

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

Before Commissioners:

Robert G. Taub, Chairman;  
Michael Kubayanda, Vice Chairman;  
Mark Acton;  
Ann C. Fisher; and  
Ashley E. Poling

Competitive Product Prices  
International Competitive Multi-Service  
Commercial Contracts

Docket No. MC2020-252

Competitive Product Prices  
International Competitive Multi-Service  
Commercial Contracts 1 (MC2020-252)

Docket No. CP2020-282

ORDER DENYING REQUEST TO ADD  
PRODUCT TO THE COMPETITIVE PRODUCT LIST

(Issued November 13, 2020)

I. INTRODUCTION

On September 18, 2020, the Postal Service filed a request to add a new product, International Competitive Multi-Service Commercial Contracts (ICMSSC) 1, to the competitive product list within the Mail Classification Schedule (MCS), pursuant to 39 U.S.C. § 3642 and 39 C.F.R. §§ 3040.130-.135.<sup>1</sup> The Postal Service seeks to file

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<sup>1</sup> Request of the United States Postal Service to Add International Competitive Multi-Service Commercial Contracts 1 to the Competitive Products List and Application for Non-Public Treatment of Materials Filed Under Seal, September 18, 2020 (Request).

almost all customized outbound international negotiated service agreements (NSAs) within the ICMSCC 1 product, using a revised set of filing requirements set out in the Request. Request at 4, 12-16. The Commission denies the Request for the reasons explained below.

## II. BACKGROUND

At the onset of the Postal Accountability and Enhancement Act (PAEA) era, the Commission noted that every proposed NSA filed with the Commission prior to the issuance of Order No. 43 “was premised either on distinct market characteristics, distinct cost characteristics, or both,” and therefore the Commission determined that NSAs “meet the definition of separate products” outlined in the PAEA.<sup>2</sup> In its initial rulemaking, however, the Commission added that “[i]n the future, it may be appropriate to group functionally equivalent negotiated service agreements as a single product if it can be shown that they have similar cost and market characteristics.” Order No. 43 at 58. In subsequent dockets, the Commission has applied this concept of functional equivalence to NSAs within umbrella products.<sup>3</sup>

In Order No. 86, the Commission established the first Global Expedited Package Services (GEPS) Contracts product, GEPS 1, an umbrella product that grouped agreements with small- and medium-size mailers for Express Mail International (EMI) and Priority Mail International (PMI). In that order, the Commission explained that the Postal Service could file subsequent, functionally equivalent agreements as price categories within the GEPS product if it identified how those agreements differed from the baseline agreement. Order No. 86 at 7. Currently, the Commission determines

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<sup>2</sup> Docket No. RM2007-1, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007, at 57-58 (Order No. 43); 39 U.S.C. § 102(6).

<sup>3</sup> See, e.g., Docket No. CP2008-5, Order Concerning Global Expedited Package Services Contracts, June 27, 2008 (Order No. 86).

whether proposed agreements can be included within the GEPS products<sup>4</sup> by determining if their terms are substantially equivalent to the baseline agreement and conducting a functional equivalency analysis.

This process was further enhanced with the development of the GEPS—Non-Published Rates (GEPS—NPR) 1 product.<sup>5</sup> The Commission approved the GEPS—NPR 1 product subject to two requirements; future GEPS—NPR agreements<sup>6</sup> must conform to a template agreement and offer prices within specified, pre-approved ranges.<sup>7</sup> These requirements allow the Commission to streamline its review process because the contract template and financial model have been approved in advance. Therefore, the Commission can determine that each GEPS—NPR agreement “satisfies, at least preliminarily, 39 U.S.C. 3633(a).” *Id.* at 16. The Commission concluded that these “checks and balances” allowed for a more streamlined review for GEPS—NPR. *Id.*

In both cases (GEPS and GEPS—NPR), there are two common and necessary themes: identical product groupings within an overall umbrella product, and financial models that are standard to the grouping.

### III. REQUEST

In its Request, the Postal Service seeks to add the ICMSCC 1 product to the competitive product list and to implement a streamlined filing process for this new product. Request at 1. The Postal Service states that the main objective of the

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<sup>4</sup> See Mail Classification Schedule (MCS), section 2510.3. There are currently eight GEPS products included in the MCS.

<sup>5</sup> Docket Nos. MC2010-29 and CP2010-72, Order Approving Postal Service Request to Add Global Expedited Package Services–Non-Published Rates 1 to the Competitive Product List, November 22, 2010 (Order No. 593).

<sup>6</sup> See Mail Classification Schedule (MCS), section 2510.8.7. There are currently 14 GEPS—NPR products included in the MCS.

<sup>7</sup> GEPS—NPR agreements offer limited options, such as postage payment method, an entry point, and a revenue commitment between eight tiers. Order No. 593 at 14.

Request is to file “all customized outbound international negotiated service agreements other than contracts filed within the GEPS – NPR product” within the ICMSCC 1 product. *Id.* at 4-5. The ICMSCC 1 product would contain customized agreements for one or any combination of eight services: Global Express Guaranteed, Priority Mail Express International, PMI, First-Class Package International Service, International Priority Airmail, International Surface Air Lift, Commercial ePacket, and Destination Country Duty and Taxes Chargeback Service. *Id.* at 13-14. Additionally, agreements in which customers would serve as resellers for any of these services would be included as well. *Id.* at 14. The Postal Service would revise this “menu” of services through subsequent filings. *Id.*

The Request also proposes a streamlined filing and expedited review process for the ICMSCC 1 agreements, including “filing conventions and practices” which the Postal Service contends would “eliminate unnecessary and repetitive workload.” *Id.* at 4. Under the proposed process, the Postal Service would file a redacted and unredacted version of an agreement, a certification of compliance with 39 U.S.C. § 3633(a)(1)-(3), and redacted and unredacted financial workpapers for each agreement.<sup>8</sup> The Postal Service further proposes to file agreements for the inclusion within the ICMSCC 1 product under the CP docket designation of the current filing and assign a serial number to each agreement. Lastly, the Postal Service proposes a “negative option process” for the Commission’s review of these agreements, under which agreements filed under the ICMSCC 1 product would be approved automatically if the Commission does not affirmatively act within a prescribed number of business days.<sup>9</sup>

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<sup>8</sup> *Id.* at 7-9. Specifically, the Postal Service would no longer file the applicable decision from its Board of Governors, revisions to the MCS, statements of supporting justification, or applications for non-public treatment. *Id.* at 8. The Commission would not issue initial scheduling notices and final orders for each agreement. *Id.* at 15. Additionally, routine Public Representative comments could be eliminated as well. *Id.*

<sup>9</sup> *Id.* The Postal Service proposes that the Commission “begin with a five business day turnaround and then through progressive experience, bring that figure down to three business days.” *Id.*

On September 21, 2020, the Commission issued an order establishing the two dockets, appointing a Public Representative, and providing interested persons with an opportunity to comment.<sup>10</sup>

#### IV. COMMENTS

The Commission received comments from the Public Representative.<sup>11</sup> No other interested party filed comments. The Public Representative “appreciates the Postal Service’s intention to make the NSA process for the agreements covered by its proposal more efficient.” PR Comments at 2. Nevertheless, she “cannot support the Postal Service’s proposed procedure in its entirety without some adjustment.” *Id.* The Public Representative proposes an alternative, whereby the Postal Service would file a financial model for each service offering annually, allowing for a more expeditious cost coverage review. *Id.* at 3-4. She also maintains that “the Public Representative and other interested persons should have an opportunity to comment and have a comment period sufficient for reviewing the materials presented in each docket.” *Id.* at 3.

#### V. COMMISSION ANALYSIS

The Commission is generally supportive of efforts by the Postal Service to streamline regulatory processes. As the Postal Service notes, these modifications have the potential to improve administrative efficiency and benefit both agencies, resulting in savings for the Postal Service. See Request at 22. The procedures in place for the GEPS and GEPS—NPR products demonstrate how those benefits can be achieved without compromising the integrity of the Commission’s regulatory review.

As explained above, the filing practices and business rules for GEPS and GEPS—NPR have achieved significant efficiencies. For GEPS, the Commission can

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<sup>10</sup> See Docket Nos. MC2020-252 and CP2020-282, Notice and Order Concerning Request to Add Product to the Competitive Products List, September 21, 2020 (Order No. 5690).

<sup>11</sup> Public Representative Comments, October 5, 2020 (PR Comments).

ensure regulatory compliance by analyzing the proposed agreement in comparison to a baseline agreement and conducting a functional equivalence analysis, forgoing the more onerous task of reviewing each agreement as a new product. The GEPS—NPR procedures go one step further, allowing for a “negative option process” like the one proposed here. This process is facilitated through use of a pre-approved template agreement, a fixed range of rates available, and business rules applicable to each agreement, which allows the Commission to preliminarily determine that the agreements will comply with 39 U.S.C. § 3633(a). Order No. 593 at 16.

These processes sit on a spectrum in terms of requirements. If the Postal Service proposes an agreement as a new product, it is not subject to any special requirements but must undergo a complete review. For GEPS agreements, the Postal Service must submit to the requirements explained above to facilitate a more streamlined review. GEPS—NPR agreements are subject to the most stringent requirements but receive the most efficient review process of these three options. The proposed ICMSCC 1 procedure, however, seeks a streamlined review similar to GEPS—NPR without any of the requirements that are designed to support that review.

The procedures proposed in the instant docket cannot be approved for two primary reasons. First, the Commission does not have a basis to preliminarily determine that agreements are in compliance with statutory requirements. Second, differing combinations of the underlying products in the agreements, as described in the Request, cannot be grouped within a single product because they are not functionally equivalent.

#### A. Statutory Compliance

Pursuant to 39 U.S.C. § 3633(a), the Commission must review competitive products to ensure that they: prohibit the subsidization of competitive products by market-dominant products; ensure that each competitive product covers its costs attributable; and ensure that all competitive products collectively cover what the

Commission determines to be an appropriate share of the institutional costs of the Postal Service. As explained above, the Commission can preliminarily determine that new GEPS—NPR agreements comply with 39 U.S.C. § 3633(a) because they must conform to a template agreement and fixed price ranges. The Commission can make this preliminary determination because the contractual terms for these agreements are sufficiently equivalent and the business rules ensure that the rates available to individual contracts will result in adequate cost coverage and contribution of each agreement to institutional costs, even at the lowest prices in the price ranges. That preliminary determination facilitates the streamlined review process in place for the product, whereby the Commission does not affirmatively act to approve each agreement.

In approving the GEPS—NPR request, the Commission noted that it included “sufficient checks and balances” to justify that level of review. However, neither of these safeguards are included in the Postal Service’s proposed process for ICMSCC1—the Postal Service proposes a review process similar to the GEPS—NPR process without providing a template agreement or a financial model for Commission’s review.

In the order approving the GEPS—NPR process, the Commission distinguished the GEPS—NPR request from a prior request in Docket No. MC2009-25, which did not include a contract template or financial model with a fixed price range.<sup>12</sup> The Commission declined to group the contracts at issue in that case, in part because these safeguards were not included.

Without these safeguards, the Commission has no basis for a preliminary determination of statutory compliance. The Commission cannot approve a “negative option” process, like the one proposed here, without making such a preliminary determination. Such a process is only justified if the Commission can be confident that perspective agreements will comply with 39 U.S.C. § 3633(a). As such, any new

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<sup>12</sup> Order No. 593 at 13-14 (citing Docket No. MC2009-25, *et al.*, Order Concerning Priority Mail Contracts 6 Through 10, June 19, 2009 (Order No. 226)).

product, or combinations of products, would similarly need a financial model applicable to each such product or combination.

## B. Functional Equivalence

The Commission also cannot approve the Request because the agreements proposed for inclusion in the ICMSCC 1 product are not functionally equivalent. As explained above, since the onset of the PAEA era, the Commission has considered each NSA to be an individual product, as defined by unique cost and market characteristics. See, e.g., Order No. 43. At that time, the Commission recognized the appropriateness of grouping functionally equivalent NSAs as a single product, provided they share similar cost and market characteristics. *Id.* Following that determination, as the Postal Service notes, a number of groupings have been established in section 2510 of the MCS for outbound international NSAs, each grouping including products, each product including agreements which are functionally equivalent to the respective products' baseline agreements. Request at 1-2. Grouping NSAs within products allows the Commission to streamline its review because it does not need to analyze each additional NSA as a new product.

In the instant docket, the Postal Service seeks to group almost all future customized outbound international NSAs for any combination of eight services currently included in the competitive product list as functionally equivalent. *Id.* at 13-14. The Postal Service styles the Request as merely an improved administrative process, stating that it "did not intend for . . . separate functional equivalency analyses to be conducted on each agreement filed for inclusion in the ICMSCC 1 product."<sup>13</sup> The Postal Service appears to suggest phasing out the concept of functional equivalence, stating that "[i]f the Commission is concerned about retaining to some extent the concept of functional equivalence . . . [it] could conclude that all outbound customized

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<sup>13</sup> Response of the United States Postal Service to Chairman's Information Request No. 1, October 20, 2020, question 1.a. (Response to CHIR No. 1).



international NSAs that include any combination of the products and services listed in the “menu” in proposed MCS section 2510.22 are functionally equivalent, and therefore should be included in the ICMSCC 1 product.” Response to CHIR No. 1, question 1.a. The Postal Service contends that “all that would be necessary would be to verify that each agreement to be included in the ICMSCC 1 product falls within the scope of contracts set forth in proposed MCS section 2510.22.” *Id.* question 2.

However, this argument appears to misunderstand the purpose of functional equivalency analyses. The conclusion that agreements have the same cost and market characteristics, and are therefore functionally equivalent, is the mechanism that allows the Commission to group agreements together within products. It also achieves the purpose of grouping the agreements, which is to allow the Commission to consider the grouped agreements as a whole when evaluating statutory compliance. If, as the Postal Service suggests, the Commission allowed agreements to be grouped merely because they “f[ell] within the scope” of umbrella products, it would defeat the purpose of grouping them entirely because the Commission is required to assess compliance with 39 U.S.C. § 3633(a) for each product, the definition of which is fixed by statute. See 39 U.S.C. § 102(6).

A conclusion that customized agreements with any combination of eight services would be functionally equivalent would take the concept past its breaking point. It would also be inconsistent with Commission precedent. In Order No. 226, the Commission declined to group NSAs on the basis that the contracts had a “catch-all” provision that would have allowed “any other customized terms or conditions.” Order No. 226 at 9. The Commission concluded that this provision was “far too wide-ranging to allow the Commission to conclude that there are similar cost characteristics in the potential contractual partners’ mailing profiles.” *Id.*

The functional equivalence concept, however, does not bar the Postal Service from proposing combinations of products that together share cost and market characteristics.

## VI. CONCLUSION

The Postal Service's Request to add the ICMSCC 1 product to the competitive product list is denied. The proposed product cannot function as the Postal Service intends because it does not include the safeguards necessary for the review process requested. Furthermore, the agreements that the Postal Service seeks to group within the ICMSCC 1 product, as described in the Request, cannot be grouped because they are not functionally equivalent.

In a future Postal Service request to further improve the efficiency of administrative review of competitive products, two elements are crucial for favorable Commission review: a consistent financial model applicable to all agreements that fall under a product or grouping, and a demonstration of the shared cost and market characteristics of agreements within the product or grouping.

## VII. ORDERING PARAGRAPH

*It is ordered:*

The Request of the United States Postal Service to Add International Competitive Multi-Service Commercial Contracts 1 to the Competitive Products List, filed September 18, 2020, is denied.

By the Commission.

Erica A. Barker  
Secretary