

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Competitive Product Prices
Global Expedited Package Services Contracts
Non-Published Rates

Docket Nos. MC2010-29
CP2010-72

COMMENTS OF THE PUBLIC REPRESENTATIVE
(August 11, 2010)

On July 16, 2010, the Postal Service filed a notice and request concerning Global Expedited Package Services (GEPS) subject to non-published rates.¹ It seeks to add the competitive product GEPS – Non-published Rates to the competitive product list within the Mail Classification Schedule (MCS). *Id.* at 1. The proposed product, as authorized by the Governors' Decision 10-2, is not envisioned as one of general applicability. *Id.*

The Postal Service's proposed new product, while related to earlier GEPS offerings, is distinctly designed to establish a niche classification for eligible small or medium sized mailer who seeks incentive pricing for Express Mail International (EMI) or Priority Mail International (PMI), or both. *Id.* at 7-8. Yet, the specialized level of service and postage for each mailer would be established by a customized Negotiated Service Agreement (NSA). *Id.* at 1-3, and 7-8.

Commission Order No. 494 established Docket No. CP2010-72 and MC2010-29, and appointed the undersigned as Public Representative.² It established the deadline

¹ Notice and Request of the United States Postal Service Concerning Global Expedited Package Services--Non-Published Rates and Application for Non-Public Treatment of Materials Filed Under Seal, July 16, 2010 (Request).

² Order No. 494 Notice and Order Concerning Request to Add a New Product to the Competitive Product List (Order No. 494).

for initial comments on August 11, 2010. *Id.* at 4. The Chairman of the Commission issued a set of information requests on July 28, 2010 with responses due on August 4, 2010.³ The Chairman recently issued an additional information request on August 10, 2010 with responses due August 13, 2010. Pursuant to Order No. 494, the Public Representative hereby files the following comments.

I. INTRODUCTION

The Postal Service's new product would effectively establish a specialized GEPS – Non-published Rate (GEPS-NPR) classification including reduced rates or fees that are allegedly cost justified. The proposed niche classification has been developed by the Postal Service and approved by the Governors. The precise rates and terms for any eligible mailer, though bounded by minimum and maximum amounts, are further subject to customization upon executing a written agreement that is directly negotiated with that specific mailer, so as to meet the mailer's needs and capabilities. According to the Postal Service, however, each particular written agreement would substantially mirror the terms of the proposed Model Agreement, a template designed for the target group of mailers, as filed under seal. See Request at 11, and Attachment 4 (under seal). The Request states that “[a]ny small- or medium-sized business wishing to mail through the GEPS—Non-published Rates product may take advantage of the incentives, based solely on their revenue commitments and choice of downstream access.” *Id.* at 9.

Unlike the existing GEPS product, the GEPS – NPR product would treat certain agreements as presumptively compliant with statutory requirements, by supplanting the usual prior approval process of the Commission with an “after the fact” process for regulatory oversight. *Id.* at 10. The suspension of prior regulatory review is based on the presumption that the actual rates and terms, under each prospective agreement for the subject mailer, will substantially conform to the permissible ones of the instant niche classification once condoned by the Commission.

³ Chairman's Information Request No. 1, July 28, 2010 (CHIR No. 1).

One of the primary differences between GEPS and GEPS--NPR is that, for the new product proposed, the Governors have approved postage rate ranges that vary by volume discounts for eight service volume commitments tiers. A rate table reflects rate ranges, and that table has columns for ten country groups and rows for seventy levels for mailpiece weights. Within these cells, the Postal Service envisions distinct but variable rates within each cell by entry point arrangement. See Request at Governors' Decision 10-2, at Attachments B and C at 2.

The eight-tiered rate design model includes every possible rate between a minimum and maximum rate within cells defined by weight.⁴ The applicable rate for a given mailer within a price range of a relevant cell mainly depends upon the country group for the country of destination and the mailer's access arrangement to enter the mailpiece. Entry closest to the International Service Center (ISC), Drop Ship facility, is accorded the deepest discount, followed by Metro and Traditional entry options. Payment options also may affect payment amounts variably.⁵ Eligible mailers must qualify as ones capable of satisfying a revenue commitment of at least \$50,000 in international postage for the lowest tier. *Id.*, at Attachment A to Governors' Decision 10-2 at 1.

II. THE RECENT HISTORY OF GEPS AND FUNCTIONAL EQUIVALENCE

The Postal Service observes that in 2004 the Commission recognized rather early that (i) the usefulness of short-term Negotiated Service Agreements (NSAs) could be limited due to their transaction costs, and (ii) the greater efficiencies of a niche classification to reduce such costs might be warranted for popular offerings.⁶ A niche

⁴ See Request at 7, and *Id.* at Attachment 2, and Attachment C to Governors' Decision 10-2 at 2 (reserving the pricing latitude of one-cent increments within each weight step and destination country group for both EMI and PMI).

⁵ *Id.* at Attachment 2 at 2 ("The exact price would be determined by applying a consistent methodology to the downstream access option, payment option and revenue commitment choices made by the customer."). *Compare*, CHIR No. 1 at Question 5 (seeking to clarify specific rate determinants or variables).

⁶ Request at 8, *citing* PRC Order No. 1391, Order Establishing Rules Applicable to Requests for Baseline and Functionally Equivalent Negotiated Service Agreements, February 11, 2004 at 55 n.27.

classification usually connotes a specialized classification including reduced, but cost-justified rates that have been developed by the Postal Service in direct consultation with its customers to meet the needs and capabilities of a mailer or group of mailers.

Previously, the Commission has found that “more inclusive mail classifications are preferable to more restrictive alternatives.” PRC Op. MC2002-2, ¶3037. Between 2002 and 2004, however, one would have expected any reliance upon a niche classification to ordinarily obviate the need for NSAs, rather than be used under a niche classification to compound financial flexibility. Thus, while it would be possible to address each of many NSAs separately under prior regulatory review for compliance, they could alternatively be approved under a niche classification if each agreement for a subset of mailers were functionally equivalent to one another. To ascertain when such a group of eligible mailers were similarly situated, Order No. 1391 explained that “[f]unctional equivalency’ focuses on (1) a comparison of the literal terms and conditions of one Negotiated Service Agreement with the literal terms and conditions of a second Negotiated Service Agreement, and (2) a comparison of the effect that each agreement would have upon the Postal Service.” See PRC Order No. 1391 at 50.

The Postal Service traces the evolutionary path from (a) the presumption that each individual negotiated agreement is properly treated as a separate product under PRC Order No. 43 in 2007 (along with cited discussions to consider niche classifications in the future), to (b) the Commission’s placement of the GEPS 1 and GEPS 2 products on the competitive product list, under PRC Dockets Nos. CP2008-5 and CP2009-50, respectively. See Request at 2-4, and 10 n.14.

On June 27, 2008, the Commission addressed the appropriate treatment of additional GEPS agreements filed under the GEPS 1 product, as follow:

As of now, the GEPS contract submitted in Docket CP2008-5, represented as ‘GEPS 1’ in the competitive product list, is the product. In the future, the Postal Service may enter into other GEPS contracts substantially similar to the one submitted in Docket CP2008-5. When this occurs, GEPS 1 will be considered the product and the included individual contracts will be treated as price categories under the product.⁷

⁷ “This may require future modification of the GEPS 1 descriptive language.” (footnote original).

PRC Order No. 86 at 7. Yet, the Commission also reiterated its long-recognized duty to perform a prior review of each Negotiated Service Agreement, to evaluate whether the terms and conditions may or may not be substantially the same.⁸

On July 29, 2009, the Commission examined a new GEPS agreement to assess whether the terms and conditions were substantially the same as a GEPS 1 contract, in Order No. 262. While it noted that “GEPS 1 was characterized as a shell classification to provide pricing incentives for EMI and/or PMI for all destinations served by EMI and PMI”,⁹ it also concluded that: “[n]otwithstanding some differences among GEPS 1 contracts and different market characteristics of mailers, the Commission finds it appropriate to group the instant contract within the GEPS 1 product.¹⁰” *Id.* at 6. It found that contracts need not be identical to be treated as functionally equivalent, where the nature of the service is essentially “a transport service initially to a domestic office of exchange and subsequently to a foreign office of exchange for delivery by a foreign post.” *Id.* at 6-7.¹¹

In Order No. 290, the Commission considered the Postal Service’s request to replace the GEPS 1 agreement with a new agreement that could be used as a baseline

⁸ “That Order aptly explains that “[i]f the Postal Service determines that it has entered into an agreement substantially equivalent to GEPS 1 with another mailer, it may file such a contract under rule 3015.5. In each case, the individual contract must be filed with the Commission, and each contract must meet the requirements of 39 U.S.C. 3633. The Postal Service shall identify all significant differences between the new contract and the pre-existing product group, GEPS 1. Such differences would include terms and conditions that impose new obligations or new requirements on any party to the contract. The Commission will verify whether or not any subsequent contract is in fact substantially equivalent. Contracts not having substantially the same terms and conditions as the GEPS 1 contract must be filed under 39 CFR part 3020, subpart B.” *Id.*

⁹ PRC Order No. 262 at 6.

¹⁰ “The differences between the contract at issue in this case and the originally classified GEPS 1 contract do not appear to be substantial. However, this finding does not preclude the Commission from revisiting this issue at a future date if circumstances warrant.” (footnote original)

¹¹ Order No. 262 observed that “[m]odifications include provisions which address the relation between regulatory oversight and contract expiration, the customer’s access and terms for other Postal Service products and services; certain flat rate products not included in the mail qualifying for discounts; simpler mailing notice requirements, changes to meet both parties scheduling needs; mail tender location changes; particular liquidated damages terms; provisions clarifying the mailer’s commitments in the event of early termination; and revisions to update terms or references from a prior contract.” *Id.* at 5-6.

agreement for further ones “because the initial GEPS 1 contract [wa]s terminating and provisions ha[d] been added to subsequent GEPS 1 contracts.” Order No. 290 at 3.

In resolving the request, the Commission ruled that its:

... expectation in labeling the initial GEPS contract (in Docket No. CP2008-5) as GEPS 1 was that it would be followed sequentially by additional GEPS contracts, *e.g.*, GEPS 2, GEPS 3, etc., that exhibited sufficient variation from the initial contract to warrant being classified as a new product. Given that the initial GEPS 1 contract is expiring and that the instant contract contains additional provisions, the Commission will label the latter as GEPS 2. (footnote omitted) Following the current practice, the Postal Service shall identify all significant differences between any new GEPS contract and the GEPS 2 product. Such differences would include terms and conditions that impose new obligations or new requirements on any party to the contract.

Id.

This determination also fell short of any Commission delegation to the Postal Service the authority to conclusively determine whether or not the terms and conditions of any proposed NSA reflected substantially the same terms of a prior agreement that had been previously filed and condoned.¹²

In its present Request, however, the Postal Service observes that “GEPS agreements represent the majority of the negotiated service agreements for competitive products consisting of international mail.” Request at 2. Because the “number of agreements continues to grow, and the number of renewing customers is substantial”, the Postal Service encourages the Commission to promptly reassess whether the prior experience gained with GEPS agreements and prior review procedures now permits the adoption of a streamlined approach, such as one that may be facilitated under the proposed niche classification of the product, GEPS—NPR. *Id.* at 8.¹³

¹² Transparency of each GEPS agreement has turned upon providing notice to others of terminated agreements, and any resulting sunset of the associated price categories in the MCS.

¹³ The Request also reflects that “[t]he Postal Service anticipates that nearly all GEPS agreements will fit within the rates set by the Governors’ decision for GEPS—Non-published Rates. *Id.* at 4.

III. COMMENT

A . The Supporting Data Does Not Appear to Be Sufficiently Detailed to Permit the Requisite Analysis

Initially, the Postal Service provided minimal financial analysis to demonstrate that the product will recover sufficient revenues to cover its attributable costs¹⁴ as well as ensure that that the requirements of 3633(a) are met. The only analysis provided was a table in the request which sums and extrapolates data from GEPS contracts over the past twelve months and forecasts GEPS—NPR revenues and costs. Request at Governors' Decision 10-2, at Attachment C. Initially, no source or supporting data was provided for the table.

The lack of financial support filed by the Postal Service prompted the Commission to file Chairman's Information Request No. 1 (CHIR No. 1). The Postal Service responded to the Commission's request on August 4, 2010.

The Postal Service's Response to CHIR No. 1 provides supporting data for the GEPS—NPR product. While the supporting data shows certain rates will cover costs, the Public Representative does not believe that the data filed demonstrate that the minimum rates presented in Attachment B to the Governors' Decision 10-2 (Attachment B) will cover costs as stated by the Postal Service. Request at Governors' Decision 10-2, at Attachment C at 3. The Commission should request an analysis that demonstrates that each Tier 8 Dropship discount (minimum rate in Attachment B) will cover its costs. If the discounted rate does not meet the Postal Service's minimum cover coverage requirement, the minimum rate in the Attachment B should reflect the discounted retail rate instead.¹⁵ This pricing methodology is explained by the Postal Service as follows:

¹⁴ In FY 2009 the Postal Service began using a hybrid incremental cost model to ensure competitive products are in compliance with 3622(a)(1). See 2009 Annual Compliance Determination at 177. However, the Postal Service was unable to report incremental cost for international products; therefore it relied on attributable costs. *Id.* Once incremental costs are developed for international products, the model presented in this docket may need to be updated to reflect more accurate costs.

¹⁵ Retail customers using Click-N-Ship™ receive incentives of eight percent and five percent off the published rates for EMI and PMI respectively. See Attachment C at 2.

If the fully discounted price covers less than [redacted] of attributable costs, then the mailer is offered either the published price or a smaller percentage discount off the published price that covers [redacted] of attributable costs

Id at 2.

The Commission should defer approving the product until actual data is produced along with some clearer assurances that the proposed minimum rates in Attachment B will cover costs.¹⁶

If approved after further substantiation, the Postal Service should also be required to continue to file under seal each contract and to identify under a GEPS--NPR Notice of Non-price Terms, discussed below, certain terms including the associated implementation date and termination date of each contract.¹⁷ Nothing less would ensure that the Commission has an accurate record of all of the agreements. The Postal Service should also be obliged to provide annual data for the volume, revenue and cost on each contract within the product.¹⁸

The current proposal sets prices for one year. The Postal Service should provide updated prices on a quarterly basis instead, however, to better ensure that financial conditions do not materially affect the profitability of any contract.¹⁹ It should also be

¹⁶ Having rate cells that do not have sufficient cost coverages creates the potential risk of some contracts becoming unprofitable. Even if unanticipated, actual contract volumes could be concentrated in unprofitable rate cells.

¹⁷ See *also*, CHIR No. 1 at Question 2. The Postal Service's GEP-NPR proposal seeks streamlined the approval of individual GEPS contracts. The Commission currently takes up to 15 days to review each GEPS contract, which includes time for public comment. The Postal Service then provides an implementation date and termination date, so the Commission knows when to remove the contract from the MCS. The new proposal would enable the Postal Service to enter into contracts and effectuate negotiated prices instantly. New special notice duties may be imposed compatibly with Section 3642(d)(1).

¹⁸ This data could either be filed timely at the date that the Postal Service files its Annual Compliance Report (ACR), or as each contract expires. For the cost model filed in support of the new product offering, the Postal Service should be obliged to promptly update it when new data on costs become available.

¹⁹ Under the current practice, where each contract is individually reviewed by the Commission, the Postal Service is allowed to make adjustments as financial indicators vary. For example, fluctuations in the exchange rate or inflation could affect the anticipated profitability of the contract. The Postal Service explains that Postal Service management updates indices monthly to "ensure that the prices are not stale in comparison to indices used as cost components." Request, at Governors' Decision, Attachment C at 2.

required to show concurrently that price floors of each rate cell has a sufficiently high cost coverage, or reflects the discounted published retail rate.

B. A Niche Classification May Be Permissible Only If Safeguards Are Implemented and Meaningfully Monitored.

The present proposal for a niche classification for GEPS – NPR raises four main additional points that merit further consideration. First, whether the Postal Service minimally complies with the requirements of Chapter 36 to permit the new product to be added as requested. Second, whether the proposed rate matrix and service terms envisioned as a niche classification, subject to NSAs will work to the mutual benefit of the mail users and postal service as a whole. Third, whether the new product adequately ensures that the international services are made available on the same terms to other potential users willing to meet the same conditions of service, despite confidentiality constraints. Fourth, whether the Postal Service’s provision of supplemental data, notice, and regular cost support reporting suffices to permit continuing oversight through monitoring by the Commission.

While the content requirements of Rule 3020.31 appear satisfied on the face of the request, the supporting justification specified by Rule 3020.32 needs to be assessed in the context of the request and against the history of related determinations.²⁰ For example, certain earlier determinations on whether the GEPS products are properly categorized as market dominant or competitive may provide a point of departure for ascertaining if conditions have changed to alter earlier treatment under the competitive heading. The regulations advancing the goals of title 39 also may be read to reinforce related laws and recent policy development favorable to promoting international trade.²¹

1. Are the requirements of Chapter 36 satisfied? The Governors’ Decision is consistent with the policies of 39 U.S.C. 3632, with regard to Action of the Governors.

²⁰ See, e.g., 39 CFR 3020.32(b), (c), and (i); see also, CHIR No. 1 at Questions 2 – 4.

²¹ Regulatory review and analyses may also consider the broader goals of the Postal Service, and the related objectives of improving efficiency in international mail so as to improve the health of the postal system as a whole, stimulate the economy generally, and enhance international commerce and trade support, consistent with applicable domestic and international law.

The Postal Service also relies heavily upon the implicit pointers to the vague legacy of earlier GEPS filings, or related sealed materials, to satisfy section 3642, which governs adding new products to the MCS, notice, and publication. See, e.g., 39 U.S.C. 3642(b)(3) and 3641(h). Yet, an allowance of requested autonomy may be conditioned upon enhanced notification duties.²²

It is not entirely clear, however, if the GEPS—NPR limits the rate flexibility such that product rates necessarily remain above relevant costs, as required under section 3622 on Modern rate regulation. Unless the Commission already has ample vestigial cost support to conclude that the support filed in response to CHIR No. 1 is adequate supplementation, it appears premature to conclude from the record that each pertinent element of 39 USC 3633(a) appears to be met. Compare Request at Attachment 3.²³

2. *Will the proposed niche classification provide mutual benefits for mailers and the postal system?* The filed description, justification, and support for a new competitive product to be added to the MCS are routinely reviewed by the Commission closely, under 39 CFR 3020, Subpart B. The Commission need not require the Postal Service to begin to provide support necessarily as though the slate were entirely blank and ignore the salient history, however, since that history may suffice to satisfy certain showings that would otherwise need to be made in the first instance for a request, absent such a track record. See *supra* at Section II. Yet, there is no transparency as to the full range of previously filed confidential information that the Postal Service apparently relies upon for its vestigial support. The proposed new product must also comport with the requirements of title 39. See also, 39 CFR 3020.30, et. seq. Inasmuch as the Postal Service has not made explicit the data needed to draw

²² See, e.g., Request at 10 n.14; see also, PRC Order 86 at 5-6 (included herein by reference). Lingering ambiguity also remains over whether every prior GEPS agreement would substantially coincide with new NSAs envisioned under the present proposal. See, e.g., CHIR No. 1 at Question 7. The NSAs not only provide a set of benefits, but allocate risks (*i.e.*, modifications, soft-landing provisions for volume deficiencies, liquidated damages or penalty levels, etc.) as well, in view of contingencies. Non-price factors may not be disregarded. A duty to file a Notice of Non-price Terms could oblige the Postal Service to clearly describe any variance in non-price terms from the Model Agreement, Request, at Attachment 3. This would preserve the duties under Order No. 86 to “identify all significant differences”, and especially ones that “impose new obligations or new requirements on a party.” Order No. 86 at 7, *supra*.

²³ See also, Request at Attachment 4 (certification that the NSAs under GEPS-NPR “should cover the product grouping’s attributable costs (based on a distribution of historical customer volumes) and preclude the subsidization of competitive products by market dominant products.”).

inferences from past filings under seal, any tentative support for the proposal by participants at this stage of the proceeding could only be ventured on the reliance of an autonomous and independent level of scrutiny by the Commission, in lieu of a complete record here. It may be possible that GEPS-NPR could provide mutual benefits, but the original proposal appears at most to support an experiment, without something more.²⁴

3. *Are assurances adequate that the same terms will be extended to other potential users willing to meet the same conditions of service?* The Postal Service operates under general duties to provide products under sound commercial laws and policies. “In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.” 39 U.S.C. 403(c). This statutory provision underscores another key issue as to whether the Commission can delegate the authority to the Postal Service to determine if its own non-price terms of distinct NSAs, for mailers who are potentially situated similarly, are also sufficiently similar to a preapproved template or standard to effectively negate the risk of unfair discrimination.

In competitive markets, rivals, including dominant providers, are usually constrained from engaging in unfair price discrimination by laws of competition and enforcement measures. One suggested approach, for proposed competitive products like the present one, would be to subject the Postal Service to the same array of duties and enforcement risks from the outset expressly. This may be achieved by delineating that any Commission approval is limited to regulatory compliance of the new product for cost coverage under Section 3633, and such approval is without any prejudice to any independent adjudicative determination of antitrust violations arising from unfair discrimination or any similar cause of action, which is often beyond the sphere of active supervision by the Commission.²⁵

²⁴ Under section 3642, experimental competitive products are possible, but revenue limitations apply. Still, the Postal Service might more strongly justify a separate experimental product for each of the three arrangements contemplated for mail tender location or “access”, under the current level of data filed, if reticent to provide data needed for a *prima facie* basis for its proposal in the present form.

The Commission's active oversight in the sphere of unfair commercial practices is predominantly intended to eliminate the risk of improper subsidies flowing in support of the niche classification of a new competitive product.²⁵ While the Postal Service may support the right to conduct business for new competitive products with the latitude to differentiate prices and service terms among mailers to a reasonable level, it should bear the correlated duty to incur liability to mailers whenever its preferential practices exceed a degree that is fair or *de minimis*. Recourse should remain available via the federal courts or the Commission, particularly in view of the remedy pursued.

4. *Will constructive regulatory oversight of NSAs be adequate given effective rate bands and largely harmonized terms?* Chairman Goldway has requested confirmation that the NSAs will be filed with the Commission. CHIR No. 1 at Question 6. The Public Representative shares this and other questions, as well as her related concerns that pertain to the exiguous cost support provided. The Postal Service's "bare bones" approach raises doubt as to whether it truly intends to offer reasonable assurances as to transparency by providing adequate data regularly and routinely on rate changes or updates, and disaggregated and aggregated revenues data, along with notice of any variances in contract terms among mailers or vis-à-vis the model agreement. Without the underlying data, the oversight duties of Commission, to ensure accountability and transparency, as well as protect against unfair conduct, could be unduly compromised. See PRC Order No. 86 at 7.

²⁵ While the Public Representative could qualifiedly support the instant proposal for a new product if it were able to rely upon the Commission to conduct analysis of the legacy of confidential data supporting prior GEPS agreements, it appears appropriate to take exception to the form of the present filing. First, the stand-alone cost support for this filing appears so sparse that it largely frustrates proper review from the outset, so as to reduce review needed for meaningful representation of the public. Second, the timing is problematic as well. While this docket contemplates an opportunity for reply comments, absent this second chance, the Postal Service's tendency to withhold the full supporting data it relies upon to justify its proposal at the date of the initial filing, amounts to little more than untenable sandbagging. At worst, it undermines the transparency required for reasonable scrutiny, and at best, it prejudicially squeezes the limited time allowed to others for valuable assessment, even on behalf of the public, of any belatedly submitted data offered in support of the proposal.

²⁶ For reasons addressed below, any approval by the Commission may be qualified with respect to further scrutiny under other commercial laws, to permit legal recourse for actual pricing practices under laws that commonly govern commercial practices, including antitrust laws, as needed. See 39 U.S.C. 404(a). The Commission should clarify that any approval of the Postal Service's pricing matrix should not be conflated with active supervision of any pricing practices, and thus does not exempt subsequent preferential pricing among mailers from compliance with antitrust law. See, e.g., *id.* at 409(e)(1)(B).

On the other hand, the history amply supports some greater autonomy in the realm of competitive GEPS offerings, and tends to provide some countervailing support that the proposal for the new product could have potential merit and be sustained, under some conditions. First, the prior history of the offering suggests that the product market has characteristics of effective competition, that ensure that varying discounts will be harmonized within a narrow range as needed in contestable markets to ensure mailer loyalty and relatively high penetration levels. Second, the competitive market may serve in the first instance, as the primary regulator of the Postal Service's pricing conduct, thereby narrowing most of the ancillary regulatory duties to conduct more exacting oversight of proper cost-based pricing. Third, the Postal Service concedes that it has finite latitude for price differentiation within the cells of its matrix.²⁷

IV. The Postal Service has a Duty to Provide Supplemental Information

The Postal Service appears obliged to file two kinds of supplemental data not yet in the record. First, the Postal Service should demonstrate that previous GEPS contracts are profitable, as stated in Attachment C. See Request at Governors' Decision 10-2, at Attachment C at 1. This will ensure that the methodology used by the Postal Service has produced profitable contracts in the past and should continue to do so in the future.²⁸ The Postal Service may show profitability by filing aggregate recent historical cost, revenue, and volume data on previous contracts. Second, the Postal Service should provide an analysis that shows that all rates listed in Attachment B cover costs, or alter the minimum rates in Attachment B to reflect the "Final Rates" provided

²⁷ It is somewhat less clear when the Postal Service would choose to deploy actual rates that "default to the lowest published rate." This raises the related question as to whether it may do so for some qualified mailers, but not other mailers with identical or similar mailing needs and capabilities. Also, the certification of cost coverage does not seem to be sufficiently robust to definitively show that all permutations and combinations plausible for a contract under the matrix of proposed rates will plainly satisfy cost coverage requirements.

²⁸ The Public Representative understands that GEPS contracts were shown to cover costs in the FY 2009 ACD; however more recent data would be valuable in the instant docket.

under seal in response to CHIR No. 1 Question 2.²⁹ The Public Representative believes that this additional information would be valuable to ensure the profitability of the proposed product.

V. CONCLUSION

Absent further support data or information, the Postal Service appears remiss in its duty to satisfy its statutory burden of supporting its proposed new product, GEPS – Non-Published Rates, for the reasons expressed in the body of the comments. This filing is intended to reserve the right to supplement these initial comments during reply, as well as to address the merits of the proposed niche classification in view of further data provided. Accordingly, the optimal decision on the request largely depends upon the prospective filing of further information and supporting data, as well as any other comments filed in the initial round.

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²⁹ See Response of the United States Postal Service to Chairman's Information Request No. 1, August 4, 2010, CHIR. No.1.Q.2.GEPS Master_Red.xls, tab: 22_Final_Rates.