

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

REPLY COMMENTS OF THE PUBLIC REPRESENTATIVE

(August 18, 2010)

On August 11, 2010, United Parcel Service (UPS) filed comments,<sup>1</sup> under Order No. 494, to oppose the Postal Service's request to add GEPS – Non-published Rates (GEPS-NPR), as an international product, to the competitive product list.<sup>2</sup> UPS urges that the offering is too broad" and therefore does not meet the statutory definition of a "product." UPS Comments at 1. Alternatively, it urges that if the offering satisfies the criteria for a new product then "the rates for the service should be treated as 'rates or classes of general applicability' under 39 U.S.C. § 3632(b)(2)." *Id.* at 2.

Commission Order No. 494 established the deadline for reply comments on August 18, 2010.<sup>3</sup> *Id.* at 4. The Postal Service had filed additional data on August 12, 2010, as a library reference, USPS-CP2010-72/NP2, in response to the Chairman's

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<sup>1</sup> Comments of United Parcel Service in Response to Notice and Order Concerning Request to Add New Product to the Competitive Product List, August 11, 2010 (UPS Comments).

<sup>2</sup> 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).

<sup>3</sup> Order No. 494 Notice and Order Concerning Request to Add a New Product to the Competitive Product List (Order No. 494).

second request for information, after the UPS Comments were submitted.<sup>4</sup> Pursuant to Order No. 494, the present reply comments are being filed to clarify earlier comments of the Public Representative, and qualifiedly support the proposed new product.

## I. UPS COMMENTS

UPS submits that “[d]ifferent contracts would contain different combinations” of factors that include volume commitment, entry arrangement, the mix between Express Mail International (EMI) or Priority Mail International (PMI), country group category, and weight. UPS Comments at 3. It contends that “[e]ach of these factors by itself, let alone in combination, could greatly affect the costs of a specific contract.” *Id.*, citing Request at 4-5. UPS opposes the proposed new product because “[t]wo or more contracts may be grouped together as a single product *only* ‘if it can be shown that they have similar cost and market characteristics.’” *Id.* at 2, citing Docket No. RM2007-1, Order No. 43 at ¶ 2177 (October 29, 2007). It also relies on PRC Order No. 226 as precedent that an Order may properly decline to group contracts as one product for Priority Mail, when several distinct factors remain variable.<sup>5</sup> Even if the proposal satisfies the criteria for a single product, it adds that, “the rates for the service should be treated as “rates or classes of general applicability” under 39 U.S.C. § 3632(b)(2). *Id.* at 2.

## II. REPLY COMMENTS OF THE PUBLIC REPRESENTATIVE

The Postal Service’s instant proposal was plainly advanced in view of Order Nos. 43, 86, and their progeny, which establish the treatment of certain GEPS contracts with

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<sup>4</sup> See USPS-CP2010-72/NP2 - Nonpublic Materials Filed in Response to CHIR No. 2 (Under Seal); see also, Notice of the United States Postal Service of Filing Nonpublic Materials in Response to Chairman’s Information Request No. 2. Notably, on August 4, 2010, the Postal Service had filed USPS-CP2010-72/NP1, the Nonpublic Materials Filed in Response to CHIR No. 1, Questions 1, 2 and 3(CHIR 1 Response).

<sup>5</sup> *Id.* at 3-4.(UPS also cautions that “[i]f all these contracts were lumped together as one product, arguably all of them together need only cover their total attributable costs, rather than each contract covering its own costs.”).

varied costs as price categories of a single product.<sup>6</sup> Under the present proposal, as noted in earlier comments by the undersigned, “[t]he 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.” *Id.* at 2. While dissimilar cost or market characteristics are often grounds to refrain from lumping services together as a single product, UPS’s cited authorities do not unequivocally exclude all niche classifications on this basis. UPS’s citation to Order No. 226, on domestic Priority Mail, expressly distinguishes the separately evolving treatment of international services. See PRC Order No. 226 at 10, n. 11.

The present question on a new niche classification remains an open one for international mail service agreements, particularly when the degree of any dissimilar market characteristics appear modest or negligible. *Compare*, UPS Comments at 1, *citing* 39 U.S.C. § 102(6) (emphasis added). UPS’ reliance upon the definition of the term “product” probably puts too fine a point on the definition.<sup>7</sup>

Unlike the domestic Priority Mail context cited by UPS, the present proposal entails a negotiated volume commitment, discount, and written agreement. Also, there are differences between domestic and international Priority mail practices. First, the Postal Service offers discounts calibrated by country groups for international Priority Mail, but not for domestic Priority Mail. Second, nothing precludes rating one mix of international services in a Negotiated Service Agreement with certain discounts under the same rate matrix with discounts as another agreement with a slightly different mix of international services. When properly anticipated, the two distinct baskets of services in similar agreements may be eligible for a common matrix of discounts for rating purposes, so long as functional equivalents are treated similarly. This approach may be both just and efficient when the cost or market characteristics of the mixes of international services under different agreements on competitive products lie within a

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<sup>6</sup> Public Representative Comments in Response to Order No. 494, August 11, 2010 (Public Representative Comments) at 4-5.

<sup>7</sup> See, e.g., PRC, Order No. 26 at ¶¶ 3069-3071; *compare*, Order No. 26 at ¶¶ 3073 n.75-3074 (“Once experience is gained, the list of products may be changed as warranted.”).

narrow range. The range of discounts supported, however, must still be justified with cost support data.<sup>8</sup>

Similarly, UPS contends that the proposal, if adjudged suitable for one product, must be treated as one that requires “rates or classes of general applicability” under 39 U.S.C. § 3632(b)(2). Yet, this is not entirely convincing either. See, e.g., 39 U.S.C. § 3632(b)(3). On one hand, publishing generally available rates would ensure discount uniformity with transparency.<sup>9</sup> On the other, the Postal Service appears to prefer to maintain its rate matrix confidential from its rivals. Response to CHIR 1, at Question 8. On balance, the Postal Service’s position appears sustainable if its non-published rate matrix includes only rate bands by cell that would have been approved separately under earlier conventional approaches. See 39 U.S.C. 3633(a); see *also*, 39 U.S.C. 407(a) and 503. Regulatory forbearance in scrutinizing each mailer’s discount separately may be viable even without published discount uniformity, since certain less restrictive alternatives may be relied upon to protect against practices of unfair discrimination, as already noted.<sup>10</sup>

Yet, one of UPS’s implicit points still retains merit, whether subpart (b)(2) or (b)(3) of 39 U.S.C. § 3632 is deemed controlling. The Postal Service would ordinarily be obliged to provide sufficient support and data to establish that rates are above costs for each GEPS-NPR contract, as a prerequisite. The Postal Service’s proposal, as presently filed, is partly defective in that it is not sufficiently limited by its terms to the more modest pricing latitude that appears supported by its data filed under seal. See CHIR. No.1.Q.2.GEPS Master\_Red.xls, (public file, relating to unredacted data filed under seal). The appreciable mismatch between Governor-approved rate design and the proposed rate matrix for a subset of cells raises a limited risk that a contract might not cover attributable costs of some combinations of service.<sup>11</sup> Any prospective

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<sup>8</sup> Notably, the Postal Service has not previously filed data to permit more extensive scrutiny over any incremental cost methodology for the international services envisioned under GEPS-NPR.

<sup>9</sup> Response of the United States Postal Service to Chairman’s Information Request No. 1, August 4, 2010(Response to CHIR 1).

<sup>10</sup> See Public Representative Comments, at 11-12 n.26.

<sup>11</sup> While providing some data in support of the floor rates in each cell, and supplements to that data in the information filed in its CHIR 1 Response, the Postal Service’s matrix of applicable rate ranges, filed under seal, is not adequately constrained to match the rates justified by the filed supporting data. See Public Representative Comments, at 13-14 n.29, and accompanying text.

allowance of the proposal for GEPS-NPR by the Commission should minimize such risk, except perhaps when the Postal Service makes a prior exceptional showing that it is meeting competition.

Accordingly, the proposal could still be properly approved under more rigorous safeguards. While the accompanying matrix of rates, as proposed, appears inadequately supported in part, it may be equitably reformed, as needed. Unless the matrix is tailored to coincide with support data or default to their lowest published rate, however, it remains unclear that each contract under the product will recover its attributable costs. The Commission should require filed source data that clearly assures that the proposed rate bands will cover costs to ensure that that the requirements of 3633(a) are met, as if each contract were a separate product. The Postal Service has a duty to anticipatorily show that price floors of each rate cell remain high enough for at least the cost coverage required by the Governors, so as to obviate the need for prior approval of contract-specific cost support data for each mailer.

The Postal Service's GEP-NPR proposal seeks the streamlined approval of individual GEPS contracts. The Postal Service should also be obliged to provide updated minimum prices on a quarterly basis instead to better ensure that financial conditions do not render any contract unprofitable despite variances.<sup>12</sup> Yet, non-price terms that vary from the model agreement may not be disregarded either. At minimum, the Postal Service should therefore be obliged to continue to file under seal each contract, and to identify non-standard provisions in advance under a GEPS--NPR Notice of Non-price Terms.<sup>13</sup>

The present proposal for a niche classification for GEPS – NPR does not appear sound, unless these or similar safeguards are meaningfully adopted and monitored. UPS's proposal for compliant rates of general applicability, or GEPS - Published Rates,

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<sup>12</sup> Fluctuations in the exchange rate or inflation could affect the profitability of a contract. The dollar is only one of several currencies in the basket of currencies comprising SDRs. See CHIR No. 2. Under the UPU's settlement system between postal authorities of different nations, SDRs can serve as an accounting convention to settle debts, regardless of the level of currency volatility.

<sup>13</sup> See *also*, Public Representative Comments, at 8 n.17.

could become a more pragmatic alternative, if the Postal Service is not amenable to adhering to such safeguards.<sup>14</sup>

### III. CONCLUSION

The proposed new product, GEPS – Non-Published Rates, may comply with title 39, provided that the rate flexibility of the proposed matrix is modified to limit discounts to ensure contract-specific cost recovery. Any conditional support is further qualified subject to other specified non-price safeguards, reporting requirements, and conditions discussed in previous comments.

Respectfully submitted,

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<sup>14</sup> In this regard, consider the dispute over AT&T's so-called Tariff 12 many years ago. Tariff 12 was actually a series of offerings that reflected AT&T's negotiated agreements with big customers for customized combinations of services. Each individual contract was reduced to a service package that was described in a component of Tariff 12 and filed with the FCC. That is, even though they were individually negotiated arrangements, the service agreement had to be reduced into tariffed form under 47 U.S.C. § 203 (1993)(Schedule of Charges). By filing each service package under Section 203, each individual service arrangement became open to the entire public to purchase. It was on this basis primarily that the D.C. Circuit upheld Tariff 12. See *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1063-64 (D.C. Cir. 1993) ("It is true that negotiation of an individual service package will usually avoid a likeness finding as between one Tariff 12 package and another; and if the package is made available to any customer who wants it upon the same terms, then there is no unlawful discrimination."); see *also*, *Sea-Land Serv., Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984) ("Although one normally regards contract relationships as highly individualized, contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any [customer] willing and able to meet the contract's terms.").