

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

Before Commissioners:

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

Competitive Negotiated Service Agreement
Review Procedures

Docket No. RM2023-5

ADVANCE NOTICE OF PROPOSED RULEMAKING ON REGULATIONS
PERTAINING TO COMPETITIVE NEGOTIATED SERVICE AGREEMENTS

(Issued February 24, 2023)

I. INTRODUCTION

The Commission initiates this rulemaking to codify regulations pertaining to the addition of Competitive negotiated service agreements (NSAs) to the Competitive product list. As part of this rulemaking, the Commission intends to review its existing practices and precedents and to make enhancements where warranted. The Commission seeks comments to facilitate the development of such rules, including comments on a conceptual Framework (Framework) for prospective enhancements.

II. BACKGROUND

There are two types of postal rates: (1) rates of general applicability; and (2) rates not of general applicability.¹ Rates of general applicability are “available to all mailers equally on the same terms and conditions.” 39 CFR 3010.101(q). Rates not of general applicability may be offered by the Postal Service to specific mailers through NSAs.² An NSA is “a written contract, to be in effect for a defined period of time, between the Postal Service and a mailer, which provides for customer-specific rates or fees and/or terms of service in accordance with the terms and conditions of the contract.” *Id.*

The Postal Service sets rates not of general applicability by entering into NSAs with specific mailers. See, e.g., *FY 2022 Annual Report* at 19, 24, 82 n.74. These NSAs require prior Commission approval before they are added to the applicable product lists; however, different statutory and regulatory criteria apply to the approval of Market Dominant NSAs and Competitive NSAs.³ The Postal Service files, and thus the Commission reviews, comparatively few Market Dominant NSAs. For example, the Postal Service did not file any Market Dominant NSAs for Commission review and approval in Fiscal Year (FY) 2020, FY 2021, or FY 2022.⁴ The Commission considers significantly more Competitive NSAs. For example, in FY 2021, the Commission

¹ See, e.g., Postal Regulatory Commission, *Annual Report to the President and Congress Fiscal Year 2022*, January 31, 2023, at 18 (*FY 2022 Annual Report*).

² 39 CFR 3010.101(f). Certain rates that are not included within NSAs may also constitute rates not of general applicability. See 39 CFR 3030.101(j).

³ See, e.g., 39 U.S.C. 3642; Postal Regulatory Commission, *Annual Report to the President and Congress Fiscal Year 2021*, January 25, 2022, at 26 (*FY 2021 Annual Report*) (“The Commission reviews [Market Dominant] NSAs to ensure they comply with 39 U.S.C. [] 3622(c) (10) and the Commission’s regulations in 39 C.F.R. part 3040, subpart G.”); *id.* at 28 (“[Competitive] NSAs require prior Commission review for compliance with 39 U.S.C. [] 3633(a) and 39 C.F.R. part 3035.”).

⁴ See Negotiated Service Agreements (NSAs) Statistics December 2022 Update, available at <https://www.prc.gov/sites/default/files/December%202022%20NSA%20Monthly%20Summary.pdf> (NSA Statistics December 2022 Update); see also *FY 2022 Annual Report* at 82 n.74 (“No Market Dominant NSAs were filed in FY 2022.”); *FY 2021 Annual Report* at 26 (“No Market Dominant NSAs were filed in FY 2021.”).

reviewed and approved 136 Competitive NSAs, excluding modifications and amendments. *FY 2021 Annual Report* at 28. In FY 2022, the Commission approved 131 Competitive NSAs. *FY 2022 Annual Report* at 25; NSA Statistics December 2022 Update. In fact, from FY 2008 through December 1, 2022, the Commission has approved 2,339 Competitive NSAs and 39 Market Dominant NSAs. NSA Statistics December 2022 Update at 1.

The Commission's current NSA approval process has its origins in the initial development of the Commission's system of modern rate regulation. When establishing this system more than 15 years ago, the Commission determined that each NSA would be subject to approval as a distinct product, with the potential exception of groups of functionally equivalent NSAs with similar cost and market characteristics.⁵

Since then, various efforts have sought to streamline the Commission's review of NSAs in certain respects by applying the concept of functional equivalence to groups of NSAs.⁶ For example, the Commission has used a functional equivalence analysis to approve "umbrella" products—groupings of NSAs that are functionally equivalent to a baseline agreement.⁷ Such functional equivalence analysis involves comparing a proposed agreement with the baseline agreement (without reviewing the proposed

⁵ Docket No. RM2007-1, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007, at ¶ 2177 (Order No. 43). For an overview of experience with NSAs through FY 2007, see Docket No. ACR2007, *Annual Compliance Determination*, March 27, 2008, 125-30 (FY 2007 ACD). This experience was limited. See FY 2007 ACD at 125 (indicating that six NSAs had been approved through FY 2007 and two requests for approval were then pending).

⁶ See, e.g., Docket No. CP2008-5, Order Concerning Global Expedited Package Services Contracts, June 27, 2008 (Order No. 86).

⁷ See, e.g., Docket Nos. MC2020-252 and CP2020-282, Order Denying Request to Add Product to the Competitive Product List, November 13, 2020, at 2-3 (Order No. 5753) (summarizing the Commission's approach to "umbrella" products); Docket No. R2013-9, Order Granting, in Part, Motion for Partial Reconsideration of Order No. 1864 and Modifying, in Part, Order No. 1864, August 11, 2014, at 7 (Order No. 2148) (allowing then-existing "umbrella" products to designate multiple baseline agreements but "plan[ning] to discontinue the practice of designating more than one baseline reference."). The Commission also has considered similar arrangements termed "shell classifications," which may use a "shell" or template in lieu of an actual agreement as a baseline. See Docket Nos. CP2008-8 *et al.*, Order Concerning Global Plus Negotiated Service Agreements, June 27, 2008, at 7-8 (Order No. 85); *cf.* Docket Nos. MC2008-6 *et al.*, Order Concerning Prices Under Inbound Direct Entry Contracts with Certain Foreign Postal Administrations, September 4, 2008, at 3, 7 (Order No. 105).

agreement as a new product).⁸ Thus, when conducting this analysis, the Commission “verif[ies] whether or not any subsequent contract is in fact substantially equivalent” to the baseline agreement. Order No. 86 at 7. The use of “umbrella” products has been more typical for international NSAs.⁹ In 2020, however, the Postal Service expressed an intention to limit its use of “umbrella” products for international NSAs.¹⁰

The Commission also has streamlined further review for a distinct set of NSA products: non-published rate (NPR) NSAs. NPR NSAs “conform to a template agreement and offer prices within specified, pre-approved ranges.” Order No. 5753 at 3 (footnote omitted). In addition, NPR NSAs “must comply with Commission classification and regulatory requirements, including preapproved pricing formulas, minimum cost coverage, and documentation.” NSA Statistics December 2022 Update at 1. These requirements allow a streamlined review process for particular NSAs because the contract template and financial model is approved in advance.¹¹ Thus, after Commission approval of a contract template and financial model, the Postal Service may enter into NPR NSAs without prior Commission approval. See NSA Statistics

⁸ See Order No. 5753 at 5-6. Thus, the Commission does not review a proposed agreement under an “umbrella” product pursuant to 39 U.S.C. 3642. However, the Commission reviews a proposed agreement under an “umbrella” product for 39 U.S.C. 3633 cost considerations. See, e.g., Docket No. CP2022-65, Order Approving Additional Inbound Competitive Multi-Service Agreement with Foreign Postal Operators, June 16, 2022, at 5-6 (Order No. 6199).

⁹ See Docket Nos. MC2020-97 and CP2020-101, Order Adding Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 1 to the Competitive Product List, March 24, 2020, at 6 (Order No. 5459).

¹⁰ *Id.* (discussing transition away from umbrella-style NSAs for most international agreements). See Docket Nos. MC2020-97 and CP2020-101, Response of the United States Postal Service to Chairman’s Information Request No. 1, March 12, 2020, question 1.a. (“The benefits of showing that a particular new agreement is functionally equivalent to another agreement, perhaps executed several years ago, has less value when the number of agreements involved begins to mount.”).

¹¹ See Order No. 5753 at 3; 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, at 15 (Order No. 593) (“[T]he model contract is based on business rules which ensure that each contract covers its attributable costs and makes a contribution to institutional costs.”).

December 2022 Update; *FY 2021 Annual Report* at 28. From FY 2011 through December 1, 2022, the Commission had approved a total of 3,900 NPR NSAs.¹²

III. LEGAL REQUIREMENTS

Section 3642 of Title 39 authorizes the Commission (upon request or its own initiative) to add new products to the Market Dominant and Competitive product lists. See 39 U.S.C. 3642(a). Section 102 of Title 39 defines a “product” 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). As defined by PAEA,¹³ the Commission treats every NSA as a separate product because it has considered each NSA to have distinct market or cost characteristics, with the exception of functionally equivalent agreements (including NPR NSAs). See Order No. 43 at ¶ 2177. Thus, the Commission will add non-functionally equivalent NSAs to the Market Dominant or Competitive product lists only if they meet the applicable criteria set forth in 39 U.S.C. 3642 and applicable regulations codified at 39 CFR part 3040. In addition, for a Competitive NSA, the Commission considers the NSA’s compliance with 39 U.S.C. 3633 under the applicable standards and procedures set forth in 39 CFR part 3035.

A. 39 U.S.C. 3642 Review

Before adding a product to the Competitive product list, the Commission must determine that the Postal Service does not exercise sufficient market power that it can effectively set the price of the product substantially above costs, raise prices significantly, decrease quality, or decrease output, without the risk of losing a significant level of business to other firms offering similar products. See 39 U.S.C. 3642(b)(1). In addition, the Commission is required to give due regard to the following additional

¹² NSA Statistics December 2022 Update at 2. By contrast, from FY 2008 through December 1, 2022, the Commission had approved a total of 2,339 Competitive NSAs according to its non-NPR NSA processes for approving such NSAs. *Id.* at 1.

¹³ Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3198 (2006).

considerations: “the availability and nature of enterprises in the private sector engaged in the delivery of the product involved; the views of those who use the product involved on the appropriateness of the proposed action; and the likely impact of the proposed action on small business concerns” 39 U.S.C. 3642(b)(3). The Commission’s rules also require certain information to be provided in support of the request. See 39 CFR 3040.132; see *also* 39 CFR 3040.152, .172.

B. 39 U.S.C. 3633 Review

Further, before adding a product to the Competitive product list, the Commission considers a proposed product’s compliance with 39 U.S.C. 3633 under the applicable standards and procedures set forth in 39 CFR part 3035. Thus, the Commission considers whether: (1) the proposed product covers attributable costs; (2) does not cause Market Dominant products to subsidize Competitive products as a whole; and (3) ensures that all Competitive products collectively cover what the Commission determines to be an appropriate share of the institutional costs of the Postal Service.¹⁴

IV. CURRENT COMPETITIVE NSA PRACTICES

When proposing to add an NSA to the Competitive product list (except as discussed below), the Postal Service submits the following materials:

- (1) Notice of its decision to add a rate not of general applicability (including an explanation and justification for the change, the effective date, the rate and class decision, and the record of proceedings regarding its decision);
- (2) Revenue and cost data for the 12-month period following the effective date of the rate or class to demonstrate that each affected competitive product will be in compliance with 39 U.S.C. 3633(a)(2);
- (3) A certified statement by a representative of the Postal Service attesting to the accuracy of the data submitted, and explaining why, following the

¹⁴ See 39 U.S.C. 3633(a); 39 CFR 3035.105, .107; see *also*, e.g., Order No. 5753 at 6-7. Review of proposed products for compliance with the criteria outlined in 39 U.S.C. 3633 is focused on the specified statutory criteria and does not include general considerations of the benefits of the proposed products.

- change, competitive products in total will be in compliance with 39 U.S.C. 3633(a)(1) and (3);
- (4) The proposed NSA;
 - (5) The Governors' decision supporting the request;
 - (6) A copy of the applicable sections of the Mail Classification Schedule (MCS) with proposed changes;
 - (7) Further information specified by 39 CFR 3040.131; and
 - (8) The statement of supporting justification specified by 39 CFR 3040.132.¹⁵

The Postal Service also may request non-public treatment of certain materials included with its submission. Docket Nos. MC2020-252 and CP2020-282 Request at 7. The Postal Service is required to file its notice requesting to add an NSA to the Competitive product list "at least 15 days before the effective date of the change." 39 CFR 3035.105(a); see 39 U.S.C. 3632(b)(3).

Upon receiving a request to add an NSA to the Competitive product list, the Commission initiates a docket to process the request. See 39 CFR 3010.102(d)(1), .152. Typically, the Commission assigns two docket designations to each such request—a Competitive Product Rate designation and a Mail Classification designation.¹⁶ The Commission assigns an officer of the Commission (Public Representative) to represent the interests of the general public in the proceeding. See 39 U.S.C. 505; 39 CFR 3010.152(b)(5). Further, the Commission invites public comment on the request. See 39 CFR 3010.152(b)(6), (c). In reviewing the request,

¹⁵ See 39 U.S.C. 3642(d)(1); 39 CFR 3035.105; 39 CFR 3040.132; *cf.* Docket Nos. MC2020-252 and CP2020-282, 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, at 7 (Docket Nos. MC2020-252 and CP2020-282 Request).

¹⁶ See, *e.g.*, Docket Nos. MC2023-94 and CP2023-95, Notice Initiating Docket(s) for Recent Postal Service Negotiated Service Agreement Filings, December 20, 2022; *cf.* Docket Nos. MC2020-252 and CP2020-282 Request at 7. The Mail Classification docket is used when considering whether the new agreement satisfies the requirements of 39 U.S.C. 3642(b) to be added to the Competitive product list, and the Competitive Product Rate docket is used when considering whether the proposed prices of the agreement satisfy the requirements of 39 U.S.C. 3633(a).

the Commission considers any comments received, and information requests may be issued.

Upon consideration of required information submitted by the Postal Service, including projections of the proposed product's revenues and costs,¹⁷ the Commission determines whether the product complies with the requirements for Competitive products in 39 U.S.C. 3642. The Commission also makes a preliminary determination of whether the proposed product will comply with the criteria outlined in 39 U.S.C. 3633(a).¹⁸ Final determination of compliance with 39 U.S.C. 3633(a) is made retrospectively, in the Commission's *Annual Compliance Determination(s)*, as set forth in 39 U.S.C. 3653. If the Commission grants a request to add an NSA to the Competitive product list, it updates the Competitive product list and the MCS accordingly.

If the Postal Service's proposal involves an approved "umbrella" product or an NPR NSA, certain different procedures apply.

"Umbrella" product. Baseline NSAs for "umbrella" products may be proposed pursuant to the Commission's procedures for the addition of products to the Competitive product list and are reviewed accordingly. However, when approving the addition of the baseline NSA, the Commission may establish procedures for reviewing NSAs that are

¹⁷ See 39 CFR 3035.105. This information includes "[s]ufficient revenue and cost data for the 12-month period following the effective date of the rate or class to demonstrate that each affected competitive product will be in compliance with 39 U.S.C. 3633(a)(2)[.]" 39 CFR 3035.105(c)(1).

¹⁸ The Commission has approved adding an NSA to the Competitive product list when it concludes that the NSA "should" or "is likely to" comply with the criteria outlined in 39 U.S.C. 3633(a). See, e.g., Docket Nos. MC2023-109 and CP2023-110, Order Adding Parcel Select Contract 59 to the Competitive Product List, January 31, 2023, at 3-4 (Order No. 6433); cf. 39 CFR 3035.106 (authorizing the Commission to require additional information if "the Commission determines additional information is necessary to enable it to evaluate whether competitive products will be in compliance with 39 U.S.C. 3633(a)"). If the Commission has concerns about the accuracy or completeness of the revenue and cost information submitted by the Postal Service, the Commission may approve adding an NSA to the Competitive product list conditionally or provisionally and require the Postal Service to submit reports regarding the NSA. See, e.g., Docket Nos. MC2023-105 and CP2023-106, Order Conditionally Adding Priority Mail, First-Class Package Service & Parcel Select Contract 5 to the Competitive Product List, February 6, 2023, at 5-7 (Order No. 6437); Docket Nos. MC2018-13 and CP2018-26, Order Conditionally Adding Parcel Select Contract 24 to the Competitive Product List, October 31, 2017, at 6-7 (Order No. 4196).

functionally equivalent to the baseline NSA. See Order No. 5753 at 2-3. For example, the Commission authorized the Postal Service to enter into agreements substantially similar to the Global Expedited Package Service agreement submitted in Docket No. CP2008-5, Global Expedited Package Services (GEPS 1) under modified Commission review and approval procedures, including review to determine substantial equivalency with the baseline NSA and review to determine compliance with the criteria set forth in 39 U.S.C. 3633. See Order No. 86 at 7.

NPR NSA. Competitive NPR NSA product groupings may be proposed pursuant to the Commission's procedures for the addition of products to the Competitive product list and are reviewed accordingly. However, when approving such requests, the Commission establishes procedures for processing subsequent agreements within the NPR NSA product grouping. Although these procedures may vary between NPR NSA product groupings, they have certain general common features. For example, in approving the addition of the Global Expedited Package Services—Non-Published Rate 15 (GEPS—NPR 15) to the Competitive product list, the Commission allowed the Postal Service to enter into GEPS—NPR 15 agreements without further prior Commission approval, subject to certain “associated reporting requirements,” including filing a copy of each agreement, along with the financial model inputs used to generate rates for each agreement within a reasonable time, and notifying the Commission of the effective date and the date of any termination of the agreement.¹⁹

NSA amendments and modifications. After the addition of an approved NSA to the Competitive product list, if the parties to the NSA seek to modify its terms, the modification is subject to Commission review and approval (with limited exceptions for NPR NSAs, as explained below). See 39 CFR 3010.152(a), 3035.105. A request for a modification that would extend an NSA's expiration date (beyond any extensions provided for in the contract itself) is generally due at least 7 days before the NSA's

¹⁹ See Docket Nos. MC2020-136 and CP2020-145, Order Adding Global Expedited Package Services (GEPS)—Non-Published Rates 15 to the Competitive Product List, June 19, 2020, at 8-10 (Order No. 5558).

established expiration date (or the last day on which the Commission could approve the amendment so that it would take effect before the NSA expires).²⁰ “[T]he Commission reviews a modification that does not materially affect the financial analysis of the agreement without setting it for public comment, and issues an order approving or denying the modification;” however, NPR NSA amendments extending the agreement or not altering the model contract or financial model do not require Commission approval.²¹

V. GOALS OF THE INSTANT RULEMAKING

The current procedures and standards for adding NSAs to the Competitive product list have been addressed substantially through separate orders issued by the Commission in various dockets. Streamlining and codifying the rules pertaining to Competitive NSAs will provide increased clarity concerning filing requirements and the review process. Codifying such procedures and standards also provides an opportunity to make improvements to the practices and precedents that have developed since Order No. 43 was issued in 2008, while maintaining the opportunities for pricing

²⁰ See Docket Nos. CP2017-253 *et al.*, Order Approving Modifications and Providing Guidance Regarding Extending Negotiated Service Agreements, October 30, 2018, at 4 (Order No. 4866); *see also* Docket No. CP2019-158, Order Approving Amendment Two to Priority Mail & First-Class Package Service Negotiated Service Agreement, November 29, 2022, at 3 (Order No. 6346); Docket No. CP2016-185, Order Approving Amendment Three to First-Class Package Service Negotiated Service Agreement, Granting Motion for Temporary Relief, and Providing Guidance, March 3, 2020, at 4-5 (Order No. 5444) (“[T]he Commission will calculate the filing deadline as seven days prior to the *earlier* of either (1) the contract’s expiration date; or (2) the last date on which the amendment or modification would need to be approved for the amendment or modification to be effective at extending the contract.” (emphasis in original)). “In the rare situation where the Postal Service is unable to file the notice at least seven days prior to the contract’s expiration date, the Postal Service should file a motion for late acceptance specifying the circumstances justifying the delay.” Order No. 4866 at 4. *But cf.* Docket Nos. CP2017-253 *et al.*, Order Addressing Modifications, Granting Temporary Relief, and Providing Guidance, December 14, 2018, at 5 (Order No. 4925) (“The Commission will not grant future requests to extend or reinstate contracts that have already expired, whether by activation of an extension clause, filing a signed modification, or moving for temporary relief.”).

²¹ Order No. 4866 at 4 (footnote omitted). See Docket No. CP2016-5, Order on Motion for Temporary Relief, December 21, 2016, at 2 (Order No. 3684); Docket No. CP2013-35, Order Concerning Motion for Temporary Relief Regarding Contract with Serial Number Ending in 0017 and Providing Guidance on Motions for Temporary Relief, March 13, 2014, at 3 n.7 (Order No. 2017).

flexibility that NSAs afford the Postal Service. For example, there may be opportunities to increase transparency in the Commission's review of proposed NSAs. At the same time, there may be opportunities to streamline certain aspects of NSA review to reduce administrative burdens on the Postal Service and the Commission. Thus, the Commission intends to use the instant proceeding to consider, and to engage with stakeholders regarding, ways in which it could enhance its Competitive NSA approval practices for the benefit of stakeholders and the public generally.

The Commission appreciates that there may be some tension between its goals of increasing transparency and streamlining review. For example, increasing scrutiny of certain aspects or types of proposed Competitive NSAs could add to the time and effort required to resolve a request to add a proposed NSA to the Competitive product list. However, because many requests to add NSAs to the Competitive product list contain common elements, it may be possible to consolidate review of those common elements to allow resources to be better allocated to increase scrutiny, or otherwise to enhance transparency, of unusual or novel elements. Further, if any stakeholders currently choose to forgo or limit participation in NSA review proceedings because of resource constraints, consolidating key aspects of NSA review might encourage them to participate.

Although the Commission intends to reconsider (as appropriate) its orders and rules setting forth its current practices for resolving requests to add proposed NSAs to the Competitive product list, the Commission is bound by the statutory requirements of 39 U.S.C. 102(6), 3633, and 3642. Thus, if any combination of agreements is proposed to be a discrete product, such agreements must come within 39 U.S.C. 102(6)'s definition of a "product" and share cost or market characteristics.²² Similarly, the Commission requires a basis for making a preliminary determination that a proposed

²² See Order No. 5753 at 9, 10; *see also* Docket Nos. MC2009-25 *et al.*, Order Concerning Priority Mail Contracts 6 Through 10, June 19, 2009, at 8 (Order No. 226) ("Negotiated service agreements may be treated as part of the same product, but only when they have similar cost and market characteristics.").

NSA will comply with the criteria outlined in 39 U.S.C. 3633(a). See Order No. 5753 at 7. Accordingly, the Commission continues to regard “a consistent financial model applicable to all agreements that fall under a product or grouping” as “crucial for favorable Commission review” of a proposed NSA. *Id.* at 10; see *id.* at 7-8.

VI. CONCEPTUAL FRAMEWORK FOR PROSPECTIVE ENHANCEMENTS

Considering these goals, the Commission has developed a conceptual Framework that could outline enhancements to its regime for adding NSAs to the Competitive product list. As discussed below, the core feature of the Framework is the creation of a three-track system to review NSAs proposed to be added to the Competitive product list. A proposed NSA would be filed in one of three tracks, and each track would have distinct filing and review procedures providing different levels of scrutiny and streamlined review. The tracks would consist of a Custom NSA track, a Standard NSA track, and an NPR NSA track. The intent is to preserve the Postal Service’s existing contracting flexibility in the Custom NSA track, while providing for streamlined pre-implementation review for contracts that satisfy the eligibility requirements of the Standard NSA track or the NPR NSA track.

The Framework provides new filing and review procedures for the Standard NSA track. These procedures would include pre-approving financial models to streamline review of individual NSAs that reflect only existing Postal Service offerings. By contrast, filing and review procedures under the Custom NSA track would resemble currently applicable filing and review practices for all NSAs except NPR NSAs and “umbrella” product NSAs. Similarly, filing and review procedures for NPR NSAs would generally follow current practices.

The Commission anticipates that implementing the Framework would require a transition period to avoid disrupting the Postal Service’s NSA negotiations. During this time the Commission would accept requests to add NSAs to the Competitive product list in accordance with either its current practices or the new rules.

Each of the three filing tracks is discussed below, along with associated changes to other rules, including rules addressing reporting requirements and docket designations.

A. Standard NSA Track

Qualifying NSAs. Under the Framework, the Standard NSA filing track would be used for agreements that are collections of existing Postal Service product offerings defined in the MCS (e.g., Priority Mail, First-Class Package Service), but do not use the pre-approved template contracts used by NPR NSAs. The services offered by the Postal Service in Standard NSAs would be permitted to vary from those of existing offerings only in specifically identified ways, which would be listed in the corresponding sections of the MCS.²³

39 U.S.C. 3642 review. Review of an individual Standard NSA for compliance with the requirements of 39 U.S.C. 3642 would involve a streamlined analysis confirming that the proposed NSA conforms to that MCS language and giving due regard to the additional considerations set forth in 39 U.S.C. 3642(b)(3).

39 U.S.C. 3633(a) review. The Framework would also streamline review of Standard NSAs for compliance with the criteria set forth in 39 U.S.C. 3633(a). Instead of reviewing financial models in each individual Standard NSA review proceeding, the Commission would review—and pre-approve—financial models in separate rulemaking proceedings.²⁴ These proceedings would be similar to those in which the Commission reviews proposals to change analytical principles, albeit with a limited scope. In such rulemaking proceedings, the Commission would consider the financial model for an

²³ The original list of permitted variations would be developed in public proceedings, and new permitted variations could be added in the future if the corresponding costs of such variations are included in the financial model. Similarly, NSAs based on new Postal Service offerings may be eligible to be filed as Standard NSAs once a list of permitted variations and corresponding financial workpapers are approved.

²⁴ Cf. Docket Nos. MC2020-252 and CP2020-282, Public Representative Comments, October 5, 2020, at 3-4 (outlining a potential approach for streamlining NSA filing procedures).

offering—including all permitted options and variations—and evaluate whether the model will accurately demonstrate compliance with the criteria set forth in 39 U.S.C. 3633(a). These rulemakings would be public proceedings, with the participation of a Public Representative and an opportunity for public comment.

After pre-approval of the financial model, review of the financial workpapers filed with individual Standard NSAs would be limited to review of the output of the financial model based on the contract-specific inputs.

Summary approval proceedings. Because individual Standard NSAs would be limited to collections of existing competitive offerings (permitting streamlined review under 39 U.S.C. 3642) and would be supported exclusively by workpapers using financial models pre-approved in separate, public rulemaking proceedings (permitting streamlined review under 39 U.S.C. 3633(a)) individual Standard NSAs would be reviewed in summary proceedings. Such proceedings would not be deemed “public proceedings,” and thus would not require the participation of a Public Representative or a public comment period.

Modifications. A request for approval of a material modification to a Standard NSA would follow the same streamlined review process as initial requests for approval of a Standard NSA (so long as the modified NSA remains eligible for the Standard NSA track). However, certain categories of minor, non-material modifications to Standard NSAs might instead be permitted to take effect upon filing, without Commission action.

Benefits of the Standard NSA track. The Framework’s Standard NSA track would streamline NSA review. Most non-NPR NSAs that the Postal Service historically has requested be added to the Competitive product list likely would qualify for the Framework’s Standard NSA track. Thus, streamlined review procedures of the Framework’s Standard NSA track could reduce the time and resources spent on review of individual NSAs and modifications filed after initial approval of applicable financial models and MCS changes. Although the first Standard NSAs of a given type will need to await approval of the financial model and MSC changes for that type, the savings in time and resources likely would exceed the additional time and resources associated

with pre-approving Standard NSA financial models and making MCS changes. Further, using summary proceedings to review individual Standard NSAs (after approval of the applicable financial model(s) and MCS changes) could reduce the time between the filing of a request that an NSA be added to the Competitive product list and the Commission's disposition of the request. Such a reduction in time could allow most Standard NSAs to take effect more quickly with the implementation of the Framework.

In addition to streamlining review, consolidating the review of Standard NSA financial models in dedicated rulemaking dockets rather than reviewing the financial models on a contract-by-contract basis in individual NSA review proceedings would serve the goal of increasing transparency. For example, it would create opportunities for meaningful public participation. Interested persons could elect to participate in the rulemaking dockets without the effort or expense of participating in (or evaluating whether to participate in) an array of individual review proceedings. Further, because no rulemaking proceeding would pertain to a single specific contract, there would be no contract-specific sensitive data to protect in any such proceeding. Limiting the scope of any redactions would create additional transparency, which could be further enhanced by including explanatory annotations and hypothetical inputs in the workpapers. Thus, the pre-approval process would include the public filing of annotated example financial workpapers with hypothetical inputs.²⁵

B. Custom NSA Track

Qualifying NSAs. Any NSA not eligible for a streamlined filing process could be filed as a Custom NSA. NSAs filed in this track would not be required to reflect existing product offerings and would be permitted to differ from existing product offerings in

²⁵ Because such example workpapers would be significantly more informative than the fully redacted workpapers currently filed publicly with each individual NSA, the Commission is also considering permitting such example workpapers to be filed publicly in lieu of redacted versions of the workpapers filed under seal in individual NSA review proceedings. This would simultaneously increase transparency and remove the requirement that the Postal Service individually redact public versions of all of the financial workpapers filed in support of each NSA.

ways other than those identified in the MCS. Thus, the full range of the Postal Service's existing flexibility for NSAs would be preserved in the Custom NSA track. The Custom NSA track is intended for relatively unique agreements. If the Postal Service intends to file multiple Custom NSAs with substantially the same offering, the Postal Service would be expected to file an MCS revision to define that offering on the MCS and submit financial workpapers for pre-approval. If approved, NSAs with that offering would subsequently become eligible for filing on the Standard NSA track. *See supra* n.23.

Custom NSA review. The review process for the Custom NSA track would closely follow the existing non-NPR NSA review process. Thus, the review process would include a full review of a proposed NSA's compliance with 39 U.S.C. 3642 and a preliminary determination of the proposed NSA's compliance with the criteria outlined in 39 U.S.C. 3633(a). The 39 U.S.C. 3633(a) review would include review of the services and obligations defined in the contract and review of the financial model used in the supporting financial workpapers to ensure that the financial model includes all contract-specific costs. A Custom NSA review proceeding would be a public proceeding with a Public Representative and an opportunity for public comment. Because Custom NSAs are not limited to existing Postal Service offerings using pre-approved financial models, review of material modifications to Custom NSAs would also be accomplished in public proceedings.

Custom NSA review timeframes. NSAs with unique terms typically take longer to review than NSAs with more-standard terms. Thus, because the Custom NSA track would consist predominantly of such NSAs, under the Framework, a proposed Custom NSA would be required to be filed 30 days before its intended effective date. This would decrease the likelihood that the Commission's review would require a change to a contract's effective date. However, the actual review time for any proposed Custom NSA would depend on, among other things, the complexity and novelty of the NSA.

C. NPR NSA Track

In general, under the Framework, NPR NSAs would be filed and reviewed under the Commission's current practices.²⁶ However, the Framework would make several changes to these practices. First, additional pricing flexibility would be made available for NPR NSAs; the same minimum pricing levels would be available for NPR NSAs as for NSAs of other types. Second, to ensure uniformity of the cost models, NPR NSAs would be required to use the same pre-approved financial models as Standard NSAs based on the same MCS-defined product description. Third, substantive modification of individual contracts in an NPR NSA product would be expressly prohibited; modification of individual contracts in an NPR NSA product would be limited to minor, non-material modifications.

D. Reporting Requirements

The Framework would require additional reporting. Depending on the extent of the changes to existing review processes that are ultimately implemented, it may be necessary or prudent to make changes to periodic and/or annual reporting requirements for NSAs. For example, if minor, non-substantive modifications extending NSAs are permitted to take effect without Commission review, it may be prudent to require periodic filing of a summary of all such extensions. Similarly, changes to the form and content of reported NSA data in the Annual Compliance Report may be warranted by the creation of independent filing tracks, and opportunities to improve reporting may be enabled by standardizing the financial workpapers for Standard NSA and NPR NSAs.

²⁶ See Section IV *supra*. As noted, under this approach, each NPR NSA product grouping includes a baseline, with a contract template and financial model, and subsequent, functionally equivalent agreements. Because the subsequent agreements are functionally equivalent to the baseline, review of each of them pursuant to 39 U.S.C. 3642 is not required. As a result, under the Framework, 39 U.S.C. 3642 review of subsequent contracts in an NPR NSA product grouping would not be required. By contrast, under the Framework, because each Standard NSA would be a separate product, each Standard NSA would require 39 U.S.C. 3642 review (although this review would be streamlined).

E. Docket Designations

To distinguish dockets considering proposed NSAs from other filings related to Competitive products, a new Competitive Negotiated “CN” docket designation would be established, specifically for NSAs. It would be used instead of the current Competitive Product Rates “CP” designation. Standard NSAs would be docketed only under this new designation. Custom NSAs and new NSA NPR products would be docketed with both Mail Classification “MC” and “CN” designations. Subsequent agreements added to an existing NSA NPR product would be docketed only in the existing CN docket corresponding to that product. Rulemaking proceedings for pre-approving financial models would be docketed with the same designation as proceedings evaluating Changes in Analytical Principles (currently Rulemaking “RM”).

F. Associated Rule Changes

Implementing the Framework may require changes to rules that have a direct or indirect bearing on NSAs. For example, to varying degrees, the Commission’s procedural rules, its rules regarding requests for non-public treatment, its rules regarding market tests, and its rules regarding the MCS may need to be adjusted to accommodate the other provisions of the Framework. Such rule changes would be proposed together with any proposed rules regarding the Framework.

VII. INVITATION TO COMMENT

Interested persons are invited to provide written comments to facilitate the Commission’s development of proposed rules. Commenters are encouraged to comment as generally or specifically as they deem appropriate. Below the Commission identifies specific topics on which it would particularly appreciate comment. However, commenters are not limited to addressing these identified topics—the Commission will consider all comments that fall within the scope of this proceeding. Further, the Commission welcomes proposals for specific language for new regulations.

First, the Commission requests comments on the goals of codifying its practices for adding NSAs to the Competitive product list. As noted, such goals include increasing transparency in NSA review and streamlining review to reduce administrative burdens. The Commission requests comments on how any conflicts between these goals should be balanced. Similarly, the Commission requests comments on whether it should consider other goals in codifying its practices for adding NSAs to the Competitive product list and how any such goals should be balanced with the goals of increasing transparency and streamlining review to reduce administrative burdens.

Second, the Commission requests comments on the Framework. For example, the Commission invites comments on the extent to which the Framework would accomplish the goals of increasing transparency and streamlining review to reduce administrative burdens while continuing to satisfy statutory requirements for review of Competitive products. The Commission, in particular, is interested in comments on whether the Framework would enhance transparency and efficiency. The Commission is also interested in comments on Framework's overall three-track structure, as well as its discrete components, and on any potential improvements that could be made to the Framework.

Third, the Commission requests comments on its use of functional equivalence analysis in considering "umbrella" products. For example, the Commission invites comments on whether its use of functional equivalence analysis since Order No. 43 has been successful. The Commission further requests comments on how "umbrella" products should be treated under the Framework. For example, would there be any utility in allowing new "umbrella" agreements on the Custom NSA track?

Fourth, the Commission requests comments on opportunities to streamline review of modifications to NSAs previously added to the Competitive product list. In particular, the Commission requests comments on what types of non-material modifications might be able to be permitted to take effect without Commission review.

Fifth, the Commission requests comments on whether, and the extent to which, additional or modified periodic reporting requirements related to approved NSAs would

enhance transparency, particularly if modifications extending NSA expiration dates are permitted to take effect upon filing. For example, would requiring the Postal Service to report periodically (*e.g.*, monthly, quarterly, semiannually) on the status (*e.g.*, active, extended, expired, terminated) and/or key aspects of approved NSAs (*e.g.*, effective date, expiration date) provide meaningful transparency? The Commission also invites comments on the efforts that would be entailed by such additional periodic reporting and the relation of the benefits of such reporting to its costs.

Sixth, the Commission requests comments on whether adopting the Framework would affect any reliance interests (*i.e.*, any interests based upon reliance on the Commission's current NSA review practices). If any reliance interests would be affected, the Commission requests comments on what mechanisms would be appropriate for addressing such interests.

Seventh, the Commission requests comments on whether the Commission should consider any changes to its rules in 39 CFR 3045.18(d)(1) regarding requests to add a non-experimental product or price category based on an experimental product to the competitive product list as an NSA. More broadly, the Commission welcomes comments on how codifying its Competitive NSA review procedures affects its other rules.

Eighth, the Commission requests comments on whether any existing service offerings that are offered through Competitive NSAs only in conjunction with other offerings might be more efficiently made available through Competitive NSAs as stand-alone offerings with separate workpapers, rather than being treated as part of the same overall product and financial model as the combined offerings. For example, the Commission is interested in comments on whether Priority Mail Open and Distribute and its palletized version, Pallet Priority Mail Open and Distribute, should be distinct offering(s) with their own MCS language and separate pre-approved workpapers instead of variations of Priority Mail included in the Priority Mail workpapers.

Ninth, the Commission requests comments on the amount of time that would be required to implement the Framework. The Commission is also interested in the relative

benefits of (1) having a fixed end to such an implementation period established in advance and (2) having the end of the implementation period be set by order once it becomes clear when the pre-approval processes will be complete. Finally, the Commission is interested in comments on the value, if any, of having the end of the implementation period coincide with the start of a fiscal year, a calendar year, or other date.

VIII. ADMINISTRATIVE ACTIONS

The Commission establishes Docket No. RM2023-5 to consider changes to its regulations pertaining to Competitive NSAs. Comments are due no later than March 31, 2023. Reply comments are due no later than April 10, 2023. All comments and suggestions received will be available for review on the Commission's website, <http://www.prc.gov>. Pursuant to 39 U.S.C. 505, Christopher C. Mohr is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in the above-captioned docket.

IX. ORDERING PARAGRAPHS

It is ordered:

1. The Commission establishes Docket No. RM2023-5 to consider changes to its regulations pertaining to Competitive negotiated service agreements.
2. Comments are due no later than March 31, 2023. Reply comments are due no later than April 10, 2023.
3. Pursuant to 39 U.S.C. 505, the Commission appoints Christopher C. Mohr to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this Notice, or abstract thereof, in the *Federal Register*.

By the Commission.

Erica A. Barker
Secretary