

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

Before Commissioners:

Robert G. Taub, Chairman;
Mark Acton, Vice Chairman;
Tony Hammond; and
Nanci E. Langley

Transferring First-Class Mail Parcels
to the Competitive Product List

Docket No. MC2015-7

ORDER CONDITIONALLY APPROVING TRANSFER

(Issued July 20, 2017)

I. INTRODUCTION

On December 6, 2016, the United States Court of Appeals issued its decision remanding for further consideration the Commission's decision to deny a Postal Service request to remove the First-Class Mail Parcels product from the market dominant product list and add identical services to the existing First-Class Package Service product appearing on the competitive product list.¹

The market dominant First-Class Mail Parcels product consists of a Retail (Single-Piece) price category, and a Keys and Identification Devices price category. The Commission's decision denied the request to reclassify as competitive both price

¹ *United States Postal Service, Petitioner v. Postal Regulatory Commission, Respondent, GameFly, Inc., Intervenor*, No. 15-1338 (D.C. Cir. Dec. 6, 2016) (Remand); Order Denying Transfer of First-Class Mail Parcels to the Competitive Product Category, August 26, 2015 (Order No. 2686).

categories.² The Remand addresses only the Commission's decision concerning the Retail (Single-Piece) price category. The Court left undisturbed the Commission's decision denying the transfer of the Keys and Identification Devices price category. Remand at 2.

This Order begins with a review of the three prior parcels transfer cases identified by the Court. The parcel services proposed for transfer in the prior cases and the instant case are compared to provide a perspective on the various parcels market segments in which they operate. Then, the market segment descriptions provided by the Postal Service in each of these cases are compared. This comparison is used to provide further understanding of the substance, quantity, and quality of evidence the Commission believes was necessary to support each separate proposal to transfer parcel services. Each proposal is factually different, involves different products or services, and relies upon different market segment definitions. Based on these reviews, the Commission reiterates its conclusion that additional information is needed to support a transfer of the retail First-Class Mail Parcels product. The Commission then explains how it will evaluate market power as applicable to 39 U.S.C. § 3642(b)(1) in the future for product list assignment cases that are likely to come before the Commission.

This Order concludes with a re-analysis of the proposal to transfer the Retail (Single-Piece) price category in light of supplemental information recently filed by the Postal Service. The Postal Service originally filed its request some 30 months ago.³ Since that time, there have been intervening price and classification changes that have made portions of the Postal Service's original proposal either inaccurate or inconsistent with current prices and classifications. Thus, on June 26, 2017, the Postal Service filed

² The Commission denied the transfer of Retail (Single-Piece) First-Class Mail Parcels based upon a finding that the Postal Service did not provide sufficient evidence demonstrating that it lacks market power as specified in 39 U.S.C. § 3642(b)(1). Order No. 2686 at 8. Specifically, the Postal Service did not identify the applicable market for Retail (Single-Piece) First-Class Mail Parcels. *Id.* at 17. The Commission denied the transfer of Keys and Identification Devices based upon an absence of any evidence to support statutory compliance. *Id.* at 23-24.

³ Request of the United States Postal Service to Transfer First-Class Mail Parcels to the Competitive Product List, November 14, 2014 (Request).

an update to its original proposal, and provided additional information.⁴ This additional information proved useful by providing the information that was found lacking when the Commission originally considered and denied the Postal Service's Request. See Order No. 2686. With this new information, the Commission now conditionally approves the transfer of the market dominant First-Class Mail Parcels Retail (Single-Piece) price category to an identical service appearing within the competitive First-Class Package Service product.⁵

II. PROCEDURAL HISTORY

On November 14, 2014, the Postal Service filed a request with the Commission, pursuant to 39 U.S.C. § 3642 and 39 C.F.R. § 3020.30 *et seq.*, which proposed to remove the First-Class Mail Parcels product from the market dominant product list and add identical services to the existing First-Class Package Service product appearing on the competitive product list. See Request. On November 20, 2014, the Commission established Docket No. MC2015-7 to consider the Request, provide notice of the Request in the *Federal Register*, establish deadlines to receive comments and reply comments, and assign an officer of the Commission to represent the interests of the general public.⁶

⁴ Response of the United States Postal Service to Chairman's Information Request No. 2, June 26, 2017 (Response to CHIR No. 2). Attachment 1 to CHIR No. 2 provides proposed Mail Classification Schedule (MCS) Changes (Response to CHIR No. 2, Attachment 1). Attachment 2 to CHIR No. 2 provides an Updated Statement of Supporting Justification (Response to CHIR No. 2, Attachment 2).

⁵ The approval is conditional on the Postal Service providing pricing for the transferred product.

⁶ Order No. 2255, Notice and Order Concerning Transfer of First-Class Mail Parcels to the Competitive Product List, November 20, 2014; 79 FR 70577 (November 26, 2014).

A Chairman's Information Request was issued.⁷ On December 15 and 16, 2014, the Postal Service provided responses to CHIR No. 1.⁸

GameFly, Inc. (GameFly) and the Public Representative filed comments.⁹ The Postal Service filed reply comments.¹⁰ The Postal Service filed a correction to its comments,¹¹ and GameFly filed supplemental comments.¹² The Postal Service filed a response to GameFly's supplemental comments.¹³

On August 26, 2015, the Commission issued Order No. 2686 which denied the Postal Service's Request without prejudice subject to the submission of a fully supported future request to transfer the First-Class Mail Parcels product.

On September 22, 2015, the Postal Service petitioned the United States Court of Appeals for the District of Columbia to review the Commission's decision in Order No. 2686.¹⁴ GameFly intervened in this matter, but did not actively participate.¹⁵ On

⁷ Chairman's Information Request No. 1, December 9, 2014 (CHIR No. 1).

⁸ Response of the United States Postal Service to Chairman's Information Request No. 1, December 15, 2014 (Response to CHIR No. 1); Response of the United States Postal Service to Chairman's Information Request No. 1, Question 3, December 16, 2014 (December 16 Response to CHIR No. 1).

⁹ Comments of GameFly, Inc., December 17, 2014 (GameFly Comments); Public Representative Comments, December 17, 2014 (PR Comments).

¹⁰ Reply Comments of the United States Postal Service, January 7, 2015 (Postal Service Reply Comments).

¹¹ Notice Regarding United States Postal Service Reply Comments, January 27, 2015.

¹² Supplemental Comments of GameFly, Inc., January 28, 2015. GameFly filed an errata to its supplemental comments on January 29, 2015. GameFly, Inc. Notice of Errata, January 29, 2015. The errata were included in a clean copy of the supplemental comments on the same day. Supplemental Comments of GameFly, Inc., January 29, 2015 (GameFly Supplemental Comments).

¹³ United States Postal Service Response to Supplemental Comments of GameFly, Inc., February 5, 2015 (Postal Service Response); Notice of Erratum to United States Postal Service Response to Supplemental Comments of GameFly, Inc., February 6, 2015.

¹⁴ See Petition for Review, *United States Postal Service v. Postal Regulatory Commission*, No. 15-1338 (D.C. Cir. Sep. 22, 2015).

¹⁵ See Motion of GameFly, Inc., for Leave to Intervene, *United States Postal Service v. Postal Regulatory Commission*, No. 15-1338 (D.C. Cir. Oct. 10, 2015).

December 6, 2016, the Court issued its decision remanding Order No. 2686 to the Commission for further consideration.

A second Chairman's Information Request was issued on May 25, 2017.¹⁶ On June 26, 2017, the Postal Service provided responses to CHIR No. 2.

III. APPLICABLE STATUTORY AND REGULATORY REQUIREMENTS

Section 3642 governs the addition of products to, removal of products from, or transfer of products (or components of a product) between the market dominant and competitive product lists. 39 U.S.C. § 3642. The Commission may consider a change to a product's market dominant or competitive designation upon request of the Postal Service, users of the mails, or upon its own initiative. 39 U.S.C. § 3642(a). The criteria for assigning a product to either the market dominant or competitive product list is described in 39 U.S.C. § 3642(b). When transferring products between product lists, there is nothing to prevent transfer of only part of a product. 39 U.S.C. § 3642(c).

The criteria for assigning a product to either the market dominant or competitive product list are based on an assessment of the Postal Service's market power; whether or not the product is covered by the postal monopoly; and the concerns of the private sector, users of the product, and small businesses.

The market power criteria are specified in 39 U.S.C. § 3642(b)(1) as follows:

(1) The market-dominant category of products shall consist of each product in the sale of which the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products. The competitive category of products shall consist of all other products.

The postal monopoly criteria are specified in 39 U.S.C. § 3642(b)(2) as follows:

¹⁶ Chairman's Information Request No. 2, May 25, 2017.

(2) Exclusion of Products Covered by Postal Monopoly.—A product covered by the postal monopoly shall not be subject to transfer under this section from the market-dominant category of mail. For purposes of the preceding sentence, the term “product covered by the postal monopoly” means any product the conveyance or transmission of which is reserved to the United States under section 1696 of title 18, subject to the same exception as set forth in the last sentence of section 409(e)(1).

The private sector, users of the product, and small businesses criteria are specified in 39 U.S.C. § 3642(b)(3) as follows:

(3) Additional Considerations.—In making any decision under this section, due regard shall be given to—

(A) the availability and nature of enterprises in the private sector engaged in the delivery of the product involved;

(B) the views of those who use the product involved on the appropriateness of the proposed action; and

(C) the likely impact of the proposed action on small business concerns (within the meaning of section 3641(h)).

The implementing regulations for the above requirements appear at 39 C.F.R. part 3020. The regulations specific to this docket appear at 39 C.F.R. part 3020, subpart B. 39 C.F.R. §§ 3020.30, *et seq.* Section 3020.32 specifies the supporting justification that the Postal Service is required to submit when it seeks to modify the product lists. That justification must include a verification that the change does not classify as competitive a product over which the Postal Service exercises “sufficient market power” as outlined in section 3642(b)(1). See 39 C.F.R. § 3020.32(d).

When including products on the competitive product list (as proposed in this docket), the product must also meet the financial requirements of 39 U.S.C. § 3633.¹⁷

These regulations:

- (1) prohibit the subsidization of competitive products by market-dominant products;
- (2) ensure that each competitive product covers its costs attributable; and
- (3) ensure that all competitive products collectively cover what the Commission determines to be an appropriate share of the institutional costs of the Postal Service.

IV. REMAND DECISION

The Court summarizes the Postal Service's argument upon review as "contending the Commission's action denying its [retail, single-piece] parcel reclassification request was arbitrary and capricious...for failing to acknowledge, much less explain, its decision to depart from precedent granting similar requests." Remand at 2. "Precedent" refers to the nature of proof that the Commission requires to justify a transfer request.¹⁸

The Court begins with a review of the evidence relied upon and the conclusions drawn by the Commission in three previous transfer cases, plus the instant parcels transfer case. Remand at 2-4. The four transfer cases are:

- Docket No. MC2010-36, Order Conditionally Granting Request to Transfer Commercial Standard Mail Parcels to the Competitive Product List, March 2, 2011 (Order No. 689);
- Docket No. MC2011-22, Order Adding Lightweight Commercial Parcels to the Competitive Product List, April 6, 2011 (Order No. 710);
- Docket No. MC2012-13, Order Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, July 20, 2012 (Order No. 1411); and

¹⁷ The product in this case is the overall First-Class Package Service product.

¹⁸ The Court notes that the Postal Service does not seek review of the denial of the request to transfer the Keys and Identification Devices category to competitive. *Id.*

- Docket No. MC2015-7, Order Denying Transfer of First-Class Mail Parcels to the Competitive Product Category, August 26, 2015 (Order No. 2686).

The Court states “[t]he fact that the Commission has decided to change...the nature of the proof required of [the Postal Service] is not, in and of itself, objectionable,’ provided it has acknowledged the change and offered a reasoned explanation for it.”¹⁹ However, “[i]n the challenged order, the Commission neither acknowledged a change in course nor explained it.” *Id.* at 5.

The Court explains that if the change was acknowledged and explained in a prior order, the above obligation may be met by referencing that order.²⁰ The Commission’s decision discusses the Round-Trip Mailer docket in which a rigorous analysis of market definition and power are undertaken.²¹ The Court distinguishes the Round-Trip Mailer docket from the four parcel transfer dockets and concludes that the mere reference to the Round-Trip Mailer docket does not satisfy the obligation of providing an explanation in the First-Class Mail Parcels transfer docket. Remand at 5-6.

The Court further explains that the Commission could have established new precedent in Order No. 2686. However, it would not be reasoned decision-making to distinguish precedent simply by emphasizing the importance of considerations not previously contemplated when prior parcels orders did not involve materially different situations. *Id.* at 6. The Court states that the Commission was obliged to forthrightly distinguish or outrightly reject those orders.²²

The Court mentions two additional arguments; one by the Commission and one by the Postal Service. It did not accept the Commission’s argument that any error was

¹⁹ Remand at 4; citing *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981).

²⁰ *Id.* at 4-5; citing *Ramaprekash v. FAA*, 346 F.3d 1121, 1129 (D.C. Cir. 2003).

²¹ Order No. 2686 at 15 n.27, discussing Docket Nos. MC2013-57 and CP2013-75, Order Denying Request, December 23, 2014 (Order No. 2306) concerning the Round-Trip Mailer request.

²² *Id.* The Commission’s Order addressing the instant remand proceeds to explain how the earlier transfer cases were factually different, and how those differences present a challenge to identifying the applicable market segment in which Retail (Single-Piece) First-Class Mail Parcels operates for the purpose of undertaking a market power analysis pursuant to 39 U.S.C. § 3642(b)(1).

harmless because the denial of the transfer request was without prejudice to refile. *Id.* It did not address the Postal Service's alternative contention that because the Commission did not address the issues raised by the dissenting opinion, the Commission's decision was arbitrary and capricious. *Id.* at 7.

The Court concludes by remanding the case to the Commission for further consideration.

V. BACKGROUND DISCUSSION

As it relates to the Postal Service, a parcel is defined as: "(1) Mail that does not meet the mail processing category of letter-size mail or flat-size mail...usually enclosed in a mailing container such as a carton." or "(2) A package."²³ Generally, parcels must contain "mailable matter" and weigh between 0 and 70 pounds. Items that fit within this definition are included within the Postal Service's overall parcels market.²⁴ As a result of this expansive definition, the Postal Service's overall parcels market is quite broad.

A broad definition of the parcels market, however, is not always helpful when analyzing the market power requirements of 39 U.S.C. § 3642(b)(1). For example, it is undisputed that United Parcel Service (UPS), Federal Express (FedEx) and others compete with the Postal Service in the overall parcels market through a variety of product offerings. Given a broad definition of the parcels market, which may include nearly all product types offered by the Postal Service, and the known competition, it might be reasonable to conclude that the Postal Service does not possess market power per 39 U.S.C. § 3642(b)(1) for any of its parcel products, and that potentially any parcel product may be categorized as competitive.²⁵ However, given that individual

²³ Publication 32, Glossary of Postal Terms, United States Postal Service, July 2013 at 157.

²⁴ Note that by this definition even letter-sized mail or flat-sized mail may be rated as a parcel if all mail processing category requirements are not met.

²⁵ At this point, the Commission is focusing solely on the market power requirements. The Commission recognizes that products also must meet other requirements. See 39 U.S.C. § 3633 and 39 U.S.C. § 3642(b)(2) and (3).

products exhibit different characteristics, this could be an erroneous conclusion. Thus, using an overly broad definition of the parcels market as the metric for evaluating market power relevant to Retail (Single-Piece) First-Class Mail Parcels may not produce meaningful results for the purpose of an 39 U.S.C. § 3642(b)(1) analysis.²⁶

In reality, most providers in the parcels market offer a variety of products within the overall parcels market.²⁷ Each product is tailored to meet the needs of the sender, capabilities of the service providers, and potential expectations of the recipient. Each product may be differentiated by customer base (retail, commercial, combination), speed of delivery (expedited, non-expedited), weight (lightweight, heavier), mode of transportation (air, ground, combination), pricing structure (zoned, unzoned; ounce increments, pound increments), or service guarantees (with, without) to name a few possibilities. It is reasonable to conclude that each variety of product is designed to meet the needs of a different market segment within the overall parcels market.²⁸

As shown by the previous parcel transfer cases, the Postal Service also recognizes the existence of various market segments. It offers different products with distinctive characteristics within the overall parcels market intended to address the needs of various market segments.²⁹ Four examples are provided by the three previous parcels transfer cases cited by the Court and the instant parcels transfer case now

²⁶ The Commission relies upon guidance provided in the Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August, 19, 2010, Chapter 4 (Horizontal Merger Guidelines), for properly defining the breadth of markets. Example 4 on page 8 is illustrative of the issues that arise when defining a market too broadly. See also Docket Nos. MC2012-14 and Docket No. R2012-8, Order No. 1448, Order Approving Addition of Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market Dominant Product List, August 23, 2012, at 23 (when analyzing the desirability of special classifications pursuant to 39 U.S.C. § 3622(c)(10)(B)); and Order No. 2306 at 14-18 (when analyzing market power pursuant to 39 U.S.C. § 3642(b)(1)).

²⁷ As applicable to the Postal Service, a “product” means a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied.” 39 U.S.C. § 102(6). For the purposes of a market power analysis pursuant to 39 U.S.C. § 3642(b)(1), the definition of a product includes “subclasses and other subordinate units” of a product. 39 U.S.C. § 3642(c).

²⁸ Given the vast combination of potential products features that may be offered, the Commission recognizes that many of these market segments may overlap.

²⁹ The Postal Service’s discussion of various market segments in its transfer proposals cited by the Court supports this conclusion.

under consideration. These examples represent only a small portion of the Postal Service's product offerings within the parcels market.

As the Commission concluded above, using the overall parcels market as the basis for evaluating market power may not produce meaningful results.³⁰ However, the complexities of the parcels market allows the Commission to analyze market power by defining an appropriate market segment within which the Postal Service's product operates based on a comparison of similar products or service offerings from different service providers. It is apparent that service providers offer a variety of products within the overall parcels market, and that these products address different segments of the overall parcels market. It is also apparent that all service providers do not compete equally within each market segment. Focusing an analysis on the appropriate market segment should result in a more meaningful market power analysis consistent with the requirements of 39 U.S.C. § 3642(b)(1).

Overall, this analysis presents a challenge to the Commission when evaluating the statutory market power provisions pursuant to 39 U.S.C. § 3642(b)(1). The Commission must define the applicable market segment upon which to undertake the market power analysis required by statute.³¹ The Commission also must identify the potential competition and the associated competitive products. The challenge is met by

³⁰ The Commission's position is supported by the Horizontal Merger Guidelines, Chapter 4.

³¹ The Commission discussed this approach in its decision. See Order No. 2686 at 15-16. This approach parallels the approach discussed in the Horizontal Merger Guidelines.

When the Agencies identify a potential competitive concern with a horizontal merger, market definition plays two roles. First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Second, market definition allows the Agencies to identify market participants and measure market shares and market concentration. See Section 5. The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.

Horizontal Merger Guidelines at 7.

undertaking a fact based analysis which compares various market segment characteristics, examines the entities that compete in that market segment, and assesses the characteristics of the products that are offered.³²

There is no bright line test to direct the Commission in this analysis. However, the Horizontal Merger Guidelines provides some guidance.³³ First, the market segment must not be defined so narrowly as to exclude all logical participants, nor so broadly as to include every conceivable participant. This balancing must be done to give meaning to the market power analysis. Second, thought must be given to the product attributes necessary to compete within the defined market segment. Some attributes will be relevant to evaluating competition, while others will be of lesser importance. The goal is to identify reasonably comparable products that compete within the same or a similar market segment.

In the Retail (Single-Piece) First-Class Mail Parcels transfer case that is the subject of the remand, the Commission denied the transfer request, concluding that it did not have sufficient information concerning the applicable market segment and the

³² The Horizontal Merger Guidelines confirms that: “[r]ather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time.” Horizontal Merger Guidelines at 1.

³³ See “The Hypothetical Monopolist Test,” Horizontal Merger Guidelines, Chapter 4.1.1, at 8.

potential competing products upon which it could reach a decision.³⁴ The Postal Service contends that it provided the same evidence in this docket that it had provided in three previous parcel transfer dockets, which successfully supported the transfer of those products. The Court concluded that when denying the transfer of First-Class Mail Parcels, the Commission did not explain how this transfer docket differed from the previous three dockets, or more specifically why the Commission was apparently requiring a different level of evidence in this docket compared to the previous three dockets.

The Commission answers the Court's question in two parts. First, although the products in the three previous dockets and the instant docket all can be considered parcels, their product characteristics are different enough for the Commission to conclude that they do not operate in the same segments of the overall parcels market. The Commission will compare and contrast the products to demonstrate the significant differences among them. These product differences support a conclusion that the products operate in different market segments.³⁵ The specific factual parameters associated with each potential market segment determines the evidence required to support a market power analysis pursuant to 39 U.S.C. § 3642(b)(1).

³⁴ "The Commission finds that the Postal Service does not provide sufficient evidence demonstrating that it lacks market power." Order No. 2686 at 8.

More specifically, the Commission stated:

The Postal Service has the burden to identify the applicable market for Single Piece, First-Class Mail Parcels, and provide evidence in support of its position. 39 C.F.R. §§ 3020.30, *et seq.* The Postal Service has not done this. Instead the Postal Service focuses on providing information concerning the newly combined product. A market definition for this newly defined product may or may not be appropriate for the Single-Piece, First-Class Mail Parcels product alone.^{FN31} [FN31: A market definition for a combined product may be broader than a market definition for an individual product, and may not be appropriate for analyzing the provisions of section 3642(b)(1).]

Id. at 17.

³⁵ Although various market segments may overlap.

Second, in each of the four dockets, the Postal Service provided different descriptions of the market segments in which the various products operate.³⁶ The Commission will compare and contrast the Postal Service's differing descriptions for the four parcels transfer proposals. After this review, the Commission concludes that the substance, quantity, and quality of evidence provided for the first three parcel transfer proposals is adequate based upon the specific facts associated with each proposal.

However, for the transfer case that is the subject of the remand, the Commission concludes that additional information is needed. The Commission denied the request because the Postal Service did not provide a market description specific to the Retail (Single-Piece) First-Class Mail Parcels product. Based on the instant review on remand of the differing market segment descriptions provided by the Postal Service for the previous parcels transfer proposals, as well as evaluation of the underlying statutory requirements, the Commission concludes that information in addition to that originally provided by the Postal Service is necessary to adequately analyze the market power requirements of 39 U.S.C. § 3642(b)(1).

VI. PARCELS PRODUCT COMPARISONS

A. Introduction

Although the four cases discussed by the Court involve the transfer of a parcel service from the market dominant to the competitive category, each service exhibits different characteristics.³⁷ The services may overlap in certain respects, but they generally do not act as substitutes for each other.³⁸ This has important implications for

³⁶ While the "quantity" or "level" of evidence provided by the Postal Service may have been similar, the specific facts presented by the evidence itself were very different.

³⁷ The Postal Service offers a variety of different products that may be used to mail parcels in different segments of the overall parcels market. This section is limited to discussion of the four parcels transfer proceedings referred to by the Court.

³⁸ If one product does not act as a substitute for another, a customer will not have an option to choose one product over the other to meet the customer's needs. Therefore, it is unlikely that the two products occupy the same market segment.

describing both the alternative service providers, similar competing services, and the market segments in which the parcels services operate.³⁹

B. Transfer of Commercial Standard Mail Parcels (Docket No. MC2010-36)

The commercial Standard Mail Parcels service is intended for commercial mailers of lightweight parcels (fulfillment parcels).⁴⁰ Transportation is entirely by ground, which reflects the product's three-to-ten day service standard for the contiguous United States (up to 22 days elsewhere), with the addition of the Postal Service's ability to defer service by one day.⁴¹

Each parcel must be less than 108 inches in combined length and girth, and under 16 ounces in weight.⁴² Pricing is unzoned, based on entry level, and applicable per piece and/or per pound pricing schedules.⁴³ Each mailing must consist of 200 pieces, or a total of 50 pounds, and must be entered in bulk through a business mail entry unit.⁴⁴ Letter "content" (as opposed to mailpiece shape) is prohibited, with limited exceptions.⁴⁵

³⁹ The section that follows discusses the characteristics of the service before transfer. The characteristics of the services may have changed after transfer or due to subsequent classification decisions.

⁴⁰ See Docket No. MC2010-36, Request of the United States Postal Service to Transfer Commercial Standard Mail Parcels to the Competitive Product List, August 16, 2010 (Commercial Standard Mail Parcels Request).

⁴¹ Docket No. MC2011-22, Responses of the United States Postal Service to Questions 1–4 of Chairman's Information Request No. 1, March 24, 2011, question 1 (Docket No. MC2011-22, Responses to CHIR No. 1); 39 C.F.R. Part 121, Appendix A to Part 121—Tables Depicting Service Standard Day Ranges, July 1, 2010.

⁴² Commercial Standard Mail Parcels Request, Attachment C § 1230.1 (note that this information was omitted from the final revision to Attachment C, but remains accurate).

⁴³ Docket No. MC2010-36, Responses of the United States Postal Service to Questions 1-2, 5-11 of Commission's Information Request No. 1, December 15, 2010, Attachment B § 1230.5 (Docket No. MC2010-36, Responses to CHIR No. 1).

⁴⁴ Commercial Standard Mail Parcels Request, Attachment C § 1230.2 (note that this information was omitted from the final revision to Attachment C, but remains accurate); see Docket No. MC2011-22, Responses to CHIR No. 1.

⁴⁵ Docket No. MC2010-36, Responses to CHIR No. 1, Attachment A at 8.

C. Transfer of Commercial First-Class Mail Parcels (Docket No. MC2011-22)

The commercial First-Class Mail Parcels service is also intended for commercial mailers of lightweight parcels.⁴⁶ It is generally used for fulfillment purposes by businesses selling merchandise, prescription drugs, and other similar items. *Id.* Attachment B at 4. Shipments are moved using a combination of air and ground transportation, which reflects the product's one-to-three day service standard for the contiguous United States (up to five days elsewhere), with no provisions for deferral.⁴⁷

Each parcel is limited to a maximum dimension of 18 by 15 by 22 inches.⁴⁸ There are also minimum dimension requirements. *Id.* This service consists of two price categories; Commercial Base and Commercial Plus.⁴⁹ The Commercial Base price category has a weight limit of 13 ounces. *Id.* § 1120.1. The Commercial Plus price category has a weight limit of less than 16 ounces. *Id.*

Typically, single-piece mailings are entered through the collection mailstream and bulk mailings are entered through a business mail unit.⁵⁰ Pricing is unzoned and based on entry level. Prices are offered for single-piece through various sortation levels with various minimum volume requirements.⁵¹ Commercial Plus pieces are priced uniformly in the 3.5 to 16 ounce range. *Id.* § 1120.5. Commercial Plus pieces are

⁴⁶ See Docket No. MC2011-22, Request of the United States Postal Service Under Section 3642, February 24, 2011 (Commercial First-Class Mail Parcels Request).

⁴⁷ 39 C.F.R. Part 121, Appendix A to Part 121—Tables Depicting Service Standard Day Ranges, July 1, 2010; see Docket No. MC2011-22, Responses to CHIR No. 1.

⁴⁸ Commercial First-Class Mail Parcels Request, Attachment C § 1120.1.

⁴⁹ *Id.* § 1120.2. The overall First-Class Mail product included Commercial Plus, Commercial Base, Retail, and Keys and Identification Devices price categories. In the commercial First-Class Mail Parcels docket, the Postal Service proposes to only transfer the Commercial Plus and Commercial Base price categories to competitive.

⁵⁰ Docket No. MC2011-22, Responses to CHIR No. 1, question 3.

⁵¹ Commercial First-Class Mail Parcels Request, Attachment C § 1120.2.

priced in 1 ounce increments, up to 13 ounces. *Id.* Letter “content” (as opposed to mailpiece shape) is allowed.⁵²

D. Transfer of Parcel Post (Docket No. MC2012-13)

The Parcel Post service is described as an economical package delivery service for less-than urgent and oversized packages.⁵³ The customer base is split between consumer/non-business users and commercial/business users.⁵⁴ Transportation is entirely by ground, which reflects the product’s two-to-eight day service standard for the contiguous United States (up to 20 days elsewhere), with the addition of the Postal Service’s ability to defer service.⁵⁵

Each parcel must be less than 130 inches in combined length and girth, and under 70 pounds in weight.⁵⁶ Pricing is zoned (8 zones) and rated in 1 pound increments. *Id.* § 1405.6. There is no minimum volume requirement (*i.e.*, may be entered as single-piece). *Id.* § 1405.3. Letter “content” (as opposed to mailpiece shape) is prohibited, with limited exceptions. *Id.* Attachment B at 6-7.

⁵² Commercial First-Class Mail Parcels Request, Attachment B at 7-8. Upon transfer to the competitive category, letter content was prohibited. For a brief period of time after transfer, letter content was again allowed for the Commercial Plus price category. See Docket No. MC2011-28. Currently, letter content is prohibited. See Docket No. CP2016-9.

⁵³ Docket No. MC2012-13, Request of the United States Postal Service to Transfer Parcel Post to the Competitive Product List, April 26, 2012, at 1-2 (Parcel Post Request).

⁵⁴ *Id.* Attachment B at 4. The Postal Service provides this assessment based upon 57 percent of Parcel Post shipments being paid for using stamps or Postal Validation Imprint (generally associated with consumers or small businesses paying at the retail counter) and 43 percent of Parcel Post shipments being paid for using Meter, IBM, permit, or other postage (generally associated with commercial customers). *Id.* n.8.

⁵⁵ *Id.* at 4; 39 C.F.R. Part 121, Appendix A to Part 121—Tables Depicting Service Standard Day Ranges, July 1, 2011.

⁵⁶ Parcel Post Request, Attachment C § 1405.2.

E. Transfer of Retail First-Class Mail Parcels (Docket No. MC2015-7)

The Retail (Single-Piece) First-Class Mail Parcels service is intended for the fast delivery of any mailable matter (weighing less than 13 ounces) in one-to-three business days.⁵⁷ The service is used by a diverse customer base.⁵⁸ Shipments are moved using a combination of air and ground transportation, which reflects the product's one-to-three day service standard for the contiguous United States (up to five days elsewhere), with no provisions for deferral.⁵⁹

Each parcel must be less than 108 inches in combined length and girth, with a 13 ounce weight limit.⁶⁰ Pricing is unzoned and rated in 1 ounce increments. *Id.* § 1120.5. There is no minimum volume requirement (*i.e.*, may be entered as single-piece). *Id.* § 1120.2. Letter "content" (as opposed to mailpiece shape) is allowed.⁶¹

F. Four Services, Potentially Four Different Market Segments

Both commercial Standard Mail Parcels and commercial First-Class Mail Parcels meet the needs of commercial (fulfilment) mailers, mailing lightweight packages (under one pound) in bulk. The First-Class Mail service provides a shorter delivery timeframe than the Standard Mail service. Mailers must have a relatively sophisticated understanding of Postal Service entry and rating requirements to utilize these specialized products. Because of the extra burden imposed on the mailer by these

⁵⁷ Request of the United States Postal Service to Transfer First-Class Mail Parcels to the Competitive Product List, November 14, 2014, at 2 (Retail First-Class Mail Request).

⁵⁸ The Postal Service bases this opinion on its analysis showing 29 percent of consumers and small businesses pay at the retail counter, 59 percent of small business customers pay using PC Postage, and 12 percent of large commercial mailers use permit imprint—typically dropping parcels directly at the Destination Delivery Unit. Retail First-Class Mail Request, Attachment B at 3 nn.5, 6.

⁵⁹ *Id.* Attachment B at 3; 39 C.F.R. Part 121, Appendix A to Part 121—Tables Depicting Service Standard Day Ranges, July 1, 2015.

⁶⁰ Retail First-Class Mail Request, Attachment C §1120.1.

⁶¹ *Id.* Attachment B at 4-5. This is an important feature when considering the product's placement within the First-Class Mail class. Without this product feature, mailers would most likely have to use the higher priced Priority Mail service to mail similarly sized items that contain "letter" content.

additional entry and rating requirements, it is highly unlikely that a retail (non-business) customer would ever use either of these services.

The Parcel Post service is for the delivery of individual (single-piece), non-urgent, heavier packages (0 to 70 pounds). It is readily available to both retail and commercial mailers. It is generally recognized that services similar to Parcel Post in terms of the physical characteristics of the item being mailed, delivery timeframes, and entry and rating requirements are offered by the Postal Service's major competitors.

The Retail (Single-Piece) First-Class Mail Parcels service is intended for the fast delivery of any mailable matter (weighing less than 13 ounces). It is readily available to both retail and commercial mailers. Although the service is similar to commercial Standard Mail Parcels and commercial First-Class Mail Parcels in that it is used to mail lightweight items, that is where the similarity ends. There are no pre-sortation or volume requirements and there is a simple per ounce pricing schedule. The service is heavily relied upon by retail customers for lightweight items that fall outside of the First-Class Mail letter or flat classifications at a lower price than some of the other premium services offered by the Postal Service.⁶² Commercial mailers also rely on this service for single-piece mailings or when there is a pricing advantage over other services intended for commercial use.

Based on the evidence submitted by the Postal Service and the analysis above, the Commission finds that each of the four services are different and potentially address different segments of the overall parcels market. For the most part, the products are not interchangeable and do not act as substitutes for each other. The various products are used to deliver parcels with different physical characteristics and with different service requirements. While there is some overlap, the customers using each of the services are likely to be different. It also can be assumed that these products are, to varying extents, in competition with various services offered by other providers.

⁶² It is the most economical product available when speed of delivery and other features of First-Class Mail are required.

A market power analysis, by its very nature, is a fact based analysis.⁶³ The Commission, upon this review, observes that each transfer proposal concerns a different product, potentially addressing a different market segment, with a different customer base. This infers that the evidence presented in each of the four cases need not be the same in substance, quantity, or quality, but instead should be tailored to the specifics of the transfer proposal. *Ab initio*, this distinguishes the four parcels transfer cases considered by the Court.

VII. PARCELS MARKET COMPARISONS

A. Introduction

As previously stated, a market power analysis pursuant to 39 U.S.C. § 3642(b)(1) is a fact based analysis. The Commission has demonstrated in the previous section that the four parcels transfer cases are distinguishable because the individual products proposed for transfer are different in the services provided and the customer base served, and potentially represent different market segments. In this section, the Commission will demonstrate that the Postal Service provided different market segment descriptions in each of the four transfer cases.⁶⁴ This further distinguishes the four parcel transfer cases. The Postal Service may have provided the same “quantity” of evidence in each case, but because each case require a fact based analysis, the substance or quality of evidence was found insufficient for the transfer case that is the subject of this remand.

⁶³ See *supra*, at 12 n.32.

⁶⁴ The Postal Service presents market share data as part of its market power analysis. The Commission recognizes that market share may be indicative of market power, but it is not always the decisive factor. Regardless, the Commission limits its discussion in this section primarily to the market share data provided by the Postal Service because it is sufficient to demonstrate market segment differences for the purpose of distinguishing the four cases.

The market segment descriptions provided by the Postal Service for each of the parcels transfer proposals are summarized below.⁶⁵

B. Transfer of Commercial Standard Mail Parcels (Docket No. MC2010-36)

The Postal Service asserts that it has “an overwhelming share of the under one pound ground parcel shipping marketplace.”⁶⁶ Based on this market description, the Postal Service provided market share estimates by revenue and by volume.⁶⁷ Market share is influenced by the Postal Service pricing its product significantly lower (below cost) than the competition. *Id.*

The Postal Service also provides market share data for the ground parcels market for all parcels weighting up to 70 pounds. Based on this market description, the Postal Service provided market share estimates by revenue and by volume. *Id.*

What is presented above is the Postal Service’s final description of the commercial Standard Mail Parcels market relied upon by the Commission in its decision. The Postal Service originally provided a somewhat different description of the commercial Standard Mail Parcels market in its request.⁶⁸ An information request prompted several corrections.⁶⁹ Finally, the descriptions were modified for a last time with the submission of a revised Statement of Supporting Justification.⁷⁰ During the pendency of the proceeding, the Commission also sought market information

⁶⁵ The Postal Service discusses various markets in which its products operate. In this Order, there is an attempt to use the term “market” to refer to the Postal Service’s overall parcels market, and “market segment” to refer to a subset of the overall parcels market. This convention may not have been followed in previous Commission orders, or in this Order where the distinction appears obvious. The semantical distinction does not affect the goal of defining an appropriate market (or market segment) for the purpose of undertaking the market power analysis required by 39 U.S.C. § 3642(b)(1).

⁶⁶ Docket No. MC2010-36, Responses to CHIR No. 1, question 1, Attachment A at 4.

⁶⁷ *Id.* at 5. The Postal Service had originally indicated in its request that the data were for Standard Parcels Only. This notation did not appear in the final revised version.

⁶⁸ Commercial Standard Mail Parcels Request, Attachment B at 5-6.

⁶⁹ See Docket No. MC2010-36, Responses of the United States Postal Service to Questions 2(a) and 7(a) of Chairman’s Information Request No. 1, September 14, 2010.

⁷⁰ Docket No. MC2010-36, Responses to CHIR No. 1, question 1, Attachment A.

concerning the recipient of commercial Standard Mail Parcels. The Postal Service stated that particular information responsive to the request was not available.⁷¹

C. Transfer of Commercial First-Class Mail Parcels (Docket No. MC2011-22)

The Postal Service asserts that commercial First-Class Mail Parcels competes in three market segments: (1) two-to-three day air; (2) consolidator ground services; and (3) commercial carrier ground services. The Postal Service provides market share data with the three market segments combined by revenue and by volume.⁷²

The Postal Service asserts that it has captured most of the two-to-three day air segment within the market definition provided above. *Id.* The Postal Service states that the service providers that provide two-to-three day air service are the same as those providing consolidator ground services, and posits that it appears these service providers are focusing on ground service and not air service. *Id.* at 5. The Postal Service explains that consolidator service providers combine the consolidators' transportation and processing capabilities with last-mile delivery by the Postal Service. The Postal Service states that consolidator service provides nearly the same service as the Postal Service (*i.e.*, speed of delivery), but at a lower price. *Id.*

The Postal Service includes commercial carrier ground service in its market comparison. This is based on an estimate that 92 percent of under 70 pound parcels arrive at their destination within one-to-three days. *Id.* at 7. One-to-three days is similar to the speed of delivery offered by the Postal Service product.

⁷¹ Docket No. MC2010-36, Responses of the United States Postal Service to Chairman's Information Request No. 1, September 13, 2010, questions 3, 4. The response to question 7 of this information request also solicited information pertaining to market share. It appears that this information was eventually incorporated into the final version of the Statement of Supporting Justification filed on December 15, 2010. Questions 9 and 10 solicit information pertaining to any studies undertaken to analyze the market power question for commercial First-Class Mail Parcels. The Postal Service stated that no studies have been undertaken.

⁷² Commercial First-Class Mail Request, Attachment B at 4.

D. Transfer of Parcel Post (Docket No. MC2012-13)

The Postal Service asserts that Parcel Post service “primarily competes in the ground package retail market, which includes households and small businesses with less than 9 employees.”⁷³ It also, as a general purpose ground package product, competes in the broader ground package market.⁷⁴ Based on these market descriptions, the Postal Service provided market share data by volume.⁷⁵ When discussing its market share, the Postal Service explains that its prices are lower than its perceived competition, with sometimes slower service and without a money-back guarantee. *Id.* nn.10, 11.

E. Transfer of Retail First-Class Mail Parcels (Docket No. MC2015-7)

The Postal Service asserts that the Retail First-Class Mail Parcels service competes in the two-to-three day air and ground markets for retail and commercial customers.⁷⁶ Even though some parcels are delivered within one day, the Postal Service does not consider this product to be part of the overnight parcel market. *Id.* at 4, n.7.

The Postal Service did not provide any market share information for the existing Retail First-Class Mail Parcels service to be transferred.

Instead, the Postal Service provides market share estimates by volume for the new combined First-Class Package Service product which includes the existing “retail” First-Class Mail Parcels service, plus the Commercial Base and the Commercial Plus

⁷³ Parcel Post Request, Attachment B at 4.

⁷⁴ *Id.* In the order approving the transfer, the Commission stated: “[t]he parcel delivery market is competitive.” Order No. 1411 at 6. This statement should not be interpreted broadly to mean that the overall parcels market is competitive relative to all products. When the remainder of the paragraph is read, it should be noted that the Commission was only discussing the segment of the parcels market applicable to the Parcel Post product and the similar competitive products under consideration.

⁷⁵ Parcel Post Request, Attachment B at 5.

⁷⁶ Retail First-Class Mail Request, Attachment B at 3.

services previously transferred in the “commercial” First-Class Mail Parcels docket. *Id.* at 4.

The new First-Class Package Service product could be used by both retail and commercial customers. The Commission asked whether or not single-piece and bulk parcel mailers are in separate markets. The Postal Service replied:

Yes, single-piece and bulk mailers do occupy separate markets. However, there are instances, such as eBay sellers who mail single-piece items daily, where the distinctions between single-piece and bulk mailers become blurred.

December 16 Response to CHIR No. 1, question 3.e.(i).

The Postal Service’s statement asserting separate markets supports the Commission’s position that it needs market data isolated to the single-piece retail product under consideration for transfer in order to undertake the market power analysis. Combined data encompassing multiple services from potentially two different market segments does not allow the Commission to analyze the market impact due to the proposed transfer of the singular Retail First-Class Mail Parcels service alone.

F. Four Market Segments, Four Distinct Sets of Evidence

The Commission makes several observations upon review of the four parcel transfer dockets. The proposed transfer of commercial Standard Mail Parcels was the first instance of the Postal Service proposing a transfer of a domestic parcels service. Additional evidence was developed during the pendency of the case, which was eventually found sufficient to support the transfer.

The Commission acknowledges that this case established the general process for undertaking a market power analysis. This is summarized as describing the product to be transferred, identifying potential competitors and potential competitive substitute products, determining the applicable market(s) or market segments, and finally applying the market power test of 39 U.S.C. § 3642(b)(1). This process remains constant throughout all four parcel transfer cases.

The second transfer proposal concerning the transfer of commercial First-Class Mail Parcels exhibited many similarities to the first proposal. The predominant users of both products were commercial mailers. The physical characteristics of the (lightweight) parcels being mailed were identical for all practical purposes. The major difference between the two services was speed of delivery. The Commission applied the same process it applied concerning the first proposal in making its determination in the second proposal. Because of the factual similarities, the level of support provided by the Postal Service and relied upon by the Commission, although somewhat different, was similar to that provided for the first proposal, but also found sufficient to support the transfer.

The third transfer proposal concerning the transfer of Parcel Post shared almost no similarities with the first two transfer proposals. The Parcel Post service is predominately for the mailing of larger, heavier weight packages, with a customer base that included both retail and commercial customers. Although factually different, the Postal Service did provide a comparable level of support to justify the transfer of Parcel Post as it had with the two prior proposals. The Commission again applied the process developed during the first proposal. However, there was one factual difference that greatly influenced the substance, quantity, or quality of evidence required to support this transfer. There was a high level of empirical knowledge by the Commission concerning Parcel Post and the viable alternatives to Parcel Post. Given the high level of empirical knowledge concerning this service on the part of the Commission, and albeit a similar level of support provided by the Postal Service, it was reasonable that the substance, quantity, or quality of evidence provided, although comparable to the previous two proposals, was deemed sufficient to support the transfer.

Shortly after the transfer proposal concerning Retail First-Class Mail Parcels was filed, the Commission decided the Postal Service's Round-Trip Mailer case. Order No. 2306 at 1-2. This was the first instance in which the Commission squarely faced complex market analysis issues applicable to 39 U.S.C. § 3642(b)(1) concerning the addition of a new product. The consideration of the proposal was very informative in

identifying market issues and how market analysis might be undertaken in the future. The Commission is not suggesting that the rigorous analysis provided in the Round-Trip Mailer is necessary in every case. However, the general principles espoused are applicable and will influence future decisions of the Commission.

The fourth transfer proposal concerning Retail First-Class Mail Parcels was somewhat similar to the first two transfer proposals in that the physical characteristics of the items being mailed are similar. Unlike the first two transfer proposals, the service is frequently used by all customer segments, *i.e.*, it is not predominately a commercial product. This difference was noted by commenters when arguing that the Postal Service may have described the applicable market too broadly. The variety of customers using the Retail First-Class Mail Parcels service would be more similar to those using Parcel Post, except for the mailing of lightweight versus heavier weight items.

The Postal Service provided factually different support for the transfer of Retail First-Class Mail Parcels than it had with the three prior proposals. The Commission followed the same process in reaching its decision as it had with the very first proposal. However, the Commission concluded that, based on the specific facts of this case, the supporting evidence was insufficient to support transfer.

The Commission had not been persuaded that other service providers offered reasonable substitutes for the Postal Service's retail product as it had been with the Postal Service's Parcel Post product. It had not been shown that any other service provider offered similar services for items 13 ounces and under, rated in 1 ounce increments (or whether or not this feature was important to retail, single-piece customers). The Postal Service had not demonstrated why a retail single-piece customer seeking an economical way to ship a lightweight package would opt for one of the typically more expensive competitor's products unless the customer was also seeking the additional features provided by that competitor's products. These explanations were not empirically evident. Compared with the consideration of the Parcel Post product, the Retail First-Class Mail Parcels product presented significantly

more complex issues for analysis. Consequently, the Commission was unable to base its decision by relying upon its empirical understanding of the product and potential substitute services as it had in the Parcel Post case.

Regardless, the Postal Service did not meet the minimum evidentiary bar because it did not provide market information specific to the product proposed for transfer. Order No. 2686 at 17. The Commission also noted the concerns of commenters that the Postal Service may have defined the market segment too broadly. *Id.* Additional information specific to this product and its associated market is necessary to analyze these concerns. Finally, given the proposed 22 percent price increase for this product, the Commission was unable to conclude that the Postal Service could not increase the price significantly, without risk of losing significant business to a competitor. *Id.* at 21-22. Based on the lack of supporting factual information provided specific to this case, the Commission denied the Postal Service's transfer request.

VIII. SUPPLEMENTAL GUIDANCE APPLICABLE TO FUTURE PROPOSALS

The Commission is required to undertake a 39 U.S.C. § 3642(b)(1) market power analysis whenever it reviews a proposal to change the list of market dominant products or the list of competitive products by adding new products to a list, removing products from a list, or transferring products between lists.⁷⁷ Thus far, the Commission has encountered three broad categories of proposals that require a 39 U.S.C. § 3642(b)(1) analysis: (1) negotiated service agreements (NSAs) based upon existing, previously categorized, products; (2) the addition of new or unique products; and (3) the transfer of an existing product (or portion of a product) between product categories. The burden of proof and the burden of producing the proof necessary to support each category of proposal is different, as explained below.

⁷⁷ Although technically required by statute, it is a moot point to perform a market power analysis when removing a product from a product list.

The majority of proposals, sometimes numbering over 100 *per year*, involve the addition of a negotiated service agreement to a product list.⁷⁸ The typical negotiated service agreement is nothing more than the offering of an existing product(s) at a customized price, or with features customized to the needs of a mailer. Because the agreements consist of existing products that previously have been categorized as market dominant or competitive, there is little to no reason for requiring a reanalysis of the market power issue.⁷⁹ No change in the product's underlying categorization is being proposed. Thus, the Commission relies on little more than the Postal Service identifying the product(s) upon which the agreement is based, and its assertions as to the competitive or market dominant nature of the product. This presents a low burden of proof. The Postal Service's current approach to supporting these types of proposals appears adequate.

The occurrences of the Commission receiving proposals that involve the addition of new or unique products to the product lists are limited. These cases involve the initial characterization of a product as market dominant or competitive. The only relevant example of this type of proposal is the Round-Trip Mailer docket. In this case, the Postal Service proposed a new competitive product, tentatively named Round-Trip Mailer, to replace existing market dominant options for round-trip DVD mail. Order No. 2306 at 1-2. In denying the request, the Commission undertook an extensive examination of the market related to the proposed product. This was necessary because of an initial lack of understanding of the market in which the product would operate and the uniqueness of the product under consideration. Without a thorough understanding of the market, the Commission would have been unable to undertake the analysis required by 39 U.S.C. § 3642(b)(1). This docket presents an example of a requirement for a high burden of proof. The Commission would urge the Postal Service

⁷⁸ In most instances, a negotiated service agreement is considered to be a product by the Commission.

⁷⁹ Assuming the product is well understood and there is no appreciable change in the market in which the product operates.

to follow the guidance provided by the Round-Trip Mailer opinion whenever proposing the addition of new or unique products.

Finally, the Commission occasionally receives proposals to transfer a product between product lists. Thus far, these proposals number in the single digits. These proposals involve the re-characterization of a product as market dominant or competitive. Unlike a negotiated service agreement proposal where there is no change in the underlying product(s) categorization, a transfer proposal asks to change the existing market dominant or competitive categorization. Therefore, sufficient information must be provided describing the applicable market(s), competitors, and similar products to undertake the market power analysis as required by statute. Unlike a proposal that involves the addition of new or unique product, the existing product under consideration typically is understood, has a marketplace history with known competitors, and has identifiable similar products offered by the competition. The burden of proof is still relatively rigorous in transfer cases, but because there is an assumption that the product and the marketplace is already understood, the burden upon the proponent to produce that evidence should be relatively low. The Commission provides many suggestions for information that would further a market power analysis related to the transfer of a product in Order No. 2686.

IX. APPROVING TRANSFER OF FIRST-CLASS MAIL PARCELS RETAIL (SINGLE-PIECE)

A. Introduction

Since this docket has been remanded to the Commission, the Postal Service has provided the Commission with additional information that has addressed the issues identified in Order No. 2686, which denied the Postal Service's initial request to transfer First-Class Mail Parcels Retail (Single-Piece) to the competitive category. The following discussion demonstrates compliance with the transfer requirements of 39 U.S.C. § 3642(b), and the competitive product requirements of 39 U.S.C. § 3633. Furthermore,

the Keys and Identification Device price category, which remains market dominant, is shown to meet the market dominant product requirements of 39 U.S.C. § 3622.

B. Market Power—39 U.S.C. § 3642(b)(1)

Section 3642(b)(1) defines the market dominant category of mail products. If “the Postal Service exercises sufficient market power that it can effectively set the price of such product [the product under consideration] substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products” the product must be classified as market dominant. The competitive category of products shall consist of all other products.

In its responses to CHIR No. 2, the Postal Service provides additional information in support of its transfer proposal. These responses provide important information that was lacking in the Postal Service’s original request for transfer in Order No. 2686. The responses also provide insights from the last several years of experience with both Market Dominant and Competitive First Class Parcel offerings.

The Postal Service describes the Single-Piece customer as primarily consisting of small businesses and individual customers who pay for postage at the retail counter and online. Response to CHIR No. 2, Attachment 2 at 3. Based on Indicia Data, the Postal Service estimates that 44 percent of these parcels were paid for using stamps or Postal Validation Imprint (indicating consumer and small businesses paying at the retail counter), 51 percent were paid for using PC Postage (indicating small business use), and 5 percent using permit imprint (indicating large commercial mailer use). *Id.* nn.4, 5. The Postal Service contends that Indicia Data indicate Single-Piece serves “a considerable number of large commercial mailers.” *Id.* Attachment 2 at 3. From this

conclusion, the Postal Service argues that the Postal Service's parcels products serve a single marketplace, and ought to be combined.⁸⁰

The Postal Service's market share analysis indicates that First-Class Mail Parcels compete in the "2-3 Day Air" and "Ground" parcels market. *Id.* at 3-4. It estimates that the combined Single-Piece, Commercial Base, and Commercial Plus product will account for 7.9 percent of the entire parcels market, 8.6 percent of the 0-70 pound 2-3 Day Air and Ground market, and 35.9 percent of the under 1 pound 2-3 Day Air and Ground market.⁸¹ The Postal Service contends that these market percentages indicate that the proposed combined First-Class Package Service product would not have a market dominant share.

The recently provided market share data shows that market share for the combined product has decreased since FY 2013. Response to CHIR No. 2, question 2. The revised market share data provided by the Postal Service details the market share of the new First-Class Package Service, incorporating what was formerly First-Class Mail Parcels. In the two more broadly defined markets by the Postal Service, 2-3 Day and Ground markets (up to 70 pounds) and the Entire Parcels market, the Postal Service's market share has increased slightly, but remains quite small. In the much more narrowly-defined market of 2-3 Day and Ground market (under 1 pound), the Postal Service's market share has declined from 38.7 percent to 35.9 percent. *Id.* question 2.a.

The Postal Service also provided market share data for exclusively First-Class Mail Retail Parcels (Single-Piece), which was not provided in the initial request. These data state that the market share for First-Class Mail Retail Parcels (Single-Piece) alone is 1.9 percent for the Entire Parcel market, 8.8 percent for the 2-3 Day and Ground

⁸⁰ *Id.* The Commission assumes the Postal Service is referring to First-Class Mail Retail Single-Piece combined with First-Class Package Service.

⁸¹ *Id.* at 4. Single-Piece, Commercial Base, and Commercial Plus refer to the price categories at the time of the Postal Service's original transfer proposal. These designations have changed over time. The Response to CHIR No. 2, Attachment 1 proposes only Commercial and Retail price categories that encompass the three original price categories.

market (under 1 pound), and 2.1 percent for the 2-3 Day and Ground market (up to 70 pounds). *Id.* question 2.b.

The Postal Service notes that First-Class Mail Parcels compete primarily against the parcel shipping services offered by UPS and FedEx. Response to CHIR No. 2, Attachment 2 at 6. It identifies the similar parcel shipping products offered by UPS and FedEx. *Id.* UPS's comparable products include 2nd Day Air, 3-Day Select, and Ground products. FedEx's comparable products include One Rate, 2-Day, Express Saver, Ground, and Home Delivery products. Unlike the Postal Service's offerings, competitors offer additional features such as money-back guarantees and insurance. *Id.*

For the above reasons, the Postal Service contends that the proposed combined First-Class Package Service product will not dominate the market and the Postal Service could not raise prices significantly or decrease the quality of the product without losing business to its competitors. *Id.* at 4.

The Postal Service also identifies a concern that the proposal represents an attempt to limit package delivery service to and from rural communities. *Id.* at 7. The Postal Service asserts that after the transfer, service standards will remain the same and the Postal Service has no intention of assessing surcharges on deliveries to rural communities as has been the practice of other service providers. *Id.*

Following the Commission's denial of the transfer request of market dominant First-Class Mail Parcels, the Postal Service made substantial changes to the competitive First-Class Package Service offering to make that offering more similar to the market dominant product in both pricing and mail preparation requirements.⁸² The Postal Service indicates that the mail preparation requirements for First-Class Mail Parcels Retail (Single Piece) and the existing competitive First-Class Package Service only differ in that first-Class Package Service pieces require certain markings on the front of the piece, while First-Class Mail Parcels pieces do not. In addition, other

⁸² See Response to CHIR No. 2, questions 1, 6, 7, 8.

requirements also differ between the two price categories. With respect to content restriction, First-Class Mail Parcels may be used for any mailable matter, including documents and personal correspondence, while the existing First-Class Package Service may not contain documents and personal correspondence.

In addition to these changes, the Postal Service leveraged its ability to create competitive NSAs, entering into over 100 competitive First-Class Package Service NSAs since FY 2014. *Id.* question 8. Thus, the Postal Service has demonstrated that even though the competitive First-Class Package Service has a lower publicly available price than market dominant First-Class Mail Parcels, the Postal Service has continued to offer discount prices to compete in the parcel marketplace.

The Postal Service's response to CHIR No. 2 clearly demonstrates that the price increases for market dominant First-Class Mail Parcels have coincided with decreased volume in FY 2012 and FY 2016. *Id.* questions 3-5. The Postal Service indicates that from FY 2012 to FY 2016, the first-ounce price for First-Class Mail Parcels Retail (Single-Piece) increased by 53.2 percent, while annual volume declined by 13.5 percent. *Id.* questions 3, 5.

The Public Representative and GameFly disagree with the Postal Service's market power analysis.⁸³ The Postal Service counters that its approach to market analysis is more appropriate than that presented by the Public Representative and GameFly.⁸⁴

Based on the above, the Commission finds that the Postal Service does not exercise "sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products." 39 U.S.C. § 3642(b)(1). Thus, the market power provisions of 39 U.S.C.

⁸³ The Public Representative's and GameFly's comments have previously been summarized. See Order No. 2686 at 11-12.

⁸⁴ The Postal Service's comments have previously been summarized. See Order No. 2686 at 13-15.

§ 3642(b)(1) does not prevent the transfer of First-Class Mail Parcels Retail (Single-Piece) to the competitive category.

C. Postal Monopoly—39 U.S.C. § 3642(b)(2)

A product subject to the Private Express Statute (PES) may not be transferred from the market dominant product list. See 39 U.S.C. § 3642(b)(2).

The Postal Service asserts that First-Class Mail Parcels Retail (Single-Piece) is outside the scope of the letter monopoly because it will not contain letters other than those within the scope of the exceptions or suspensions to the PESs. Response to CHIR No. 2, Attachment 2 at 5-6. The Postal Service explains that Single-Piece parcels typically contain merchandise, which is not subject to the PESs. *Id.* at 5. Any invoices or receipts (which are letters) accompanying merchandise mailed as Single-Piece fall within a “cargo” exception. This exception allows letters that “accompany and relate in all substantial respects to some part of the cargo or to the ordering, shipping or delivery of the cargo.” 39 C.F.R. § 310.3(a). Furthermore, any incidental, non-addressed, non-personalized advertising accompanying merchandise mailed as Single-Piece fall within the suspension of the PESs specified in 39 C.F.R. § 320.7 for that type of matter.

With respect to any letter that might be mailed as a First-Class Mail Parcels Retail (Single-Piece) parcel,⁸⁵ the Postal Service proposes to raise the price of Single-Piece to a price “at least the amount equal to 6 times the rate then currently charged for the 1st ounce of a single-piece first class letter” to comply with the PESs exception for letters as specified in 39 U.S.C. § 601(b)(1). Response to CHIR No. 2, Attachment 2 at 2, 5-6.

GameFly contends that the Request must be denied because elimination of market dominant First-Class Mail Parcels Retail (Single-Piece) would violate the prohibition against moving any product covered by the postal monopoly from the market

⁸⁵ These would be letters that accompany merchandise that do not fall within the previously described cargo exception or advertising suspension, or purely letter content material sent in a parcel-shaped mailpiece.

dominant category. GameFly Comments at 19; see 39 C.F.R. § 3642(b)(2).. GameFly focuses on the Postal Service’s plan to raise the price of First-Class Mail Parcels Retail (Single-Piece) to a minimum of six times the price of a 1-ounce First-Class Mail letter. GameFly contends that the six times price exception does not apply to the Postal Service, but only to an appropriately priced mailpiece conveyed by “private competitors.” GameFly Comments at 20.

The Postal Service argues that it is entirely appropriate to consider the Postal Service’s price for the purposes of the PESs’ minimum price test. Postal Service Reply Comments at 15. The Postal Service asserts that GameFly’s interpretation of the exception is “seductively literal, yet plainly illogical,” and states that the Commission’s “administration of the mail classification regime calls for a dose of pragmatism.” *Id.* at 16.

The Commission finds that the Postal Service appears to have properly interpreted the regulations concerning the cargo exception and the advertisement suspension of the PESs for letter material that accompanies merchandise sent as First-Class Mail Parcels Retail (Single-Piece). Mailing letter material within these exceptions is allowed by statute, is not subject to the PES prohibitions, and does not prevent the transfer of this product.

D. Other Considerations—39 U.S.C. § 3642(b)(3)

When considering the transfer of Single-Piece First-Class Mail Parcels to the competitive category, the Commission must consider: (1) the availability and nature of enterprises in the private sector engaged in the delivery of the product involved; (2) the views of those who use the product involved on the appropriateness of the proposed action; and (3) the likely impact of the proposed action on small business concerns (within the meaning of section 3641(h)).

1. The availability and nature of enterprises in the private sector engaged in the delivery of the product involved

The Postal Service notes that First-Class Mail Parcels compete primarily against the parcel shipping services offered by UPS and FedEx. Response to CHIR No. 2, Attachment 2 at 6. It identifies the similar parcel shipping products offered by UPS and FedEx. *Id.* UPS's comparable products include 2nd Day Air, 3-Day Select, and Ground products. FedEx's comparable products include One Rate, 2-Day, Express Saver, Ground, and Home Delivery products. Unlike the Postal Service's offerings, competitors offer additional features such as money-back guarantees and insurance. *Id.*

The Public Representative suggests that the UPS and the FedEx products serve a different market than the Postal Service First-Class Mail Parcels product, and are not truly in competition. He suggests that perhaps the Postal Service has defined the parcels market too broadly. He points out several differences in the product offerings: UPS and FedEx feature zoned rates, additional fees for deliveries in certain areas, date-certain delivery guarantees, and weights up to 150 pounds. He states that the Postal Service product is a low-cost product which offers uniform national rates and weights up to 13 ounces. He suggests that the UPS and FedEx products might be more relevant to commercial mailers, whereas the Postal Service product is not as relevant to commercial mailers. Public Representative Comments at 8-9.

2. The views of those who use the product involved on the appropriateness of the proposed action

The Postal Service opines that because the service standards for the transferred rate categories will remain the same, customers' major concern would most likely be the effect of the transfer on prices. Response to CHIR No. 2, Attachment 2 at 7. Additionally, the Postal Service cannot raise the price above that of its competitors. *Id.*

The Postal Service also identifies a concern that the proposal represents an attempt to limit package delivery service to and from rural communities. *Id.* The Postal

Service asserts that after the transfer, service standards will remain the same and the Postal Service has no intention of assessing surcharges on deliveries to rural communities as has been the practice of other service providers. *Id.*

3. The likely impact of the proposed action on small business concerns (within the meaning of section 3641(h))

The Postal Service states that small businesses will likely be concerned with price. *Id.* at 7-8. However, this should be ameliorated by the fact that the price will be limited to that of its competitors as discussed above. The Postal Service also states that it is not aware of any small businesses that offer products that compete with First-Class Mail Parcels. *Id.* at 8.

4. Summary of other considerations

Much of the information provided by the Postal Service and commenters related to this section has been considered within the market power discussion appearing above. After taking the other considerations into account, the Commission remains persuaded that the transfer of First-Class Mail Parcels Retail (Single-Piece) is justified under 39 U.C.S. § 3642(b)(3).

E. Provisions Applicable for Competitive Products—39 U.S.C. § 3633

The Commission must examine each competitive product to ensure that: (1) competitive products are not subsidized by market dominant products; (2) each competitive product covers its attributable costs; and (3) competitive products collectively cover an appropriate share (5.5 percent) of institutional costs. 39 U.S.C. § 3633(a); 39 C.F.R. § 3015.7.

The Postal Service states that in FY 2016, the estimated cost coverage for First-Class Mail Parcels Retail (Single-Piece) price category was 121.1 percent. Response to CHIR No. 2, Attachment 2 at 2. It also states that in FY 2016, the estimated cost coverage for the existing First-Class Package Service product was 141.3

percent. *Id.* Thus, transferring a price category that exhibits greater than 100 percent cost coverage to the competitive product list implies that the new product should not result in the subsidization of competitive products by market dominant products. The Postal Service also states that First-Class Package Service will likely cover attributable costs. *Id.* Finally, given the above including the proposed price increase for the Retail price category, the Postal Service concludes that competitive products collectively will continue to provide an appropriate share of institutional costs once the transfer is complete. *Id.* at 2-3.

The Commission finds the best estimate of cost coverage for First-Class Mail Parcels Retail (Single-Piece) price category is 120.7 percent. This is the appropriate figure to use to evaluate consistency with 39 U.S.C. § 3633(a) and with the provisions of 39 C.F.R. § 3015.7. The record demonstrates that current prices for the First-Class Mail Parcels Retail (Single-Piece) price category recover their attributable costs. First-Class Mail Parcels Retail (Single-Piece) price category represents a small share of all competitive products. Therefore, transferring commercial First-Class Mail Parcels Retail (Single-Piece) price category to the competitive product list will have little impact on the ability of all competitive products collectively to cover an appropriate share of institutional costs. The total contribution to institutional costs from competitive products in FY 2016 is 16.5 percent of total institutional costs. Adding First-Class Mail Parcels Retail (Single-Piece) price category to the competitive product list would not cause the contribution to institutional costs from competitive products to fall below 5.5 percent of institutional costs. 39 U.S.C. § 3633(a)(3). Thus, it follows that the requirement that competitive products are not subsidized by market dominant products is also met.

F. Provisions Applicable for Market Dominant Products—39 U.S.C. § 3622

The Postal Service proposes to move the First-Class Mail, Parcels Keys and Identification Devices price category to a new price category within First-Class Mail Flats.

The Commission finds that the redefined market dominant product appears to comport with applicable statutory provisions. Section 3622(c)(2) requires each class or type of mail service to cover its attributable costs and make a reasonable contribution to overhead. While the cost coverage for First-Class Mail in total is sufficiently above 100 percent, each product within a class should cover its attributable costs to maximize efficiency, create predictable and stable rates, and assure adequate revenues. See 39 U.S.C. § 3622(b)(1), (2), and (5). The redefined First-Class Mail Flats product is estimated to have a cost coverage of 143.9 percent.

G. The Mail Classification Schedule and conforming change proposals

The Postal Service proposes to move the Keys and Identification Devices price category from the First-Class Mail Parcels product to the First-Class Mail Flats product. See Response to CHIR No. 2, Attachment 1 §§ 1120 and 1115. Including Keys and Identification Devices as part of First-Class Mail Parcels was partly for convenience and partly because their non-descript physical shape shared some similarities with parcels. Keys and Identification Devices are an extremely low volume service. Its move will have negligible financial impact on the First-Class Mail Flats product. The Commission does not oppose moving this rate category to First-Class Mail Flats.

The Postal Service proposes to remove First-Class Mail Parcels from USPS Tracking and Signature Confirmation eligibility. See *id.* §§ 1505.8 and 1505.17. First-Class Parcel Service is currently eligible for USPS Tracking and Signature Confirmation. The Commission approves this conforming change. It should have no impact on the services provided.

The Postal Service proposes to change the name of the First-Class Mail Parcels “Single-Piece” rate category to the First-Class Mail Parcels “Commercial” rate category. The Commission approves of the name change to better distinguish the retail from the commercial price categories. See *id.* § 2125.

The Postal Service proposes to specify that First-Class Parcel Service Retail is sealed against inspection and may be used to mail any mailable matter. See *id.*

§ 2125.1. The Postal Service also proposes to clarify that First-Class Package Service Commercial is not sealed against inspection and retains a “letter” prohibition. *Id.* The proposals preserve the existing characteristics of the rate categories prior to the implementation of the instant transfer proposal. The Commission approves these confirming changes.

The Postal Service proposes to remove requirements related to payment of postage from the First-Class Parcel Service Commercial price category. *Id.* The Commission does not approve this change. The Postal Service has not explained why this change is necessary, or how mailers will be better informed of the characteristics of this rate category once the information is removed. The Postal Service may propose this change, with supporting justification, in a future classification change filing.

The changes to the MCS which incorporate the transfer of First-Class Mail Parcels from the market dominant product list to the existing competitive First-Class Package Service and the conforming changes, as discussed above (with minor changes to the proposed language), appear following the signature of this Order.

H. Conclusion

It has been demonstrated that the statutory requirements have been met which allows transfer of the market dominant Retail (Single-Piece) price category to the competitive First-Class Package Service product. The Postal Service has yet to finalize prices for the new Retail price category. Response to CHIR No. 2, Attachment 2 at 6 n.8. Thus, the Request to transfer the price category is conditionally approved pending the proposal, review, and approval of prices. The associated revisions to the competitive product list and the MCS appear below the signature of this Order and are effective once prices are proposed, reviewed and approved.

X. ORDERING PARAGRAPH

It is ordered:

1. This Order fully addresses the issues remanded by the United States Court of Appeals for the Commission's further consideration filed on December 6, 2016.
2. The transfer of the First-Class Mail Retail (Single-Piece) price category from the market dominant product list by adding identical services to the existing First-Class Package Service product appearing on the competitive product list is conditionally approved pending the proposal, review, and approval of prices.
3. Conforming classification changes are approved including the move of Keys and Identification Devices from First-Class Mail Parcels to First-Class Mail Flats, but not including the removal of certain mail payment requirements from the First-Class Package Service, Commercial price category.
4. The Secretary shall arrange for publication in the *Federal Register* of an updated product list reflecting the change made in this Order.

Stacy L. Ruble
Secretary

Supplemental Views of Commissioner Hammond
Dissenting Opinion of Commissioner Langley

SUPPLEMENTAL VIEWS OF COMMISSIONER TONY HAMMOND

I continue to believe that the request to transfer First-Class Mail Parcels to the competitive list should have been granted based on the original evidence that the Postal Service presented in this case. My reasoning is set forth in the Joint Dissent attached to Order No. 2686. I have joined today's order approving the transfer because the additional information that the Commission has received following the remand has only strengthened the case for the transfer.

Tony Hammond

DISSENTING OPINION OF COMMISSIONER NANCI E. LANGLEY

I continue to oppose the Postal Service's request to transfer Single-Piece Retail First-Class Mail Parcels from the market dominant category to the competitive category. I supported the initial order, Order No. 2686, in which the Commission denied the transfer because the Postal Service did not provide sufficient evidence demonstrating that it lacks market power as specified in 39 U.S.C. § 3642(b)(1). Although the Postal Service filed new information on June 26, 2017, in response to Chairman's Information Request No. 2, I do not believe that information meets the burden in this matter, and I, therefore, believe the Request does not comply with the statutory requirements of 39 U.S.C. § 3642.¹

In this case in particular, I agree with the Public Representative who notes that the parcels market may be too broadly defined. I believe that Single-Piece Retail First-Class Mail Parcels, whose weight is limited to 13 ounces, is in a different market than the Postal Service's competitors and even the Postal Service's competitive products to which this product will be transferred. In my opinion, there may be two distinct markets for parcels: (1) one for retail customers, including those residing in rural and remote areas, and (2) one for large commercial mailers. The existence of these two separate markets would explain why the Postal Service can raise its prices significantly without losing market share.

¹ In addition, as originally proposed and reiterated again in its Response to CHIR No. 2, Attachment 2, the Postal Service indicates that Single-Piece First-Class Mail Parcels (Retail) may contain letter materials that may not fall within an exception or suspension. To address this, the Postal Service proposes to increase the price of a Single-Piece First-Class Mail Parcel to a minimum of six times the price currently charged for the first ounce of a Single-Piece First-Class Mail Letter. Single-Piece First-Class Mail Parcels containing "letters" (not otherwise subject to the cargo exception or the advertisement suspension) remain a product the conveyance or transmission of which is reserved to the United States under section 1696 of title 18. Therefore, in this case, Single-Piece First-Class Mail Parcels (Retail) may not be transferred from the Market Dominant list of products. See 39 U.S.C. §§ 601(b)(1) and 3642(b)(2).

In fact, the Postal Service fails to explain why its prices for Single-Piece Retail First-Class Mail Parcels can increase by 22 percent without losing market share or why such an increase is not significant.² Nor is there a discussion of how the Postal Service's under one pound parcels compete with its two major competitors that do not offer pricing by ounce increments under one pound to retail customers. In addition, the analysis used as the basis for the Postal Service's argument that there is only one marketplace for parcels does not address the fact that 95 percent of the users of Single-Piece Retail First-Class Mail Parcels are overwhelmingly consumers and small businesses. This would explain why the Postal Service can raise its prices significantly without losing market share because it has a captive market for Single-Piece Retail First-Class Mail Parcels.

For example, a retail customer who is not eligible to access commercial rates currently, can mail a First-Class Mail Parcel 10-ounce package to Portland, Oregon from Washington, DC for \$3.75. Using other available Postal Service options, the same package would cost the mailer \$8.35 for Priority Mail 2-Day, \$13.60 for Priority Mail 2-Day Medium Flat Rate Box, and \$8.17 for USPS Retail Ground (with expected delivery in a week). The Postal Service has not informed the Commission of what it will cost to mail a similar parcel after transfer of this market dominant product to the competitive category other than to indicate that prices will increase.

Lastly, although not a factor in determining whether a product is eligible for transfer from market dominant to competitive categories, the reclassification of Single-Piece Retail First-Class Mail Parcels to the competitive category eliminates the statutory requirement that the Postal Service must report Single-Piece Retail First-Class Mail Parcels service performance to the Commission on an annual and quarterly basis. The transfer of Single-Piece Retail First-Class Mail Parcels would eliminate the Commission's and, by extension, the public's visibility into delivery service

² Order No. 2686 at 5.

performance,³ because only market dominant products are reviewed for service performance under the Postal Accountability and Enhancement Act.

For these reasons, I continue to find the Postal Service has not met the requirements under 39 U.S.C. § 3642 to transfer Single-Piece Retail First-Class Mail Parcels to the Competitive Products list and oppose the transfer.

Nanci E. Langley

³ See *also* Postal Service Response to CHIR No. 1, question 2.b.

CHANGE IN PRODUCT LIST

The following material represents changes to the product list codified in Appendix A to 39 C.F.R. part 3020, subpart A—Market Dominant Product List. These changes reflect the Commission’s order in Docket No. MC2015-7. The Commission uses two main conventions when making changes to the product list. New text is underlined. Deleted text is struck through.

Appendix A to Subpart A of Part 3020—Market Dominant Product List

(An asterisk (*) indicates an organizational group, not a Postal Service product.)

First-Class Mail*

Single-Piece Letters/Postcards

Presorted Letters/Postcards

Flats

Parcels

Outbound Single-Piece First-Class Mail International

Inbound Letter Post

* * * * *

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 A—Market Dominant Products **1000 Market Dominant Product List**

* * * * *

1000 MARKET DOMINANT PRODUCT LIST

FIRST-CLASS MAIL*

Single-Piece Letters/Postcards
Presorted Letters/Postcards
Flats
~~Parcels~~
Outbound Single-Piece First-Class Mail International
Inbound Letter Post

* * * * *

1100 First-Class Mail

* * * * *

1100.2 Products Included in Class

- Single-Piece Letters/Postcards (1105)
- Presorted Letters/Postcards (1110)
- Flats (1115)
- ~~Parcels (1120)~~
- Outbound Single-Piece First-Class Mail International (1125)
- Inbound Letter Post (1130)

* * * * *

1115 Flats

1115.1 Size and Weight Limitations

Flats

	Length	Height	Thickness	Weight
Minimum	5 inches	3.5 inches	0.007 inch	none
and at least one dimension exceeds	11.5 inches	6.125 inches	0.25 inch	
Maximum	15 inches	12 inches	0.75 inch	13 ounces

Letter Shaped Mail Exceeding 3.5 Ounces subject to Flats pricing

	Length	Height	Thickness	Weight
Minimum	5 inches	3.5 inches	0.007 inch	>3.5 ounces
Maximum	11.5 inches	6.125 inches	0.25 inch	13 ounces

Parcels (Keys and Identification Devices)

	<u>Length</u>	<u>Height</u>	<u>Thickness</u>	<u>Weight</u>
<u>Minimum</u>	<u>not applicable</u>			<u>none</u>
<u>Maximum</u>	<u>not applicable</u>			<u>2 pounds</u>

1115.2 Minimum Volume Requirements

		Minimum Volume Requirements
Flats	Single-Piece	none
	Presorted	500 pieces per mailing
	Mixed ADC	500 pieces per mailing
	ADC	500 pieces per mailing
	3-Digit	500 pieces per mailing
	5-Digit	500 pieces per mailing
<u>Keys and Identification Devices</u>		<u>none</u>

1115.3 Price Categories

The following price categories are available for the product specified in this section:

- Automation
 - 5-Digit
 - 3-Digit
 - ADC
 - Mixed ADC
- Presorted
- Single-Piece
- Move Update Assessment Charge
- Flat Round-Trip Mailer
- Keys and Identification Devices—Payment is due on delivery unless an active Business Reply Mail advance deposit account is used.

* * * * *

1115.5 Prices

Automation Flats

Maximum Weight (ounces)	5-Digit (\$)	3-Digit (\$)	ADC (\$)	Mixed ADC (\$)
1	0.446	0.630	0.670	0.750
2	0.656	0.840	0.880	0.960
3	0.866	1.050	1.090	1.170
4	1.076	1.260	1.300	1.380
5	1.286	1.470	1.510	1.590
6	1.496	1.680	1.720	1.800
7	1.706	1.890	1.930	2.010
8	1.916	2.100	2.140	2.220
9	2.126	2.310	2.350	2.430
10	2.336	2.520	2.560	2.640
11	2.546	2.730	2.770	2.850
12	2.756	2.940	2.980	3.060
13	2.966	3.150	3.190	3.270

Presorted Flats

Maximum Weight (ounces)	Presorted (\$)
1	0.798
2	1.008
3	1.218
4	1.428
5	1.638
6	1.848
7	2.058
8	2.268
9	2.478
10	2.688
11	2.898
12	3.108
13	3.318

Single-Piece Flats¹

Maximum Weight (ounces)	Single-Piece (\$)
1	0.98
2	1.19
3	1.40
4	1.61
5	1.82
6	2.03
7	2.24
8	2.45
9	2.66
10	2.87
11	3.08
12	3.29
13	3.50

Notes

1. A handling charge of \$0.01 per piece applies to foreign-origin, inbound direct entry mail tendered by foreign postal operators, subject to the terms of an authorization arrangement.

Keys and Identification Devices

<u>Maximum Weight</u> <u>(ounces)</u>	<u>Keys and Identification Devices</u> <u>(\$)</u>
<u>1</u>	<u>3.50</u>
<u>2</u>	<u>3.50</u>
<u>3</u>	<u>3.50</u>
<u>4</u>	<u>3.50</u>
<u>5</u>	<u>3.68</u>
<u>6</u>	<u>3.86</u>
<u>7</u>	<u>4.04</u>
<u>8</u>	<u>4.22</u>
<u>9</u>	<u>4.40</u>
<u>10</u>	<u>4.58</u>
<u>11</u>	<u>4.76</u>
<u>12</u>	<u>4.94</u>
<u>13</u>	<u>5.12</u>
<u>1 (pound)</u>	<u>Priority Mail Retail Zone 4 postage plus 0.83</u>
<u>2 (pounds)</u>	<u>Priority Mail Retail Zone 4 postage plus 0.83</u>

Move Update Assessment Charge

Add \$0.07 per assessed piece, for mailings with less than 70 percent of mailpieces passing a Performance Based Verification at acceptance and which cannot demonstrate compliance with Move Update requirements.

Flat Round-Trip Mailer

- a. Flat Round-Trip Mailer service allows a mailer to send a flat-shaped mailpiece to a subscriber at the applicable one (1) ounce Machinable Letter price and pay postage for the return of the contents of that mailpiece at the one (1) ounce Single-Piece Machinable Letter price.
- b. A mailer may either prepay postage for the return mailpiece by using Permit Reply Mail or only pay for mailpieces actually returned by using Business Reply Mail.
- c. Qualifying pieces must contain a standard 12 cm or smaller optical disc.
- d. Pieces weighing no more than two (2) ounces qualify for the one (1) ounce price.
- e. Returned pieces must be picked up by the mailer at designated Postal Service facilities.
- f. Flat Round-Trip Mailers are not subject to prices for:
 - (i) the Nonmachinable Letters price category of Presorted Letters/Postcards, or
 - (ii) the Single-Piece Nonmachinable Letters price category of Single-Piece Letters/Postcards.

Full-service Intelligent Mail Option

Subtract \$0.003 for each automation flat that complies with the requirements for the Full-service Intelligent Mail option.

Picture Permit Imprint Indicia

Add \$0.01 for each piece that includes Picture Permit Imprint Indicia.

Emerging and Advanced Technology Promotion (March 1, 2017 to August 31, 2017)

Provide a two percent discount on the qualifying postage for First-Class Mail presort or automation letters, postcards, and flats, and USPS Marketing Mail letters and flats that are sent during the established program period, and which either include affixed or embedded technology that allows the recipient to engage in a technological experience, or were automatically generated by the recipient's applicable online activities. To receive the discount, mailers must comply with the eligibility requirements of the program.

Earned Value Reply Mail Promotion (January 1, 2017 to June 30, 2017)

Provide a \$0.05 per piece rebate on all Business Reply Mail, Courtesy Reply Mail, and Share Mail pieces that meet program requirements and are placed in the mailstream by the recipient and scanned during the program period. To receive the rebate, registered customers must have distributed a Business Reply Mail, Courtesy Reply Mail, or Share Mail card or envelope, and must comply with all other eligibility requirements of the program.

1120 Parcels Reserved

1120.1 Size and Weight Limitations

Retail (Single-Piece)

	Length	Height	Thickness	Weight
Minimum	large enough to accommodate postage, address, and other required elements on the address side			none
Maximum	408 inches in combined length and girth			13 ounces

Parcels (Keys and Identification Devices)

	Length	Height	Thickness	Weight
Minimum	not applicable			none
Maximum	not applicable			2 pounds

1120.2 Minimum Volume Requirements

	Minimum Volume Requirements
Retail	none
Keys and Identification Devices	none

~~1120.3 Price Categories~~

~~The following price categories are available for the product specified in this section:~~

- ~~• Retail
 - ~~○ Single Piece~~~~
- ~~• Keys and Identification Devices — Payment is due on delivery unless an active Business Reply Mail advance deposit account is used.~~

~~1120.4 Optional Features~~

~~The following additional postal services may be available in conjunction with the product specified in this section:~~

- ~~• Ancillary Services (1505)
 - ~~○ Address Correction Service (1505.1)~~
 - ~~○ Business Reply Mail (1505.3)~~
 - ~~○ Certified Mail (1505.5)~~
 - ~~○ Certificate of Mailing (1505.6)~~
 - ~~○ Collect on Delivery (1505.7)~~
 - ~~○ USPS Tracking (1505.8)~~
 - ~~○ Insurance (1505.9)~~
 - ~~○ Registered Mail (1505.12)~~
 - ~~○ Return Receipt (1505.13)~~
 - ~~○ Signature Confirmation (1505.17)~~
 - ~~○ Special Handling (1505.18)~~~~
- ~~• Competitive Ancillary Services (2645)
 - ~~○ Adult Signature (2645.1)~~
 - ~~○ Package Intercept Service (2645.2)~~~~
- ~~• Pickup On Demand Service~~

1120.5 — Prices

Retail[†]

Maximum Weight (ounces)	Single-Piece (\$)
1	2.67
2	2.67
3	2.67
4	2.67
5	2.85
6	3.03
7	3.21
8	3.39
9	3.57
10	3.75
11	3.93
12	4.11
13	4.29

Notes

1. — A handling charge of \$0.01 per piece applies to foreign-origin, inbound direct entry mail tendered by foreign postal operators, subject to the terms of an authorization arrangement.

Keys and Identification Devices

Maximum Weight (ounces)	Keys and Identification Devices (\$)
1	3.50
2	3.50
3	3.50
4	3.50
5	3.68
6	3.86
7	4.04
8	4.22
9	4.40
10	4.58
11	4.76
12	4.94
13	5.12
1 (pound)	Priority Mail Retail Zone 4 postage plus 0.83
2 (pounds)	Priority Mail Retail Zone 4 postage plus 0.83

Pickup On Demand Service

Add \$22.00 for each Pickup On Demand stop.

* * * * *

1500 Special Services

* * * * *

1505 Ancillary Services

* * * * *

1505.8 USPS Tracking

1505.8.1 Description

- a. USPS Tracking service provides mailers of ~~First-Class Mail parcels~~, USPS Marketing Mail parcels, Package Services, Priority Mail, Parcel Select, USPS Retail Ground, and First-Class Package Service pieces with end-to-end tracking updates, including confirmation of delivery, as the item travels to its destination.
- b. USPS Tracking service is automatically included with the purchase of items sent via First-Class Mail Parcels, Package Services, Priority Mail, Parcel Select, USPS Retail Ground, and First-Class Package Service.
- c. USPS Tracking service does not include the collection of any recipient signatures.
- d. Tracking updates may be obtained over the internet, by telephone, via mobile smartphone application, or by electronic file transfer for mailers who provide an electronic manifest. Tracking updates include the location, date, and time of: delivery or attempted delivery, the item's arrival and departure from certain postal facilities, and if the item is forwarded or returned to the sender.
- e. USPS Tracking service may only be obtained at the time of mailing by: applying a unique tracking barcode prior to mailing; or presenting the item at a Post Office, branch, station (including any authorized contractor), or self-service kiosk, for mailing.

1505.8.2 Prices

	(\$)
First-Class Mail Parcels	
— Electronic/Returns with integrated retail system label	0.00
— Retail	0.00
First-Class Package Service	
Electronic	0.00
USPS Marketing Mail Parcels	
Electronic	0.37
Package Services	
Returns with integrated retail system label	0.00
Electronic	0.00
Retail	0.00
Priority Mail	
Electronic/Returns with integrated retail system label	0.00
Retail	0.00
Parcel Select	
Electronic	0.00
USPS Retail Ground	
Electronic/Returns with integrated retail system label	0.00
Retail	0.00

* * * * *

1505.17 Signature Confirmation

1505.17.1 Description

- a. Signature Confirmation service provides mailers of ~~First-Class Mail parcels~~, First-Class Package Service, Package Services, Parcel Select (except Parcel Select Lightweight), USPS Retail Ground, and Priority Mail pieces with a record of delivery, the recipient's signature, and end-to-end tracking updates as the item travels to its destination. If the initial attempt to deliver the item is not successful, a notice of attempted delivery will be provided to the addressee.

- b. If the item is successfully delivered, a delivery record (including the signature of the recipient) is maintained by the Postal Service for one year. If the item is returned to the sender, the Postal Service does not include the sender's return signature as part of the delivery record. An electronic copy of the delivery record is available upon request.
- c. Tracking updates may be obtained over the internet, by telephone, via mobile smartphone application, or by electronic file transfer for mailers who provide an electronic manifest. Tracking updates include the location, date, and time of: delivery or attempted delivery; the item's arrival and departure from certain postal facilities; and if the item is forwarded or returned to the sender.
- d. Signature Confirmation service may only be obtained: online; by taking the item to a Post Office, branch, station, self-service kiosk, or business mail entry unit; or by giving the item to a rural carrier.
- e. Signature Confirmation service must be requested at the time of mailing.
- f. Signature Confirmation service also provides, as an optional feature at an additional fee:

Restricted Delivery which directs delivery only to the addressee or addressee's agent. The addressee must be an individual (a natural person) specified by name.

1505.17.2 Prices

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Part B—Competitive Products
2000 Competitive Product List

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2125 First-Class Package Service

2125.1 Description

- a. Any mailable matter may be mailed as First-Class Package Service Commercial mail, except matter that meets the definition of “letter” in 39 C.F.R. § 310.1 and does not fit within any of the exceptions or suspensions to the Private Express Statutes in 39 C.F.R. Parts 310 and 320.
- b. First-Class Package Service Commercial mail is not sealed against postal inspection. Mailing of matter as such constitutes consent by the mailer to postal inspection of the contents, regardless of the physical closure.
- c. Any mailable matter may be mailed as First-Class Package Service Retail mail.
- d. First-Class Package Service Retail mail is sealed against postal inspection and shall not be opened except as authorized by law.
- ~~e.~~ First-Class Package Service pieces that are undeliverable-as-addressed are entitled to be forwarded or returned to the sender without additional charge.
- ~~f.~~ Postage for First-Class Package Service pieces Commercial mail must be paid for by one of the following methods:
 - Registered end-users of USPS-approved PC Postage products when using a qualifying shipping label managed by PC Postage system.
 - USPS-approved IBI postage meters that electronically transmit transactional data to the USPS.
 - Permit imprint.
 - Permit holders using Merchandise Return Service (MRS) for First-Class Package Service mailpieces when all MRS requirements are met (505.3.0).

Attachments and Enclosures

- a. First-Class Mail or USPS Marketing Mail pieces may be attached to or enclosed in First-Class Package Service mail. Additional postage may be required.

2125.2 Size and Weight Limitations

Single-PieceCommercial

	Length	Height	Thickness	Weight
Minimum	3.5 inches	3.0 inches	0.05 inch	none
Maximum	18 inches	15 inches	22 inch	16 ounces

Retail

	<u>Length</u>	<u>Height</u>	<u>Thickness</u>	<u>Weight</u>
<u>Minimum</u>	<u>large enough to accommodate postage, address, and other required elements on the address side</u>			<u>none</u>
<u>Maximum</u>	<u>108 inches in combined length and girth</u>			<u>13 ounces</u>

2125.3 Minimum Volume Requirements

	Minimum Volume Requirements
<u>Single-PieceCommercial</u>	<u>None</u>
<u>Retail</u>	<u>none</u>

2125.4 Price Categories

The following price categories are available for the product specified in this section:

- Single-PieceCommercial
- Retail

2125.5 Optional Features

The following additional postal services may be available in conjunction with the product specified in this section:

- Ancillary Services (1505)
 - Address Correction Service (1505.1)
 - Business Reply Mail (1505.3)
 - Certified Mail (1505.5)
 - Certificate of Mailing (1505.6)
 - Collect on Delivery (1505.7)
 - USPS Tracking (1505.8)
 - Insurance (1505.9)
 - Merchandise Return Service (1505.10)
 - Registered Mail (1505.12)
 - Return Receipt (1505.13)
 - Signature Confirmation (1505.17)
 - Special Handling (1505.18)
- Pickup on Demand Service
- Competitive Ancillary Services (2645)
 - Package Intercept Service (2645.2)

2125.6 Prices

Single-PieceCommercial

Maximum Weight (ounces)	Single-Piece (\$)			
1	2.61			
2	2.61			
3	2.61			
4	2.61			
5	2.77			
6	2.77			
7	2.77			
8	2.77			
9	3.32			
10	3.46			
11	3.60			
12	3.74			
13	3.88			
14	4.02			
15	4.16			
15.999	4.30			

Retail¹

<u>Maximum Weight (ounces)</u>	<u>Single-Piece (\$)</u>
<u>1</u>	<u>TBD</u>
<u>2</u>	<u>TBD</u>
<u>3</u>	<u>TBD</u>
<u>4</u>	<u>TBD</u>
<u>5</u>	<u>TBD</u>
<u>6</u>	<u>TBD</u>
<u>7</u>	<u>TBD</u>
<u>8</u>	<u>TBD</u>
<u>9</u>	<u>TBD</u>
<u>10</u>	<u>TBD</u>
<u>11</u>	<u>TBD</u>
<u>12</u>	<u>TBD</u>
<u>13</u>	<u>TBD</u>

Notes

1. A handling charge of \$0.01 per piece applies to foreign-origin, inbound direct entry mail tendered by foreign postal operators, subject to the terms of an authorization arrangement.

Irregular Parcel Surcharge

Add \$0.20 for each irregularly shaped parcel (such as rolls, tubes, and triangles).

IMpb Noncompliance Fee

Add \$0.20 for each IMpb-noncompliant parcel paying commercial prices.

Pickup On Demand Service

Add \$22.00 for each Pickup On Demand stop.