

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

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Mark Acton, Vice Chairman; and  
Robert G. Taub

Market Test of Experimental Product–  
Metro Post

Docket No. MT2013-1

ORDER APPROVING REQUEST FOR EXTENSION AND EXPANSION  
OF METRO POST MARKET TEST

(Issued November 7, 2014)

I. INTRODUCTION

The Metro Post market test was scheduled to expire on December 16, 2014.<sup>1</sup> On September 19, 2014, the Postal Service filed the Request, pursuant to 39 U.S.C. § 3641(d)(2) and Order No. 1539, to extend the duration of the Metro Post market test for an additional year and to expand the market test to additional markets across the nation. *Id.* at 1. For the reasons discussed below, the Commission approves the request for extension and expansion of the Metro Post market test.

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<sup>1</sup> Request of the United States Postal Service for Extension and Expansion of Metro Post Market Test, September 19, 2014, at 1 (Request).

## II. REQUEST

Metro Post is a package delivery service that provides customers with same-day delivery from participating locations within a defined metropolitan area.<sup>2</sup> The Postal Service intends to expand the Metro Post market test to a number of additional markets nationwide over the next year so that it can examine the market for same-day delivery in a wider range of metropolitan areas. Request at 1. It states that testing has begun in new metropolitan areas to confirm the Postal Service's operational capabilities in these areas. *Id.* It states that it is prepared to begin onboarding new customers in those areas in the near future. *Id.* The Postal Service explains that it is necessary to test a variety of metropolitan areas to determine "the operational feasibility and the desirability of making Metro Post a permanent product." *Id.* at 1-2.

Accordingly, the Postal Service requests to extend the Metro Post market test for one additional year, until December 16, 2015, and to expand the test into other metropolitan areas over the coming year. *Id.* at 2. The Postal Service asserts that all other aspects of the Metro Post market test remains unchanged and in compliance with 39 U.S.C. § 3641 and Commission Order No. 1539. *Id.*

## III. PROCEDURAL HISTORY AND COMMENTS

On October 12, 2012, the Postal Service filed a notice proposing to conduct the Metro Post market test for one calendar year in the San Francisco metropolitan area.<sup>3</sup> It also requested an exemption from the \$10 Million Adjusted Limitation. Notice at 7. The Commission approved the Metro Post market test on November 14, 2012 and granted the request for an exemption. Order No. 1539 at 13. It directed the Postal

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<sup>2</sup> Order Approving Metro Market Test, November 14, 2012, at 1 (Order No.1539).

<sup>3</sup> Notice of the United States Postal Service of Market Test of Experimental Product—Metro Post—and Notice of Filing Material under Seal, October 12, 2012, at 2, 6 (Notice); Responses of the United States Postal Service to Chairman's Information Request No. 1, October 25, 2012, question 1 (Responses to CHIR No. 1).

Service to notify the Commission prior to expanding the market test to other metropolitan areas or otherwise changing the market test. *Id.*

On December 4, 2013, the Postal Services provided notice of its intent to expand the Metro Post market test to the New York metropolitan area and continue the test for an additional calendar year.<sup>4</sup> On March 1, 2014, the Postal Service suspended the Metro Post market test in San Francisco.<sup>5</sup>

The Postal Service filed the instant Request on September 19, 2014. The Commission noticed the filing, appointed a Public Representative, and provided interested persons the opportunity to submit comments on whether the Postal Service's filing is consistent with the policies of 39 U.S.C. § 3641.<sup>6</sup> On October 2, 2014, the Commission issued Chairman's Information Request No. 2 with responses due on October 8, 2014.<sup>7</sup> The Postal Service did not file responses by that deadline.

On October 9, 2014, the Public Representative requested an extension of time for filing comments in order to allow interested persons sufficient time to consider the Postal Service's responses to CHIR No. 2.<sup>8</sup> That same day, the Commission issued an order extending the comment deadline to two days after the date on which the Postal Service submits a complete response to CHIR No. 2.<sup>9</sup>

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<sup>4</sup> Notice of the United States Postal Service of Expansion of Metro Post Market Test, December 4, 2013.

<sup>5</sup> USPS OIG Report, Metro Post Same Day Delivery Pilot—San Francisco District: Management Advisory Report, Report Number DR-MA-14-002, February 5, 2014, at 1 (OIG Report); Responses of the United States Postal Service to Chairman's Information Request No. 2, October 10, 2014, question 2 (Responses to CHIR No. 2).

<sup>6</sup> Notice and Order Concerning Request for Extension and Expansion of Metro Post Market Test, September 25, 2014 (Order No. 2198).

<sup>7</sup> Chairman's Information Request No. 2, October 2, 2014 (CHIR No. 2).

<sup>8</sup> Public Representative's Motion for Extension of Comment Deadline, October 9, 2014.

<sup>9</sup> Order Extending Deadline for Comments, October 9, 2014 (Order No. 2212).

On October 10, 2014, the Postal Service submitted its responses to CHIR No. 2.<sup>10</sup> On October 14, 2014, the Commission's rules governing market tests of experimental products became effective.<sup>11</sup> On October 15, 2014, the Public Representative filed comments concerning the Postal Service's Request.<sup>12</sup> No other person filed comments. The Public Representative recommends that the Commission grant the Postal Service's request to extend the Metro Post market test for one year. PR Comments at 3. She suggests that the Commission allow the Postal Service to expand the market test to additional metropolitan areas, but continue to require that the Postal Service notify the Commission before expanding. *Id.* at 4.

#### IV. COMMISSION ANALYSIS

Based on a review of the record—including the Postal Service's filings, the comments received, and responses to CHIRs—the Commission concludes that the requested extension and expansion meet the requirements of 39 U.S.C. § 3641. Accordingly, the Commission grants the request to extend the Metro Post market test for an additional year. The market test shall expire on December 16, 2015 unless the market test is cancelled. The market test may also expand to additional metropolitan

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<sup>10</sup> Responses to CHIR No. 2. The Postal Service also filed a motion for late acceptance. Motion of the United States Postal Service for Late Acceptance of Responses to Chairman's Information Request No. 2, October 10, 2014. The motion is granted.

<sup>11</sup> See 79 FR 54552 (September 11, 2014). The Request was filed before the Commission's market test rules in part 3035 became effective. The D.C. Circuit has held that rules do not operate retroactively, even when applied to transactions predating their institution, if they are procedural rules that regulate only "secondary rather than primary conduct." 292 F.3d 849, 859 (D.C. Cir. 2002). Applying new rules to pending cases has no retroactive effect if the new rules are "substantively consistent with prior regulations or prior agency practices...." *Id.* at 860. Thus, the market test rules do not operate retroactively because they are mostly procedural in nature and are substantively consistent with prior Commission practice regarding market tests. Nonetheless, the Commission reviews and approves the Request based on 39 U.S.C. § 3641 and Commission precedent in past orders. Going forward, however, the Commission will apply the market test rules to future filings concerning the Metro Post market test, including notices describing changes made to the market test.

<sup>12</sup> Public Representative Comments in Response to Notice and Order Concerning Request for Extension and Expansion of Metro Post Market Test, October 16, 2014 (PR Comments). The Public Representative also filed a motion for late acceptance. Motion of Public Representative for Late Acceptance of Comments, October 16, 2014. The motion is granted.

areas nationwide as long as the Postal Service provides prior notice to the Commission before expanding the market test to these areas or otherwise changing the market test.<sup>13</sup>

Below the Commission evaluates the request for extension and expansion for compliance with 39 U.S.C. §§ 3641(d) and (b), respectively. The Commission also discusses the suspension of the market test and updates to the data collection plan.

#### A. Request for Extension

In general, the duration of a market test may not exceed 24 months unless the Commission authorizes an extension for up to an additional 12 months. 39 U.S.C. § 3641(d). The Commission may grant a request for extension “[i]f necessary in order to determine the feasibility or desirability of [an experimental] product...” *Id.* § 3641(d)(2).

The Postal Service proposes to extend the Metro Post market test for an additional year.<sup>14</sup> It asserts that extending the market test is necessary to determine the operational feasibility and desirability of making Metro Post a permanent product. *Id.* at 1-2. It states that testing has begun in new metropolitan areas to confirm the Postal Service’s operational capabilities in these areas and to examine the market for same-day delivery in a wider range of metropolitan areas. *Id.* at 1.

The Public Representative states that it is difficult to evaluate why an extension of the market test is preferable to making Metro Post a permanent product. PR Comments at 3. In this case, however, she states that it is not unreasonable to give the Postal Service the benefit of the doubt assuming that it has the market knowledge necessary to make an informed, strategic decision. *Id.* Accordingly, she recommends

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<sup>13</sup> Additionally, based on the revenue reported in the quarterly reports filed for Metro Post, the Commission observes that the extension and expansion of Metro Post is unlikely to jeopardize the revenue limitation exemption the Commission previously granted under 39 U.S.C. § 3641(e)(2).

<sup>14</sup> Request at 1. The Commission appreciates that the Postal Service complied with 39 U.S.C. § 3641(d)(2) by filing the Request at least 60 days before the market test was scheduled to expire.

that the Commission grant the Postal Service's request to extend the Metro Post market test for one year. *Id.*

The Commission approves the request for extension based on the Postal Service's representation that it needs additional time to determine whether making Metro Post a permanent product is feasible or desirable. An extension would also enable the Postal Service to examine the market for same-day delivery in a wider range of metropolitan areas and to evaluate its operational capabilities. In addition, no one submitted comments opposing the extension. Accordingly, the Commission grants the request to extend the Metro Post market test for an additional year. The Metro Post market test shall expire on December 16, 2015 unless the market test is cancelled.<sup>15</sup>

#### B. Request for Expansion

The Postal Service requests to expand the Metro Post market test to additional metropolitan areas nationwide. Request at 1. The Public Representative recommends that the Commission allow the expansion in principle, but continue to require that the Postal Service notify the Commission before expanding the market test to other metropolitan areas. PR Comments at 3. She argues that maintaining the advance notification requirement would continue to ensure that the Commission meets its statutory duty to evaluate whether the continued offering of Metro Post will create a market disruption. *Id.* at 4.

The Postal Service may not test an experimental product under 39 U.S.C. § 3641 unless the experimental product satisfies three conditions: (1) the experimental product must be significantly different from all Postal Service products offered within the past two fiscal years; (2) the introduction or continued offering of the experimental product will not provide an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, especially regarding small business concerns; and (3) the

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<sup>15</sup> The Postal Service may cancel a market test at any time, but it must file a notice of cancellation with the Commission within 10 days of cancelling the market test. 39 C.F.R. § 3035.12.

Postal Service correctly identifies the experimental product as either market dominant or competitive. See 39 U.S.C. § 3641(b). An experimental product must continue to meet these three conditions for the duration of the market test. In particular, the phrase “introduction or continued offering” under section 3641(b)(2) requires the Commission to evaluate market disruption throughout the duration of the market test to ensure continued compliance.<sup>16</sup>

The proposed expansion does not affect compliance with 39 U.S.C. §§ 3641(b)(1) and (3) because the characteristics of Metro Post as an experimental product have not changed. Metro Post continues to be a significantly different product that is correctly characterized as competitive. The proposed expansion does affect the market test’s compliance with section 3641(b)(2) concerning potential market disruption.

In Order No. 1539, the Commission found that Metro Post was unlikely to create an unfair or otherwise inappropriate competitive advantage, either for the Postal Service or any mailer, because the market test was restricted to the San Francisco area and limited in the number of participants and number of packages receiving same-day delivery. Order No. 1539 at 8. In addition, the Commission found that prices offered by competitors for similar services typically fell within the price range the Postal Service intended to test. *Id.*

In this case, the Postal Service proposes to expand the market test nationwide, “focusing on the largest 100 metropolitan areas based on customer demand.” Responses to CHIR No. 2, question 1. Because the market test is being considered for expansion to a wider range of metropolitan areas nationwide, the Commission must re-evaluate the market test for market disruption to ensure that the “continued offering of [Metro Post] will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns....” See 39 U.S.C. § 3641(b)(2).

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<sup>16</sup> See Docket No. MT2014-1, Order Authorizing Customized Delivery Market Test, October 23, 2014, at 8 (Order No. 2224).

The Commission set forth and applied a framework for analyzing market disruption in a recent order approving the Customized Delivery market test. See Order No. 2224 at 9-12. The framework outlined four steps to evaluate market disruption: (1) identify the relevant market for the market test; (2) identify businesses that offer similar products or services in the relevant market; (3) evaluate whether the introduction or continued offering of the experimental product will create “an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer” with regard to the businesses identified in step (2); and (4) examine the impact of the market test on “small business concerns.” *Id.* at 9-11. In this case, the Commission applies a similar framework to analyze whether the expansion of the Metro Post market test will cause market disruption.

The first step of the market disruption analysis is to identify the relevant market. For market tests, the relevant market is identified by examining the description of the experimental product and the geographic area(s) where the Postal Service intends to offer the experimental product during the market test duration. *Id.* at 9. In this case, Metro Post can be described as a package delivery service that provides customers with same-day delivery from participating locations within a defined metropolitan area. The Postal Service intends to offer Metro Post in metropolitan areas nationwide. Thus, the relevant market for the Metro Post market test is the same-day package delivery service to customers from participating locations in metropolitan areas nationwide.

The second step of the market disruption analysis is to identify businesses that offer similar products or services in the relevant market. In this case, these businesses are same-day package delivery service providers operating in metropolitan areas nationwide. The Postal Service previously identified several businesses that offer some type of same-day delivery service, such as eBay, Amazon.com, Wal-Mart, and UPS. Responses to CHIR No. 1, question 3. The Commission also reviewed publicly-

available information and company websites to identify similar businesses.<sup>17</sup> Based on that review, the Commission determined that there are many same-day package delivery service providers operating in metropolitan areas nationwide.

The third step of the market disruption analysis is to evaluate whether the “continued offering” of Metro Post will create “an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer” with regard to same-day package delivery service providers. See 39 U.S.C. § 3641(b)(2). For example, if prices for Metro Post were set significantly below prices offered by other same-day package delivery service providers, the Postal Service and its partners may have “an unfair or otherwise inappropriate competitive advantage” over these service providers who are unable to lower the prices for their services.

The Postal Service explains that the expansion of Metro Post into new metropolitan areas will not create market disruption because prices for same-day delivery service are generally the same across multiple metropolitan areas. Responses to CHIR No. 2, question 5. It asserts that in some cases, prices offered by other same-day package delivery service providers are lower than the Metro Post price range. *Id.*

The Commission examined other same-day package delivery service providers and found that they charge between \$4.99 and \$13.00 for same-day delivery.<sup>18</sup> Additionally, these service providers offer same-day package delivery service in a variety of metropolitan areas, including Atlanta, GA; Boston, MA; Chicago, IL; Dallas/Fort Worth, TX; Indianapolis, IN; Los Angeles, CA; New York, NY; Philadelphia,

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<sup>17</sup> See, e.g., Manila Bulletin, “UPS, FedEx Mull Same-Day Delivery,” (October 22, 2012), available at: <https://ph.news.yahoo.com/ups-fedex-mull-same-day-delivery-063928966--sector.html>; Sarah Perez, “With Newly Announced Expansions, Amazon’s Same-Day Delivery Service Now Outpaces Competitors,” (August 6, 2014), available at: <http://techcrunch.com/2014/08/06/with-newly-announced-expansions-amazons-same-day-delivery-service-now-outpaces-competitors/>; Robert Bowman, “Why the U.S. Postal Service Can Win the Battle for the Same-Day Delivery Market,” (January 14, 2014), available at: <http://www.forbes.com/sites/robertbowman/2014/01/14/can-the-u-s-postal-service-win-the-battle-for-same-day-delivery/>.

<sup>18</sup> Some businesses also offer monthly and yearly same-day delivery subscriptions.

PA; San Francisco, CA; Seattle, WA; and Washington, DC.<sup>19</sup> Furthermore, these service providers offer the same prices across multiple metropolitan areas.

The Commission finds that the prices offered by other same-day package delivery service providers are comparable to the prices the Postal Service intends to test when it expands to additional metropolitan areas. Therefore, the Commission concludes that the expanding the Metro Post market test to other metropolitan areas nationwide is unlikely to provide the Postal Service or its partners an unfair or inappropriate competitive advantage. Moreover, the prices the Postal Service plans to charge for Metro Post will have limited impact because the prices will only be effective for the duration of the market test. Additionally, as noted in Order No. 1539, concerns about the pricing of Metro Post will also be addressed if and when the Postal Service requests that Metro Post become a permanent product. Order No. 1539 at 9. In that case, the Postal Service's prices will be further constrained by the statutory requirement that Metro Post must cover its costs. See 39 U.S.C. § 3633(a)(2).

The fourth step of the market disruption analysis involves examining the impact of the market test on "small business concerns" in the relevant market. In this case, "small business concerns" means courier and express delivery service companies that meet certain criteria.<sup>20</sup> The Postal Service argues that courier and express delivery service companies will continue to operate within the emerging market for same-day delivery. Responses to CHIR No. 1, question 5. It contends that couriers and smaller delivery service companies deliver items that fall outside the intended scope of the Metro Post market test, including medical items; business, legal, and financial documents; and perishable goods. *Id.* It asserts that Metro Post focuses on the delivery of parcels purchased by consumers, many of which are delivered after

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<sup>19</sup> This list represents a compilation of locations where businesses offer same-day delivery. Same-day package delivery service providers are not available in all locations.

<sup>20</sup> CHIR No. 2, question 5. CHIR No. 2 asked the Postal Service to describe how the proposed expansion of the Metro Post market test will not create market disruption, particularly for small business concerns. *Id.* In its response, the Postal Service referred to the explanation previously provided in its Responses to CHIR No. 1, question 5.

business hours, while courier and express delivery service companies specialize in time-sensitive items delivered within an hour. *Id.*

The Commission finds that the Postal Service provides a reasonable justification for why the expansion will not cause market disruption for small business concerns. While not dispositive, no small business concern opposes the expansion. Furthermore, 39 U.S.C. § 3641 contains additional safeguards to ensure that market disruption will not occur. The Commission is authorized to limit the amount of revenues the Postal Service may obtain from any particular geographic market as necessary to prevent market disruption. 39 U.S.C. § 3641(e)(1). If necessary, the Commission may also cancel the market test or take other action that it deems appropriate. 39 U.S.C. § 3641(f).

Applying the framework discussed above, the Commission finds that the record contains no indication that expanding the Metro Post market test into other metropolitan areas nationwide will “create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns...” 39 U.S.C. § 3641(b)(2). The expansion of the Metro Post market test, therefore, satisfies the “market disruption” condition in 39 U.S.C. § 3641(b)(2).

The Postal Service has not identified the additional metropolitan areas where Metro Post will be tested. To assess continued compliance with 39 U.S.C. § 3641, the Postal Service must continue to comply with the directive in Order No. 1539 to “notify the Commission prior to expanding the market test to other metropolitan areas or otherwise changing the market test, *e.g.*, number of customers and number of packages.” Order No. 1539 at 8. In addition, the Commission’s rules require the Postal Service to file a notice with the Commission describing each material change made to the market test or services offered under the market test at least 10 days before implementing the change. 39 C.F.R. § 3035.6. Material changes include expanding the market test to other metropolitan areas and changing the number of customers or packages. *See id.* After the notice is filed, the Commission will evaluate whether the proposed expansion or change impacts Metro Post’s compliance with section 3641.

### C. Suspension of Market Test

On March 1, 2014, the Postal Service suspended the Metro Post market test in San Francisco. OIG Report at 1; Responses to CHIR No. 2, question 2. The Postal Service has not re-initiated the market test in San Francisco, but is currently evaluating San Francisco for expansion of the market test over the next year. Responses to CHIR No. 2, question 2. The Postal Service did not inform the Commission about the suspension.

As discussed in Section IV.B, above, Order No. 1539 directed the Postal Service to notify the Commission before changing the market test. The Commission's rules also require the Postal Service to provide 10 days advance notice before implementing a material change. 39 C.F.R. § 3035.6. Suspending a market test qualifies as a material change because it affects geographic scope and eligibility for service. *See id.* The Postal Service must provide the Commission 10 days advance notice, pursuant to 39 C.F.R. § 3035.6 and Order No. 1539, before suspending the Metro Post market test in another metropolitan area or re-initiating the market test in San Francisco.

### D. Data Collection Plan

The existing data collection plan for the Metro Post market tests consists of the following information: (1) the total revenue received from the Metro Post market test; (2) the attributable and total costs incurred, including administrative and ancillary costs; (3) the volume of Metro Post packages delivered via same-day service; (4) the number of test participants; and (5) work hours, travel times, and other cost data. Order No. 1539 at 12. The Commission directed the Postal Service to file the results of the data collection plan within 40 days of the end of each fiscal quarter. *Id.* at 13. To date, the Postal Service has submitted four data collection reports.<sup>21</sup>

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<sup>21</sup> See Metro Post Data Collection Report FY13, Q1-2, May 24, 2013; Metro Post Data Collection Report, Fiscal Year 2013, Quarter 3, September 13, 2013; Metro Post Data Collection Report, Fiscal Year 2013, Quarter 4, December 19, 2013; Metro Post Data Collection Report, Fiscal Year 2014, Quarters 1-3, September 5, 2014.

This Order updates the existing data collection plan in light of the market test expansion to additional metropolitan areas nationwide. The updated Metro Post data collection plan consists of the following information, disaggregated by fiscal quarter, for each metropolitan area tested:

- Total revenue generated from the market test;
- Attributable costs incurred in conducting the market test, including product specific costs related to the administration of the market test;<sup>22</sup>
- Volume data consisting of the total number of packages delivered via Metro Post;
- Number of test participants; and
- Work hours, travel times and distance, and other cost data.

The Postal Service shall file the information required by the data collection plan in data collection reports. 39 C.F.R. § 3035.20(d). The Postal Service must continue to file data collection reports within 40 days after the close of each fiscal quarter during which the Metro Post market test is conducted. See Order No. 1539 at 13. Data or information may be filed under protective conditions to prevent disclosure of commercially sensitive material.

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<sup>22</sup> Order No. 1539 required the Postal Service to report “attributable and total costs incurred in conducting the market test, including administrative and ancillary costs” as part of the data collection plan. Order No. 1539 at 12. During the rulemaking proceeding establishing rules for market tests of experimental products, the Postal Service asked the Commission to clarify the meaning of “administrative and ancillary costs.” Docket No. RM2013-5, Order Adopting Final Rules for Market Tests of Experimental Products, August 28, 2014, at 29 (Order No. 2173). In the final rules, “administrative and ancillary costs” were replaced by “product specific costs.” *Id.* at 31. The updated Metro Post data collection plan is revised to reflect this change.

V. ORDERING PARAGRAPHS

*It is ordered:*

1. The Commission grants the Postal Service's request to extend the Metro Post market test for an additional year. The Metro Post market test shall expire on December 16, 2015 unless the market test is cancelled.
2. Based on the record before it, the Commission finds that the proposed expansion of the Metro Post market test to additional metropolitan areas nationwide is consistent with 39 U.S.C. § 3641.
3. Pursuant to 39 C.F.R. § 3035.6 and Order No. 1539, the Postal Service must provide the Commission 10 days advance notice before expanding the Metro Post market test to a new metropolitan area or otherwise changing the market test, *e.g.*, number of customers and number of packages.
4. The data collection plan for the Metro Post market test is updated as described in the body of this Order.
5. The Postal Service shall continue to file the results of the market test data collection plan, as described in the body of this Order, within 40 days of the end of each fiscal quarter.
6. The Mail Classification Schedule will be modified to reflect the new expiration date of the market test as discussed in the body of this Order and as shown below the signature line of this Order.

By the Commission.

Ruth Ann Abrams  
Acting Secretary

## CHANGES TO THE MAIL CLASSIFICATION SCHEDULE

The following material represents a change to the Mail Classification Schedule. The Commission uses two main conventions when making changes to the Mail Classification Schedule. New text is underlined. Deleted text is struck through.

### **Part B—Competitive Products** **2000 Competitive Product List**

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#### **2800 Market Tests**

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#### **2801 Metro Post**

#### *Reference*

Docket No. MT2013-1

PRC Order No. 1539, November 14, 2012

#### *Expires*

December 16, ~~2014~~2015

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