

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Competitive Product Prices  
Global Expedited Package Services 1 (CP2008-5)  
Negotiated Service Agreement

Docket No. CP2008-25

PUBLIC REPRESENTATIVE COMMENTS  
IN RESPONSE TO UNITED STATES POSTAL SERVICE  
FILING OF ADDITIONAL GLOBAL EXPEDITED PACKAGE SERVICES 1  
NEGOTIATED SERVICE AGREEMENT  
(October 2, 2008)

In response to Order No. 110, the Public Representative hereby comments on the September 22 Notice of United States Postal Service Filing of Functionally Equivalent Global Expedited Package Services 1 Negotiated Service Agreement ("Notice"), a negotiated service agreement (NSA) with an individual mailer. The Postal Service posits this agreement as functionally equivalent to the Global Express Package Services 1 (GEPS 1) product established in Docket No. CP2008-5.

The GEPS 1 contract identified on September 22 appears to meet all the statutory requirements of title 39. The Public Representative has had access to, and reviewed, all materials the United States Postal Service submitted under seal in this matter, and documentation in its original (not redacted) version. An account follows.

**Functional Equivalency**

The Notice proposes that this contract fully comports with materials filed in accordance with 39 CFR § 3015.5, under the Rules of Practice and Procedure regarding requests to modify the product lists within the Mail Classification Schedule.

Specifically, GEPS 1 meets the description of services provided in Attachment A, and falls between the price floor and ceiling formulae proposed in Attachment B to the Governors' Decision No. 08-7 (CP2008-5).<sup>1</sup> Because this contract does fall with these parameters and pricing guidelines, it would appear to be a functionally equivalent GEPS agreement.

These are contracts that provide for incentives for Express Mail International and Priority Mail International. Preparation requirements include using USPS-supplied labeling software (or a software that has the same functionality as the USPS-supplied labeling software). The software allows for preparation of address labels and Customs declarations and submission of electronic shipment information to the Postal Service, as well as prepayment of Customs duties and taxes and pre-advice for foreign Customs authorities by the Postal Service. To qualify for a contract, a mailer must be capable, on an annualized basis of either tendering at least 5,000 pieces of mail to the Postal Service, or paying at least \$100,000 in international postage to the Postal Service. Most importantly, for a mailer to qualify, the contract must cover its attributable costs. In these functions, it would appear that the GEPS 1 agreement complies with the template proposed in Docket No. CP2008-5. In other words, this agreement appears to be functionally equivalent to the contract the Commission approved in that docket.

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<sup>1</sup> The Commission consolidated Docket No. CP2008-4 with CP2008-5.

The Public Representative would respectfully point out that Order 110 uses the term “substantially equivalent,” in a way that might lead a casual reader to believe that the terms “functional equivalent” and “substantially equivalent” are interchangeable:

The Governor’s Decision supporting the GEPS 1 product was filed in consolidated Docket No. CP2008-5. In Order No. 86, the Commission established GEPS 1 as a product and held that additional contracts may be included as part of the GEPS 1 product if they meet the requirements of 39 U.S.C. 3633, and if they are *substantially equivalent* to the initial GEPS 1 contract filed in Docket No. CP2008-5. (Footnote omitted, emphasis added.)

Commission Order 110, at page 2.

While the contracts here *are* substantially equivalent, the Commission’s rules after the Postal Accountability and Enhancement Act of 2006 (PAEA), articulate a process of review for a contract that is *functionally* equivalent of a precedent:

[2177] *Commission analysis.* The Commission finds that negotiated service agreements meet the definition of separate products. To date, every proposed negotiated service agreement filed with the Commission was premised either on distinct market characteristics, distinct cost characteristics, or both. This is true even though they were applied to existing products. In 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. However, as a starting point, it is appropriate to assume new negotiated service agreements will be separate products as defined by the PAEA.

Commission Order 43 at 57-8.<sup>2</sup>

For the purpose of clarity, the Public Representative would respectfully recommend the use of the term “functionally equivalent” as a term of art in discussing

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<sup>2</sup> Order Establishing Ratemaking Regulations For Market Dominant And Competitive Products, Docket No. RM2007-1, October 29, 2007.

NSAs. There are distinctions that can be made between “functionally -” and “substantially -” equivalent contracts (although such groups would overlap). Nevertheless, the substance of these contracts (NSAs) would appear to be secondary to their function when analyzing their viability under provisions of title 39. If time were to permit, further analysis of this terminology might be of value to the Commission. For the sake of the deadline in this docket, the Public Representative concedes that these contracts appear to be substantially equivalent and that they appear to be functionally equivalent.

### **Confidentiality**

The Postal Service Notice contains a rationale for maintaining confidentiality concerning pricing, processes which enable discounted pricing, the attendant formulae and other contractual terms which are matters of commercial sensitivity.<sup>3</sup> Here, it would appear that the Postal Service has concisely justified the extent of confidentiality appropriate in this matter.

The PAEA provided the Commission with expanded oversight powers and set in place a regulatory framework for increased transparency and accountability. Ultimately, the Commission shall be the arbiter of what information, in matters before it, shall be under seal or made public.<sup>4</sup>

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<sup>3</sup> Postal Service Notice, at 2-3.

<sup>4</sup> 39 U.S.C. 504(g)(3)(A).

In a tangential but related matter the Public Representative must note respectfully that Order No. 110 did not appear in the *Federal Register* until Tuesday, September 30.<sup>5</sup> If any member of the public were relying only on the *Federal Register* (instead of the Commission's website, where Orders are posted upon issuance) this may have created a challenge in filing a timely response. The Public Representative would therefore encourage the Commission to remind the public that its docket is updated every business day on the Commission's website. In matters of governance, the public can appreciate confidentiality, but abhors secrecy – intentional or not. The philosophical riddle regarding a tree falling in the forest now has another potential answer -- thanks to increased accountability of government agencies such as the Commission, scanning technology and the reach of the World Wide Web.

### **Pricing, Cost Coverage and Contribution**

The Public Representative acknowledges that the pricing in the present GEPS 1 contract appears to comport with provisions of title 39. In addition to having the mailer prepare mailings for less costly handling by the Postal Service, the contract employs pricing incentives based upon volumes and other provisions favorable to both the Postal Service and the public.

### **Conclusion**

The statutory threshold for NSAs regarding competitive products is a bright line: each contract must generate sufficient revenue to cover its attributable costs, enable

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<sup>5</sup> 73 FR 164 (September 30, 2008) at 56868-9.

competitive products as a whole to cover their costs, and contribute a minimum of 5.5 percent to the Postal Service's total institutional costs.<sup>6</sup> The GEPS 1 Contract would appear to meet all three aspects of that standard. The Public Representative would caution that in the case of outbound service agreements, settlement costs (what the Postal Service pays to a foreign postal administration for delivery of mailpieces in destination countries) might negatively impact NSAs. This concern is tempered by the fact that this contract's term is for one year only. Nevertheless, the Public Representative would again encourage the Commission to use its authority and influence to promote equitable settlement cost arrangements among members of the Universal Postal Union.

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

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<sup>6</sup> 39 C.F.R. § 3015.7(c).