

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Competitive Product Prices  
Global Direct Contracts  
Negotiated Service Agreement

Docket No. CP2009-18

PUBLIC REPRESENTATIVE COMMENTS  
IN RESPONSE TO ORDER NO. 159

(January 5, 2009)

The Public Representative hereby offers comments on the United States Postal Service's request to add a Global Direct Negotiated Service Agreement to the Global Direct Product on the Competitive Product List<sup>1</sup> in response to the Commission's notice and request for comment.<sup>2</sup>

**Overview**

The Public Representative believes that this Negotiated Service Agreement (NSA) is appropriately categorized as a competitive product and comports with the PAEA statutory requirements in covering its costs, and the contract appears to be functionally equivalent to the existing product agreements.

The Public Representative recommends initiating a Public Inquiry docket to evaluate two issues associated with international mail suggested by this

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<sup>1</sup> Notice of the United States Postal Service Filing of Functionally Equivalent Global Direct Contracts Negotiated Service Agreement, December 23, 2008 (Notice). The Postal Service filed an unredacted copy of the contract and supporting materials under seal.

<sup>2</sup> See PRC Order 159, Notice and Order Concerning Filing of Additional Global Direct Contracts Negotiated Service Agreement, December 29, 2008, at 3.

docket and raised in comments filed in previous international mail products dockets.

### **Nature of the Agreement**

A Global Direct agreement is a direct entry bulk international mail service that provides business customers with a less expensive and more effective way to enter bulk mail into another country so that it resembles mail originating in the destination (receiving) country. It is a useful alternative to setting up separate operations in the receiving country. The Postal Service accepts such mail within the United States, transports it to another country and enters it into the mail stream of the receiving country. The Global Direct mail bears the postage/indicia of the receiving country and also has a return address within that receiving country. Such direct entry mail offers many business advantages for business mailers.

### **The Public Interest**

Important public interests associated with these negotiated contracts are adequacy of cost coverage, appropriate categorization of the product and overall transparency. In this instance, there is also a public interest in whether the contract is legitimately designated as functionally equivalent to the contracts within the established mail classification or shell category. Upon review of the

contract and financial analysis documents, the Public Representative is satisfied that this set of negotiated service agreements meet these statutory and other significant criteria, including the provisions of 39 U.S.C. 3632, 3633 and 3642.

These agreements also offer advantages and additional options for mailers to better market on a cross-border basis.

### **The Public Interest in Adequate Cost Coverage**

An essential public interest in competitive products contracts of this sort is to ensure that these contracts adequately cover their costs so that cross-subsidization by market dominant products does not occur.<sup>3</sup> There is a strong public interest in ensuring that these products pay their own way and are not supported by mailing prices paid by the general public or other mailers of market dominant products.<sup>4</sup> The contract or group of contracts within a specific product is obliged by law to enable competitive products as a whole to cover their costs, and to contribute a minimum of 5.5 percent to the Postal Service's total institutional costs.<sup>5</sup>

The Public Representative, after reviewing the materials under seal in this proceeding and appropriate consultation with technical staff, acknowledges that

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<sup>3</sup> See 39 U.S.C. § 3633 (a)(1) & (2).

<sup>4</sup> *Id.*

<sup>5</sup> See 39 U.S.C. § 3633 (b).

the provisions of the CP2009-18 contract<sup>6</sup>, including the pricing structure, overtly comport with the requirement that it will generate sufficient revenue to cover attributable costs for the services provided, enable competitive products as a whole to cover their costs, and as a whole to contribute a minimum of 5.5 percent to the Postal Service's total institutional costs. These factors should assure that there is no subsidization of this NSA by market dominant products.

### **The Public Interest in Appropriate Categorization of NSAs**

In an earlier docket requesting establishment of a Competitive Product, the Public Representative expressed misgivings about the categorization of an umbrella product that included Global Direct.<sup>7</sup> The Postal Service offered clarification and the Commission found the Service's evidence persuasive and determined that Global Direct is properly classified as a Competitive Product.<sup>8</sup>

After assessing the data as filed under seal, the Public Representative believes that the proposed contract in this docket is appropriately categorized as a Competitive Product. In addition, an examination of the sealed materials does not suggest any reason why the contracts are not functionally equivalent.

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<sup>6</sup> Within the context of the MC2009-9 product.

<sup>7</sup> See Public Representative Comments in Response to United States Postal Service Request to Add Global Plus Negotiated Service Agreements to the Competitive Products List, August 27, 2008.

<sup>8</sup> See PRC Order No. 112, Order Concerning Global Plus 2 Negotiated Service Agreements, October 3, 2008, at 7.

### **Public Interest in Transparency**

The public interest is served when the Postal Service and the Commission make available to the public the maximum amount of information about negotiated service agreements taking into consideration the important need for preserving the confidentiality of sensitive or proprietary business information.

The Postal Service has taken noticeable steps toward that important objective in its NSA filings. This includes accommodations for the convenience of other parties given the short time frames available for notice and comment. For example, the Postal Service has taken note of a suggestion from the Public Representative and has agreed to provide in future filings, where applicable, redacted reference copies of documents from previous dockets.<sup>9</sup>

### Concerns Over Timely Federal Register Publication

The Public Representative takes note that *Federal Register* notices for this and similar Competitive Product NSA cases typically appear on or around the deadline for comments. On the surface such last minute publication seems unfair and likely to constrain the opportunity for public comment. Investigation by the Public Representative finds that this unfortunate result occurs due to the brief statutory deadline for such cases, the processing requirements for *Federal Register* publication, and the need to gather and analyze public comment prior to

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<sup>9</sup> See Notice at 1, n.2.

a Commission determination. While no solution to this concern suggests itself, it is important to note that the Commission electronically publishes notice and opportunity for comment on the Commission website with much more advance notice, and this is where most interested parties will likely find this information. In this instance, the *Federal Register* notice serves mainly as a permanent record of the proceedings rather than as the primary means of notice. Under the current statutory obligations, this is unlikely to change.

#### **Public Interest in Increased Options for Mailers**

As noted above, deployment of an NSA of this type offers many business advantages to mailers who may find worthwhile business opportunities across an international border. Assessment of the sealed contract suggests that this is the case in regard to this particular contract.

#### **The Need for a Public Inquiry Docket on International Mail Issues**

It is admirable that the Postal Service is engaged in these negotiated deals and is securing the benefits of agreements with mailers and with other nations. Such agreements stimulate use of the mail (particularly new usage), and in most cases it is advantageous to all parties to have a provider of first and last resort offering favorable international mail rates.

However, two years ago, U.S. postal law with respect to international mail changed upon the passage of the PAEA, resulting in two (or more) primary areas of potential concern and fundamental inconsistency between the PAEA structure and the reality of the current marketplace. These areas of concern are recurrent and have been mentioned by commenters in several cases.

The first concern applies primarily to outbound international mail: the near-exclusive availability to the Postal Service of other-nation delivery rates negotiated under bilateral agreements and the exclusive availability to the Postal Service of terminal dues rates under the UPU international arrangement.

The second concern involves distinct and substantial customs handling advantages available to the Postal Service, and applies primarily to inbound international mail (although outbound is also affected.)

#### Statutory Requirements

The PAEA speaks rather clearly on the subject of international mail, and Congress granted the Commission an important role in fulfilling the objectives of the PAEA and in exercising wide-ranging authority over the areas in which the Commission was granted regulatory oversight.

39 U.S.C. § 404(a) bars the Postal Service from issuing any rule or regulation that has the effect of precluding competition or establishing unfair competitive advantage.<sup>10</sup>

39 U.S.C. § 407(b)(1) says the Secretary of State should not conclude any treaty, convention, or other international agreement (including those regulating international postal services) if such treaty, convention, or agreement would, with respect to any competitive product, grant an undue or unreasonable preference to the Postal Service....”<sup>11</sup>

39 U.S.C. § 407 says, in part, that “[i]t is the policy of the United States...to promote and encourage unrestricted and undistorted competition in the provision of international postal services and other international delivery services, except where provision of such services by private companies may be prohibited by law of the United States”.<sup>12</sup>

#### Privileged Access to Other-Nation Delivery Rates

When the Postal Service sends mail to other nations, it pays those nations either a fee negotiated as part of an arrangement between the two national posts, or for countries with which it does not have a bilateral agreement, it pays the UPU terminal dues rates. These are favorable rates which are less than

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<sup>10</sup> See 39 U.S.C. 404 (a)(1).

<sup>11</sup> 39 U.S.C. 407 (b)(1).

<sup>12</sup> 39 U.S.C. 407 (a)(2).

rates available to other mailers. While in theory other mailers may attempt to negotiate separate agreements, the ability of anyone other than a national post to actually have sufficient leverage to negotiate an agreement is questionable.

Such agreements, if they even exist, may be few and far between.

Such an arrangement leaves the Competitive Product marketplace less competitive, since the dominant player has unique access to special rates in the destination countries.

#### Customs Advantages

The Postal Service reportedly maintains a number of commercially significant advantages in the competitive international mail marketplace relating to customs clearance and handling, such as:

- The rigor of commercial customs clearance, which involves individualized piece tracking) versus that of postal channel customs clearance (mainly general visual inspection of the mail stream);
- The additional cost regime appended to commercial clearance processes, requiring extra shipping fees;
- The substantial differences in handling between UPU postal bills of lading<sup>13</sup> and Master Airwaybills<sup>14</sup> used by commercial shippers: such as the waiver of minimum charges for transport of shipments travelling under postal lading bills, and the fact that CN38s are essentially unavailable to commercial shippers because those papers are no longer provided to applicants.

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<sup>13</sup> "CN38" forms

<sup>14</sup> "MAWB" forms

- Current governmental policy requiring ETOEs (Extraterritorial Offices of Exchange) and commercial shippers to use the unfavorable MAWBs, and essentially precluding the use of CN38s for non-Postal Service shippers;
- Differences in Transportation Security Administration treatment between USPS and other shippers with regards to non-document mail matter from “unknown shippers”;
- Disparate Postal Inspection Service treatment, in which a law enforcement unit bound to the dominant competitor in the international mail industry has an opportunity to treat other entrants in the market differently.

#### The Postal Service is Aware of these Issues

This is not to suggest that the Postal Service is not examining these issues nor failing to take them seriously. The Service has long engaged in interagency discussions to address aspects of Customs handling of postal items, even before the passage of PAEA.<sup>15</sup> It is important to acknowledge and applaud the admirable contributions of Customs Inspectors and Postal Inspectors in the face of seemingly insurmountable resource and logistical constraints. And as suggested in another docket, the Postal Service holds a great deal of responsibility in properly managing the transition from the previous international shipping/mailling regime to the one envisioned under PAEA in which it aggressively competes in the marketplace.

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<sup>15</sup> See *generally* USPS/Customs Report on enforcement of customs law and establishment of an interagency operating agreement, circa 1999-2000 (title approximate) (as cited in the 2000 USPS Comprehensive Statement at 44).

The Commission Can Look Beyond the State Dept. Advisory Committee

The PAEA directed the State Department to establish a Federal Advisory Committee on International Postal and Delivery Services. This Committee includes participants from the Postal Service, the State Department, Customs and Border Protection, the Postal Regulatory Commission and other agencies, as well as representatives from the postal community such as industry associations.

The Advisory Committee is just that: an advisory committee. It is tasked with giving advice to the applicable agencies but not in setting policy, establishing regulations or conducting regulatory oversight, as is the PRC.

While the Federal Advisory Committee may present opportunities for discussions on these topics, this need not be the only place for such activity to occur. Ultimately, it is the Commission which must report to Congress on the operations and effectiveness of the PAEA, and it would be advantageous to the Commission to establish a Public Inquiry docket so as to gather comments and to focus the discussion on those areas which merit the most careful consideration.

Yes, the Issues are Beyond the Scope of this Proceeding

In at least two previous cases, the Commission responding to similar concerns, opined that the issues raised are beyond the scope of this proceeding.

The Public Representative agrees entirely that this docket (CP2009-18) is not the proper type of forum in which to discuss these issues. These issues are beyond the scope of a simple Competitive Products docket for which the PAEA requires expedited response and in which the Commission rightly focuses on the narrow task of determining the propriety of placement on the correct product list and compliance with PAEA cost coverage and anti-cost-subsidy provisions.

Holding this matter in abeyance until the arrival of a more propitious opportunity could cast a more substantial and urgent burden upon the Commission in future years. The Commission should establish a Public Inquiry docket that would be the proper forum to explore these important yet vulnerable parts of the statutory mandate so as to preserve the vibrancy of competition in the Competitive Products arena, and to provide the Commission with sufficient background and factual data to be able to properly advise Congress at the appropriate time.

### **Summary**

In conclusion, the agreement satisfies the statutory requirements for a Competitive Product, comports with the public interest and should be approved by the Commission.

The Commission should utilize the mechanism of a separate Public Inquiry docket to address two rather complex and interrelated concerns that may

tend to impair competition in Competitive Products areas: privileged access to recipient-nation delivery charges (such as bilateral negotiated rates or terminal dues) and disparate customs clearance treatment.

Initiating a Public Inquiry docket would directly aid the Commission in its primary objective of overseeing and periodically reporting to Congress and the public on the operation of the PAEA.

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

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