

Docket No. RM2018-12

ORDER AMENDING RULES RELATING TO MARKET TESTS

(Issued January 8, 2019)

I. INTRODUCTION

On September 13, 2018, the Commission issued a notice of proposed rulemaking that proposed amending its regulations governing market tests of experimental products appearing in existing 39 C.F.R. part 3035.¹ The amendments proposed revisions to the regulations concerning market test revenue limitations and requests to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list.² For the reasons discussed

¹ Notice of Proposed Rulemaking to Amend Market Test Regulations, September 13, 2018 (Order No. 4822).

² Product lists categorize postal products as either market dominant or competitive. 39 C.F.R. § 3020.1(b). Each experimental product is identified on the applicable product list during a market test under the organizational group heading “Market Tests” in accordance with 39 U.S.C. § 3641(b)(3) and 39 C.F.R. § 3020.4(b)(2)(ii)(D) and 3020.4(b)(3)(ii)(D). Existing § 3035.18 and the revisions finalized in this Order apply only to a request to offer a proposed product or price category in non-experimental status, that is—subject to the applicable requirements of 39 U.S.C. §§ 3622, 3633, or 3642, and the applicable regulations promulgated thereunder.

below, the Commission adopts the following final rules, which include minor revisions to the proposed rules.

II. BACKGROUND

Section 3641 of title 39 of the United States Code authorizes the Postal Service to conduct market tests of experimental products. In accordance with its specific authority to regulate market tests under 39 U.S.C. § 3641 and its general authority under 39 U.S.C. § 503 to promulgate regulations and establish procedures, the Commission codified existing 39 C.F.R. part 3035 to establish procedures for conducting market tests of experimental products.³ The Commission initiated this proceeding to consider amendments to the existing market test regulations that would better reflect current practice and improve transparency and accountability.

The proposed amendments fell into one of two general categories. The first category proposed revisions to the method for calculating applicable revenue limitations for market tests appearing in existing §§ 3035.15 and 3035.16 to be consistent with the current level of precision used in calculating the annual limitation on the percentage change in rates for market dominant products (price cap). The second category included amendments aimed to clarify the process under existing § 3035.18 for filing requests to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list and to emphasize the necessity of receiving specific detailed information in those instances.

³ See Docket No. RM2013-5, Order Adopting Final Rules for Market Tests of Experimental Products, August 28, 2014 (Order No. 2173).

III. COMMENTS

The Commission received comments on the proposed amendments from the Public Representative and the Postal Service.⁴ The Public Representative supports adopting proposed amendments to the revenue limitations in §§ 3035.15 and 3035.16 because they will benefit the public by promoting consistency across Commission proceedings and regulations. PR Comments at 2-3. She comments that the proposed amendments to existing § 3035.18 increase transparency of requests filed under this provision and ensure that the Commission and the public have sufficient time for review. *Id.* at 10-11. She suggests minor changes to clarify requirements about the applicability and content of requests to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list. *Id.* at 5-10.

The Postal Service also supports the amendments to the revenue limitations because they harmonize the Commission's calculation of market test revenue limitations with its calculation of the price cap. Postal Service Comments at 1. The Postal Service asserts that it shares the Commission's goal of resolving the ambiguity surrounding the applicability of § 3035.18. *Id.* However, the Postal Service expresses concern that the proposed amendments could unnecessarily restrict its ability to enter into negotiated service agreements (NSAs) following a market test, which would discourage the Postal Service from using market tests to experiment and innovate.⁵ It suggests several changes to proposed § 3035.18 that it contends would meet the goal of the proposed amendments while avoiding unnecessary restrictions on the Postal Service's ability to effectively compete for business. Postal Service Comments at 2-4.

The specific changes recommended by the Public Representative and Postal Service as well as the Commission's related analysis are discussed in section IV, *infra*.

⁴ Public Representative Comments in Response to Notice of Proposed Rulemaking to Amend Market Test Regulations, October 16, 2018 (PR Comments); Comments of the United States Postal Service, October 18, 2018 (Postal Service Comments).

⁵ *Id.* NSAs are written contracts between the Postal Service and a mailer for customer-specific rates and fees that are effective for a defined period of time. 39 C.F.R. § 3001.5(r).

IV. COMMISSION ANALYSIS

A. Market Test Revenue Limitations

Unless the Commission grants an exemption, total revenues anticipated or in fact received by the Postal Service from an experimental product must not exceed \$10 million in any year. 39 U.S.C. § 3641(e)(1). Upon written application of the Postal Service, the Commission may exempt the market test from the \$10 million revenue limitation if certain requirements are met. 39 U.S.C. § 3641(e)(2). If the Commission grants an exemption, total revenues anticipated, or in fact received by, the Postal Service from a market test may not exceed \$50 million in any year. *Id.* These amounts must be adjusted annually by the change in the Consumer Price Index for such year, as determined under the regulations of the Commission.⁶

Existing §§ 3035.15 and 3035.16 explain the method for calculating these revenue limitations. The existing regulations use a Base Average that is calculated using one decimal place (214.5). The proposed amendments calculated the Base Average using three decimal places (214.463) to be consistent with the price cap rules by replacing “214.5” with “214.463” in paragraphs (d) and (e) of existing § 3035.15 and in paragraphs (c) and (d) of existing § 3035.16. This change will slightly increase the market test revenue limitations, but will have limited substantive effect. Order No. 4822 at 4.

The Public Representative supports these proposed amendments because they promote consistency across Commission proceedings, which will help the public understand or replicate the Commission’s calculations without reviewing other regulations. PR Comments at 2-3. She comments that the proposed amendments increase existing market test revenue limitations, but do not adversely affect the public. *Id.* at 3. The Postal Service also supports the proposed amendments to the revenue

⁶ 39 U.S.C. § 3641(g). Existing § 3035.15(a) uses the Consumer Price Index—All Urban Customers (CPI-U index), as specified by 39 C.F.R. §§ 3010.21(a) and 3010.22(a), to calculate these amounts.

limitations because they harmonize the Commission's calculation of market test revenue limitations with its calculation of the price cap. Postal Service Comments at 1. It states that this consistency improves the existing market test regulations. *Id.*

Both the Public Representative and the Postal Service support the proposed amendments to the market test revenue limitations in §§ 3035.15 and 3035.16. The Commission makes no changes to these regulations and adopts them as proposed.

B. Requests to Add a Non-Experimental Product or Price Category Based on an Experimental Product to the Product List

Existing § 3035.18 contains requirements for filing a request to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list. Generally, each product offered by the Postal Service must comply with 39 U.S.C. § 3622 (governing market dominant products) or 39 U.S.C. § 3633 (governing competitive products), as well as 39 U.S.C. § 3642 (governing changes to the lists of market dominant and competitive products) and applicable regulations. Experimental products, however, are not subject to these requirements. 39 U.S.C. § 3641(a)(2).

The Postal Service may decide to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list based on its performance or other factors. Accordingly, existing § 3035.18 sets forth procedures for filing such requests. The Commission's statutory responsibility is to ensure that a request filed under § 3035.18 complies with 39 U.S.C. §§ 3622, 3633, or 3642, and the applicable regulations promulgated thereunder. See Order No. 2173 at 24. Existing § 3035.18 uses the term "permanent" to describe the non-experimental status of the proposed product or price category. See *id.* Existing § 3035.18(a) states that if the Postal Service decides to make an experimental product permanent, it must file a request under 39 U.S.C. § 3642 and 39 C.F.R. part 3020, subpart B to add a new product or price category to the market dominant or competitive product list. Existing § 3035.18(a) requires the Postal Service to file such requests at

least 60 days before the market test expires or the market test exceeds any authorized adjusted limitation in any fiscal year, whichever is earlier.

Under existing § 3035.18(b), a request to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list must quantify the product specific costs associated with developing the market test, which are the costs incurred before the market test was implemented. Under existing § 3035.18(c), the Postal Service must also file a notice of such request in the market test proceeding's docket that includes the applicable docket number(s) for the proceeding evaluating the request.

In Order No. 4822, the Commission explained that several issues arose when reviewing past requests to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list, including questions concerning the applicability of existing § 3035.18 as well as the required content and timing of such requests. The proposed amendments aimed to address these issues by clarifying the process under existing § 3035.18 for filing such requests and specifying applicability, content, and notice requirements. In the sections below, the Commission reviews these issues, addresses related comments, and describes any resulting changes to proposed § 3035.18.

1. Applicability of Existing § 3035.18

The proposed amendments removed the word "permanent" from existing § 3035.18 and clarified that this regulation applies to any non-experimental product or price category based on a former or current experimental product that the Postal Service seeks to add to the market dominant or competitive product list, whether permanent or temporary. Proposed § 3035.18(b) required the Postal Service to file a request under § 3035.18 if the proposed non-experimental product or price category: (1) offers the same (or similar) service as a former or current experimental product, (2) has the same distinct cost or market characteristic as a former or current experimental

product, or (3) uses (or is based on) data or assumptions from a former or current market test proceeding.

The Public Representative supports these proposed amendments because they increase transparency of the Commission's review of requests to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list, which benefits the public. PR Comments at 4. She comments that the proposed amendments clarify the process for filing a request under § 3035.18(a), resolve the ambiguity regarding "permanent" products, and address the applicability of § 3035.18 to expired or canceled market tests. *Id.* at 4-5. She states that the proposed amendments provide an improved description of the products and price categories subject to § 3035.18. *Id.* at 5.

The Public Representative suggests using more precise language in proposed § 3035.18(b)(1), which required the Postal Service to file a request under § 3035.18 if the proposed non-experimental product or price category "offers the same (or similar) service as a former or current experimental product[.]" *Id.* at 5-6 (quoting Order No. 4822 at 9; Order No. 4822, Attachment A at 3). She states that "[t]he use of the term 'similar' may lead to ambiguity about the level of changes the Postal Service could make to a market test product or price category that would exempt it from [§ 3035.18's] requirements." PR Comments at 6. She observes that proposed § 3035.18(b)(2) contains a more precise definition regarding cost or market characteristics that could be used as a model for the Commission in revising proposed § 3035.18(b)(1). *Id.* She also suggests that Commission consider language aligning with existing § 3035.6 relating to material changes to market tests. *Id.*

Proposed § 3035.18(b) is intended to identify instances when § 3035.18 applies. The term "or similar" in proposed § 3035.18(b)(1) is intended to include instances when the proposed non-experimental product or price category is not identical to an experimental product. For example, the experimental product, Customized Delivery, was a package delivery service offering that provided customers with delivery of

groceries and other prepackaged goods within a customized delivery window.⁷ If the Postal Service sought to add Customized Delivery as a competitive NSA but changed the prices, geographic scope, or eligibility to participate, the Postal Service would still need to file such request under § 3035.18. If there is a nexus between the proposed non-experimental product or price category and the market test or experimental product, the Postal Service must file a request under § 3035.18. Thus, although “similar” is not precisely defined in final § 3035.18(b)(1), the Commission intends to apply final § 3035.18 in all cases where a nexus between the proposed non-experimental product or price category and the market test or experimental product exists. The use of “similar” appropriately captures the myriad of potential situations where the proposed non-experimental product may not be identical to the market test or experimental product. As a result, the Commission declines to make the changes suggested by the Public Representative.

The Postal Service asserts that it shares the Commission’s goal of resolving the ambiguity surrounding the applicability of existing § 3035.18. Postal Service Comments at 1. However, it expresses concern with how proposed § 3035.18 would apply to NSAs. *Id.* at 2. In particular, the Postal Service is concerned that NSAs incorporating features from a market test would continually be subject to more rigorous filing requirements than other NSAs even after the market test has been concluded for some time. *Id.* The Postal Service states that this could discourage the Postal Service from conducting market tests and instead encourage the Postal Service to innovate through NSAs. *Id.*

To address this issue, the Postal Service recommends that the requirements of § 3035.18 apply only to NSAs that seek to continue services provided under a market test immediately when the market test expires. *Id.* at 2-3. This would occur when the Postal Service is seeking to transition a customer from a market test to an NSA with no

⁷ Docket No. MT2014-1, Order Authorizing Customized Delivery Market Test, October 23, 2014, at 1 (Order No. 2224).

interruption in service. *Id.* at 3 n.5. The Postal Service recommends that final § 3035.18 not apply if the proposed NSA is filed more than one month after the market test ends. *Id.* at 3. In that case, the Postal Service states that the Commission should evaluate such request as it would any other competitive NSA. *Id.*

The Commission declines to provide an exception for requests to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list as an NSA. Analyzing market test data is necessary for the Commission to properly evaluate all requests filed under § 3035.18, even after a market test has ended. Based on experience with such requests to date, the Commission cannot specify a time period after a market test ends when the information required under proposed § 3035.18 would not be necessary for its review. Thus, the Commission does not adopt the Postal Service's suggestion in the final rules. All requests to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list that meet the criteria of final § 3035.18(b) must be filed under final § 3035.18 and meet applicable content and notice requirements.

2. Contents of Requests Filed Under § 3035.18

Proposed § 3035.18(c) identified information the Postal Service must include in a request to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list. Proposed § 3035.18(c)(1) required that such a request identify the market test and docket number that the proposed non-experimental product or price category is based on. Proposed § 3035.18(c)(2) stated that the request must explain how the proposed non-experimental product or price category relates to a market test or an experimental product. Proposed § 3035.18(c)(3) required that the request identify any assumptions from the market test that the request uses or is based on. Proposed § 3035.18(c)(4) required financial models supporting the request to include all data from data collection reports or separately identify and explain any differences between the data collection

reports and the data provided in the financial models. Proposed § 3035.18(c)(5) contained the substance of existing § 3035.18(b), which requires a request to quantify the product specific costs associated with developing the market test (*i.e.*, the costs incurred before the market test was implemented). Proposed § 3035.18(e) required the Postal Service to file a notice of its request under § 3035.18 in the market test proceeding's docket. This notice must include the applicable docket number(s) for the proceeding evaluating the request.

The Public Representative supports proposed § 3035.18(c) because it increases transparency by providing more specific requirements for the contents of a request filed under § 3035.18. PR Comments at 6-7. She comments that proposed § 3035.18(c)(3), which requires a request filed under § 3035.18 to identify supporting assumptions from a market test proceeding, addresses the Commission's concerns about transparency in past dockets. *Id.* at 6. She submits that this information will help the public better understand a request and connect it to the applicable market test. *Id.* She asserts that the requirement in proposed § 3035.18(c)(4) concerning supporting financial models is intended to minimize the number of information requests needed to review the request, which increases transparency and benefits the public. *Id.* at 6-7. The Public Representative recommends that final § 3035.18(c)(4) use more precise language to clearly describe the reports and models that are referred to. *Id.* She suggests language that would describe the reports and models in more detail. *Id.* at 7-8.

To promote clarity and consistency, final § 3035.18(c)(4) provides more details about the data collection reports and financial model. The final rule specifies that "data collection reports" refer to the reports filed during the market test, and "financial model" refers to the financial model supporting the request filed under final § 3035.18.⁸ Final § 3035.18(c)(4) also replaces "to support" with "in" to clarify that a request filed under

⁸ The Public Representative suggests adding "quarterly" before "data collection reports" in final § 3035.18(c)(4). Although most market test data collection reports are filed quarterly, the Commission may prescribe a different time period for filing these reports. See 39 C.F.R. § 3035.20(d).

final § 3035.18 must explain the differences between the data collection reports filed during the market test and the data used in the financial model supporting the request.

The Postal Service comments that the content requirements in proposed § 3035.18(c) and (e) should expire a reasonable period of time after a market test ends. Postal Service Comments at 3-4. It states that the requirement in proposed § 3035.18(c)(4) related to data collection reports could reasonably persist. *Id.* at 4 n.7.

A request to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list requires the Commission to compare the financial model and data in such request with the data collection reports from the market test. The information in proposed § 3035.18(c)(3) and (4) are necessary for the Commission to identify differences between data and assumptions used in the market test and the data and assumptions used in the financial model supporting the request. Similarly, the information in proposed § 3035.18(c)(1) and (2) are necessary for identifying the relationship between the market test and proposed non-experimental product or price category. A quantification of product specific costs required by proposed § 3035.18(c)(5) is necessary for the Commission to evaluate whether a proposed product complies with applicable statutory and regulatory criteria. Order No. 2173 at 28, 31. Based on current practice, the Commission cannot specify a time period after a market test ends when such information would no longer be necessary or relevant. For this reason, the Commission declines to set an expiration date for the content requirements in final § 3035.18(c).

With regard to proposed § 3035.18(e), the Postal Service asserts that no clear regulatory purpose would be served if the Postal Service were required to forever file notices of new NSAs in a market test docket long after the market test has ended. Postal Service Comments at 4. The notice requirement in proposed § 3035.18(e) helps mailers and the general public track the progress of a market test from an experimental product to a product on the market dominant or competitive product list. Order No. 2173 at 25-26. This requirement ensures that interested persons monitoring the market test are informed if the Postal Service files a request under § 3035.18 related to the

market test. *Id.* However, interested persons are less likely to monitor a market test docket after it ends. As a result, the Commission finds it appropriate to limit final § 3035.18(e) to active market test dockets⁹ and makes a corresponding change to final § 3035.18(e). Under final § 3035.18(e), if a market test's docket is closed, then the Postal Service is not required to submit a notice of its request filed under § 3035.18 in the market test proceeding's docket.¹⁰ Transparency concerns are mitigated because the final rules require that a request filed under § 3035.18 identify the market test and docket number that the proposed non-experimental product or price category is based on. Final § 3035.18(c)(1). This requirement ensures that interested persons can easily locate the related market test docket.

3. Notice

Existing § 3035.18 requires the Postal Service to file a request to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list "at least 60 days before the market test expires (including any extension period granted) or the market test exceeds any authorized adjusted limitation in any fiscal year, whichever is earlier." 39 C.F.R. § 3035.18(a). Proposed § 3035.18(d) required the Postal Service to file a request under § 3035.18 at least 60 days before the requested decision date.

The Public Representative supports the advance notice requirement because it increases the likelihood that the Commission and the public will have sufficient time to review a request filed under § 3035.18. PR Comments at 9. She comments that adopting the proposed amendments will benefit the public by correcting the issue of the Postal Service filing such requests through the competitive NSA process instead of

⁹ Active cases are listed on the Commission's website. See www.prc.gov; hover over "Case Information" and follow the "Active Cases" link.

¹⁰ The Commission automatically closes a docket if there has been no activity of record by any interested person for 12 consecutive months. 39 C.F.R. § 3001.71(a). This rule excepts dockets that require by rule or statute the Commission to issue a final determination, or if the Commission has otherwise indicated a final order is forthcoming. *Id.*

under existing § 3035.18. *Id.* She expresses concern that the proposed rule, which required the Postal Service to file a request under § 3035.18 “at least 60 days before the requested decision date,” is ambiguous about the timeline if the Postal Service does not explicitly seek a decision by a certain date. *Id.* at 9-10 (quoting Order No. 4822 at 9; Order No. 4822, Attachment A at 4). The Public Representative suggests that the final rule include more specific language from existing § 3035.18, which distinguishes between the market test expiration date and the expected date that the market test exceeds any authorized adjusted limitation in any fiscal year. PR Comments at 10; see existing § 3035.18(a). She contends that these changes will reduce the ambiguity surrounding when the 60-day notice period would apply. PR Comments at 10.

To address this concern, the final rules contain separate requirements for requests filed under § 3035.18 that seek to continue services provided under a market test immediately when the market test ends. If the Postal Service seeks to continue the services provided under a market test immediately when the market test ends with no interruption in service, the Postal Service must provide advance notice before (i) the market test expires (including any extension period granted) or (ii) the market test is expected to exceed any authorized limitation specified in §§ 3035.15 and 3035.16 during any fiscal year, whichever is earlier. Final § 3035.18(d). In all other instances, the Postal Service must provide advance notice before the requested date for the Commission’s decision. *Id.*

The Postal Service acknowledges the Commission’s need to ensure adequate time to review complex NSAs. Postal Service Comments at 2. However, it contends that the advance notice period should differ for competitive NSAs and other products. *Id.* at 3. It explains that it is concerned about competitive NSAs specifically and would not oppose the 60-day notice period for other products, including market dominant NSAs. *Id.* at 3 n.6. The Postal Service points out that the Commission routinely reviews complex NSAs within 15 days, often with other NSAs pending before the Commission. *Id.* It asserts that a 60-day notice period is impractical for competitive NSAs given the highly competitive space the Postal Service operates in and the fast-

paced nature of customer negotiations. *Id.* The Postal Service submits that a 30-day notice period “would strike a more reasonable balance between the Commission’s duty to properly review NSAs and the business needs of the Postal Service and its customers.” *Id.*

The Commission acknowledges the need for expeditious review of competitive NSAs. However, the Commission must balance that need with its responsibility to ensure that a request filed under § 3035.18 complies with applicable legal requirements. The Commission previously stated that the 60-day notice requirement in existing § 3035.18(a) ensures that both the Commission and interested persons have adequate time to evaluate and respond to a request to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list. See Order No. 2173 at 27. Past practice has shown that competitive NSAs offering the same service as a market test are substantially more complex in terms of both contract terms and financial models compared to other NSAs. For example, the request to add Customized Delivery as a competitive NSA raised novel issues because the request included an untested financial model.¹¹ Additional time was necessary to gather more data and explore the reasonableness of the assumptions underlying the financial model to confirm that all costs associated with the proposed NSA were accurate and reliable. *Id.* at 6-7. The Postal Service’s suggestion of 30 days for competitive NSAs would not have provided the Commission sufficient time to review the Customized Delivery request.

Also, experimental products, unlike products on the market dominant and competitive product lists, are not subject to the requirements of 39 U.S.C. §§ 3622, 3633, or 3642, or the regulations promulgated under those sections. 39 U.S.C. § 3641(a)(2). If the Postal Service files a request under § 3035.18 to add a competitive

¹¹ See Docket Nos. MC2018-13 and CP2018-26, Order Conditionally Adding Parcel Select Contract 24 to the Competitive Product List, October 31, 2017, at 7 (Order No. 4196).

NSA to the product list, the Commission must ensure that the proposed NSA meets these requirements, which necessitates more time for review.

To balance the need for expeditious review with the Commission's responsibility to ensure compliance with applicable legal requirements, the final rules contain a 45-day advance notice period for requests filed under § 3035.18 to add a competitive NSA to the competitive product list. Final § 3035.18(d)(1). For all other products, the Postal Service must provide 60 days' advance notice. Final § 3035.18(d)(2).

In summary, final § 3035.18(d) contains separate notice requirements for requests filed under § 3035.18 that seek to continue services provided under a market test immediately when the market test ends. If the Postal Service seeks to continue the services provided under a market test immediately when the market test ends with no interruption in service, the Postal Service must file a request under § 3035.18 at least 45 days (for competitive NSAs) or 60 days (for other products) before (i) the market test expires (including any extension period granted) or (ii) the market test is expected to exceed any authorized limitation specified in §§ 3035.15 and 3035.16 during any fiscal year, whichever is earlier. Final §§ 3035.18(d)(1) and (2). In all other instances, the Postal Service must file a request under § 3035.18 at least 45 days (for competitive NSAs) or 60 days (for other products) before the requested date for the Commission's decision. *Id.*

V. SECTION-BY-SECTION ANALYSIS OF THE FINAL CHANGES TO 39 C.F.R. PART 3035

Final § 3035.15(d). Final § 3035.15(d) is adopted as proposed.

Final § 3035.15(e). Final § 3035.15(e) is adopted as proposed.

Final § 3035.16(c). Final § 3035.16(c) is adopted as proposed.

Final § 3035.16(d). Final § 3035.16(d) is adopted as proposed.

Final § 3035.18. The final rules change the heading of existing § 3035.18 to "Request to add a non-experimental product or price category based on an experimental product to the product list" as proposed.

Final § 3035.18(a). Final § 3035.18(a) is adopted as proposed.

Final § 3035.18(b). Final § 3035.18(b) is adopted as proposed.

Final § 3035.18(c). Final § 3035.18(c)(4) is revised to specify the data collection reports and financial models referenced. Otherwise, final § 3035.18(c) is adopted as proposed.

Final § 3035.18(d). Final § 3035.18(d) is revised to specify a different advance notice requirement for competitive NSAs (45 days) as compared to other products (60 days). It also contains separate notice requirements for a request filed under § 3035.18 that seeks to continue services provided under a market test immediately when the market test ends.

Final § 3035.18(e). Final § 3035.18(e) adds “if the market test proceeding’s docket is an active case before the Commission” at the end of the first sentence.

VI. REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. See 5 U.S.C. § 601 *et seq.* (1980). If the proposed or final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities, the head of the agency may certify that the initial and final regulatory flexibility analysis requirements of 5 U.S.C. §§ 603 and 604 do not apply. See 5 U.S.C. § 605(b).

In the context of this rulemaking, the Commission’s primary responsibility is regulatory oversight of the United States Postal Service. The rules that are the subject of this rulemaking have a regulatory impact on the Postal Service, but do not impose any regulatory obligation upon any other entity. Based on these findings, the Chairman of the Commission certifies that the rules that are the subject of this rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, pursuant to 5 U.S.C. § 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. §§ 603 and 604.

VII. ORDERING PARAGRAPHS

It is ordered:

1. Part 3035 of title 39, Code of Federal Regulations, is revised as set forth below the signature of this Order, effective 30 days after publication in the *Federal Register*.
2. The Secretary shall arrange for publication of the amended rules and general statement as to the basis and purpose of the amended rules in the *Federal Register*.

By the Commission.

Stacy L. Ruble
Secretary

List of Subjects in 39 CFR Part 3035

Administrative practice and procedure, Postal Service.

For the reasons discussed in the preamble, the Commission amends 39 CFR part 3035 as follows:

Part 3035—RULES FOR MARKET TESTS OF EXPERIMENTAL PRODUCTS

1. The authority citation for part 3035 is revised to read as follows:

Authority: 39 U.S.C. 503; 3641.

2. Amend § 3035.15 by revising paragraphs (d) and (e) to read as follows:

§ 3035.15 Dollar amount limitation.

* * * * *

(d) The calculation of the \$10 Million Adjusted Limitation involves the following steps. First, a simple average CPI-U index was calculated for fiscal year 2008 by summing the monthly CPI-U values from October 2007 through September 2008 and dividing the sum by 12 (Base Average). The resulting Base Average is 214.463. Then, a second simple average CPI-U index is similarly calculated for each subsequent fiscal year by summing the 12 monthly CPI-U values for the previous fiscal year and dividing the sum by 12 (Recent Average). Finally, the annual limitation for the current fiscal year is calculated by multiplying \$10,000,000 by the Recent Average divided by 214.463. The result is expressed as a number, rounded to the nearest dollar.

(e) The formula for calculating the \$10 Million Adjusted Limitation is as follows:

$\$10 \text{ Million Adjusted Limitation} = \$10,000,000 * (\text{Recent Average}/214.463).$

3. Amend § 3035.16 by revising paragraphs (c) and (d) to read as follows:

§ 3035.16 Exemption from dollar amount limitation.

* * * * *

(c) The calculation of the \$50 Million Adjusted Limitation involves the following steps. First, a simple average CPI-U index was calculated for fiscal year 2008 by summing the monthly CPI-U values from October 2007 through September 2008 and dividing the sum by 12 (Base Average). The resulting Base Average is 214.463. Then, a second simple average CPI-U index is similarly calculated for each subsequent fiscal year by summing the 12 monthly CPI-U values for the previous fiscal year and dividing the sum by 12 (Recent Average). Finally, the annual limitation for the current fiscal year is calculated by multiplying \$50,000,000 by the Recent Average divided by 214.463. The result is expressed as a number, rounded to the nearest dollar.

(d) The formula for calculating the \$50 Million Adjusted Limitation is as follows:

$\$50 \text{ Million Adjusted Limitation} = \$50,000,000 * (\text{Recent Average}/214.463).$

4. Revise § 3035.18 to read as follows:

§ 3035.18 Request to add a non-experimental product or price category based on an experimental product to the product list.

(a) If the Postal Service seeks to add a non-experimental product or price category based on a former or current experimental product to the market dominant or competitive product list, the Postal Service shall file a request, pursuant to 39 U.S.C.

3642 and part 3020, subpart B of this chapter, to add a non-experimental product or price category to the applicable product list.

(b) The Postal Service shall comply with the requirements specified in paragraphs (c) through (e) of this section if the proposed non-experimental product or price category:

(1) Offers the same (or similar) service as a former or current experimental product;

(2) Has the same distinct cost or market characteristic as a former or current experimental product; or

(3) Uses (or is based on) data or assumptions from a former or current market test proceeding.

(c) A request filed under this section shall:

(1) Identify the market test and docket number that the proposed non-experimental product or price category is based on;

(2) Explain the relationship between the proposed non-experimental product or price category and market test or experimental product;

(3) Identify any assumptions from the market test that the request uses or is based on;

(4) Include all data from data collection reports filed during the market test in the financial model supporting the request, or separately identify and explain any differences between the data collection reports filed during the market test and the data used in the financial model supporting the request; and

(5) Quantify the product specific costs associated with the development of the market test; that is, costs incurred before the market test was implemented.

(d) The Postal Service must provide advance notice of a request filed under this section.

(1) The requirements in this paragraph (d)(1) apply if the Postal Service seeks to add a non-experimental product or price category based on an experimental product to the competitive product list as an NSA. If the Postal Service seeks to continue the services provided under a market test immediately when the market test ends with no interruption in service, the Postal Service must file a request under this section at least 45 days before (i) the market test expires (including any extension period granted) or (ii) the market test is expected to exceed any authorized limitation specified in §§ 3035.15 and 3035.16 during any fiscal year, whichever is earlier. In all other instances, the Postal Service must file a request under this section at least 45 days before the requested date for the Commission's decision.

(2) The requirements in this paragraph (d)(2) apply if the Postal Service seeks to add a non-experimental product or price category based on an experimental product to the market dominant or competitive product list as a product other than a competitive NSA. If the Postal Service seeks to continue the services provided under a market test immediately when the market test ends with no interruption in service, the Postal Service must file a request under this section at least 60 days before (i) the market test expires (including any extension period granted) or (ii) the market test is expected to exceed any authorized limitation specified in §§ 3035.15 and 3035.16 during any fiscal

year, whichever is earlier. In all other instances, the Postal Service must file a request under this section at least 60 days before the requested date for the Commission's decision.

(e) The Postal Service shall also file a notice of a request filed under this section in the market test proceeding's docket if the market test proceeding's docket is an active case before the Commission. This notice shall include the applicable docket number(s) for the proceeding evaluating the request.