

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Competitive Products Prices
Global Expedited Package Services
Negotiated Service Agreements

Docket No. CP2008-11
Docket No. CP2008-12
Docket No. CP2008-13

PUBLIC REPRESENTATIVE COMMENTS
IN RESPONSE TO UNITED STATES POSTAL SERVICE
NOTICE OF GLOBAL EXPEDITED PACKAGE SERVICES CONTRACT
(August 19, 2008)

The Public Representative hereby comments on the Postal Service's notices announcing price and classification changes for Competitive Products not of general applicability. The notices seek to modify the product lists within the Mail Classification Schedule (MCS).¹ The Commission assigned to these changes Docket Nos. CP2008-11, CP2008-12, and CP2008-13, designated the undersigned as Public Representative in these proceedings and directed that comments would be due no later than August 20, 2008.²

In filing these notices and sealed supporting materials with the Commission, the Postal Service seeks Commission approval to add three Negotiated Service Agreements (NSAs) for certain competitive outbound

¹ Notice of United States Postal Service of Filing of Functionally Equivalent Global Expedited Package Services 1 Negotiated Service Agreements, August 5, 2008, filed in Docket Nos. CP2008-11, CP2008-12, and CP2008-13 (Notices). See *also* Errata filed August 6, 2008. The Postal Service filed copies of the three contracts and supporting materials under seal.

² See Order 95, Notice and Order Concerning Filing of Additional Global Expedited Package Services 1 Negotiated Service Agreements, August 11, 2008, p. 2-3.

international package services to the Global Expedited Package Services Contracts 1 (GEPS 1) product category. GEPS 1 was established by decision of the Governors of the United States Postal Service³ under the authority granted the Governors by the PAEA.⁴

The Postal Service filed its notices pursuant to 39 U.S.C. § 3633, 39 CFR § 3015.5 and Commission Order No. 86. In Order No. 86, the Commission reiterated its position that NSAs may be grouped and included as elements of the GEPS 1 product if they meet the requirements of 39 U.S.C. § 3633, and if they are functionally equivalent to the existing GEPS 1 contract(s), and if they exhibit similar cost and market characteristics.⁵

Overview

The Public Representative proffers comments that:

- these contracts satisfy the important public interest in adequate cost coverage and appropriate categorization;
- these contracts promote increased access to U.S. goods by consumers (including Americans living abroad); and

³ See Decision of the Governors of the United States Postal Service on the Establishment of Prices and Classifications for Global Expedited Package Services Contracts, issued May 6, 2008 (Governors' Decision No. 08-7). A redacted copy of Governors' Decision No. 08-7 was filed July 23, 2008; an unredacted copy was filed under seal on May 20, 2008 in Docket CP2008-4.

⁴ See Postal Accountability and Enhancement Act (PAEA), Pub. Law 109-435, Title II, §202, 120 Stat. 3206; 39 U.S.C. §§ 3632(b)(3), 3633.

⁵ See Order No. 86, Order Concerning Global Expedited Package Services Contracts (June 27, 2008) at 2 (*citing* Order No. 78, Notice and Order Concerning Prices Global Expedited Package Services Negotiated Service Agreements, June 3, 2008, at 2-3).

- the Postal Service continues to make progress toward improved transparency and disclosure but additional steps and vigilance toward that end is warranted.

The Public Interest in Adequate Cost Coverage

An essential public interest in competitive products contracts of this sort is to ensure that these contracts adequately cover their costs so cross-subsidization by market dominant products does not occur.⁶ In other words, there is a strong public interest in ensuring that these products pay their own way and are not supported by mailing prices paid by the general public or other mailers of market dominant products.⁷ In addition, this is linked to an interest in ensuring that the undertaking of these contracts will enable competitive products as a whole to cover their costs, and to contribute a minimum of 5.5 percent to the Postal Service's total institutional costs.⁸

The Public Representative, after reviewing the materials under seal in this proceeding and appropriate consultation with technical staff, acknowledges that the provisions of the contracts, including the pricing structure, comport with the requirement that they will generate sufficient revenue to cover attributable costs for the services provided, enable competitive products as a whole to cover their costs, and as a whole to contribute a minimum of 5.5 percent to the Postal Service's total institutional costs. These factors should assure that there is no subsidization of these NSAs by market dominant products.

⁶ See § 3633 (a)(1) & (2).

⁷ *Id.*

⁸ See § 3633 (b).

The Public Interest in Appropriate Categorization of NSAs

The mailing public relies on the statutory role of the Governors to evaluate proposed postal rates to help ensure that these rates will benefit rather than detriment the Postal Service.⁹ In this instance, a public interest exists in ensuring that proposed NSAs (competitive product rates or classes not of general applicability) have been actually considered and approved by the Governors.¹⁰

The Commission's recognition of NSA shell classifications effectively permits the Governors to exercise their authority in a more measured fashion by directing the establishment of categories encompassing a set of similar NSAs.¹¹

The contracts in these three dockets are "functionally equivalent" to those described by the shell classification already approved by the Governors, and thus they fall within the scope of the Governors' approval.

The Public Representative concurs with the Postal Service that the cost and market characteristics of these agreements are substantially similar and that any differences are not material for purposes of inclusion in GEPS 1. These contracts appear appropriately categorized as a Competitive Product under the umbrella of the GEPS 1 shell classification.

⁹ For example, on the infrequent occasion when one or more Governors take exception to a Decision, the public benefits from awareness of the reservations expressed by the dissenting Governor or Governors.

¹⁰ See § 3632(a), (b).

¹¹ See, e.g., Order No. 78 at 2-3.

Public Interest in Increased Access to U.S. Goods by Consumers

It is often difficult for those living in other countries (including Americans who work and live overseas) to purchase their favorite American retail goods and supplies locally at what they consider to be reasonable prices. The reasons for this could include:

- the cost of shipping small quantities of specialty items by traditional routes and through traditional business channels;
- the increasing cost of containerized shipping and air shipping;
- currency and exchange rate volatility;
- local market situations with limited competition; and
- the innate perishability, fragility and/or time-sensitive nature of many consumer products.

As a result, consumers with the resources to purchase goods from the U.S. are increasingly turning to the internet to order goods from American suppliers and have them shipped overseas.

Deployment of Negotiated Service Agreements for the sorts of mailers identified in the sealed agreements help make it easier for individuals and families in other countries (including Americans and their families who live and work overseas) to purchase their preferred retail goods and products from the United States.

Negotiated shipping services procured in bulk by companies selling products by mail make the purchase of those products by consumers more

affordable by increasing the vendor's flexibility to adjust their shipping and handling charges according to rapidly-changing business conditions.

By reducing impediments to mail order export, these NSAs also serve to make an incremental contribution toward the U.S. trade deficit.

The Public Interest in Transparency and Disclosure

The privilege to invoke confidentiality for data carries with it the relatively modest (and reasonable) burden of identifying the reasons why that particular data must be kept confidential.

In its filing of supporting materials and certification of prices for these NSAs, the Postal Service initially sought broad confidentiality for the entirety of each certification. In Order 95, the Commission directed the Postal Service to publicly file a redacted version of the certification and to justify why portions other than the name of the contracting party and the name of the percentages listed were considered confidential or should otherwise be entitled to be filed under seal.¹² The Postal Service responded by filing redacted certifications¹³ that made sparing use of the redacting pen, thus protecting the Service's sensitive business information yet accommodating transparency of the process. The courts and the

¹² Order No. 95 at 2.

¹³ See United States Postal Service Response to Notice and Order Concerning Global Expedited Package Services 1 Negotiated Service Agreements and Notice of Filing Redacted Copy of Certifications, August 13, 2008.

law encourage bifurcation of sensitive from non-sensitive information rather than a blanket sealing or withholding of relevant documents.¹⁴

The PAEA specifies that the appropriate balancing test to guide the Commission in according confidentiality to “information of a commercial nature, including trade secrets...which under good business practice would not be publicly disclosed”¹⁵ is to “balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets”.¹⁶ The Commission recently proposed regulations to carry out that provision and has sought public comment on the draft rules,¹⁷ which are explicit in their requirement regarding segregable releasable portions.¹⁸

Under the PAEA, the Postal Service is granted increased pricing and marketing flexibility, particularly for its Competitive Products offerings. However,

¹⁴ See, e.g., *Piper & Marbury, L.L.P. v. USPS*, No. 99-2383, 2001 WL 214217, at **3-5 (D.D.C. Mar 6, 2001) (magistrate’s recommendation), *adopted* (D.D.C. Mar 30, 2001), *reconsideration denied* (D.D.C. Feb. 28, 2002). In this unpublished opinion, attorneys for UPS invoked the federal public record access law to request access to a contract between the United States Postal Service and DHL. The Postal Service argued that the entirety of the contract was sensitive business information and that “no meaningful portions” could be released without “destroying the integrity” of the document or “disclosing otherwise protected information”. The magistrate found that even if the requested contract contained commercial information protectible under 39 U.S.C. § 410(c)(2) (2000), the Postal Service could not withhold entire contract under the exemption outlined in that provision.

¹⁵ § 410(c)(2).

¹⁶ § 504(g)(3)(A).

¹⁷ See *generally* Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, August 13, 2008. See *also* § 504(g)(3)(B).

¹⁸ See proposed rule 3007.10(b) in Commission Order 96. *Accord* 5 U.S.C. § 552(b), providing that in the context of a public records request, any portions of records subject to disclosure that can be segregated from records otherwise exempt from disclosure must be provided.

this flexibility comes with an obligation to comport with public transparency by affirmative disclosure of non-sensitive portions of business-sensitive filings.

The Public Representative commends the Postal Service in its movement toward habitual, routine public release of the segregable releasable portions of sensitive documents in Competitive Products filings.¹⁹ The analytical and even the procedural aspects of the decisions issued by the Governors carry with them a strong public interest value by providing assurance that the Governors are fulfilling their role in overseeing special rates offered by the Postal Service. The public interest dictates that the Postal Service continue in its development of procedures to provide Governors' decisions and other material documents so as to carefully and fairly distinguish truly confidential data where necessary.

Nevertheless, the Commission should remain vigilant to ensure that this commendable trend continues and thereby the process remains truly transparent as directed under the PAEA.²⁰

¹⁹ The Public Representative notes, however, that the interests of public transparency and accessibility would benefit from improvements in the formatting of Governors' Decisions filed with the Commission and published on the Commission's website. The bulk of the Governors' Decisions filed to date fall short of the Service's document production standards and do not comply with the Commission's filing rules that require "text-based pdf" files. 39 CFR § 3001.10(b). (An examination of the 17 Governors' Decisions filed with the Commission during the past three years shows only six Decisions are text-based pdf files, the remaining 11 are images only.) Most Governors' Decisions are filed using an inadequate image format that lacks Optical Character Recognition (OCR) processing, and as a result these documents do not become keyword indexed on the Commission's website. The text contained in these decisions is not available for word processing purposes without retyping. Nor is the text in those decisions accessible to those who use assistive technologies as required under Section 508 of the Rehabilitation Act.

²⁰ Transparency is not without benefit to the Postal Service. The Commission could undoubtedly better apply its limited resources in timely evaluation of Competitive Product filings when not diverted by the need to remind the Postal Service to file sparingly redacted documentation to satisfy Commission rules intended to guarantee transparency. In addition, release of non-sensitive details in redacted documents may suffice for the informational purposes of those who may otherwise feel obliged to seek access to sealed records.

The Public Representative respectfully submits the preceding Comments for the Commission's consideration.

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