

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

Before Commissioners:

Dan G. Blair, Chairman;
Mark Acton, Vice Chairman;
Ruth Y. Goldway;
Tony L. Hammond; and
Nanci E. Langley

Modification of the Mail Classification Schedule
Addition to Competitive Product Category
Express Mail Contract 1

Docket No. MC2008-5

ORDER CONCERNING EXPRESS MAIL CONTRACT 1

(Issued August 8, 2008)

I. BACKGROUND

On July 21, 2008, the Postal Service filed a request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30, *et seq.* to modify the Mail Classification Schedule by adding Express Mail Contract 1 to the competitive product list. The Postal Service asserts that Express Mail Contract 1 is a competitive product “not of general applicability” within the meaning of 39 U.S.C. 3632(b)(3).¹ A redacted version of the Governors’ Decision establishing the price and classification and a certification of the Governors’ vote is

¹ Request of the United States Postal Service to Add Express Mail Contract to Competitive Product List and Notice of Establishment of Rates and Class Not of General Applicability, July 21, 2008 (Request).

included as Attachment A to the filing (Attachment A). The requested changes in the Mail Classification Schedule product list are included in the filing as Attachment B with the new product shown in brackets.² The statement of supporting justification required by 39 CFR 3020.32 is included as Attachment C to the filing (Attachment C).

In the same July 21, 2008 filing, the Postal Service gives notice, pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5, that the Governors have established prices and classifications not of general applicability for Express Mail Contract 1. Request at 2.

In support of its Request, the Postal Service has also filed materials under seal, including an unredacted version of an explanation and justification in the Governors' Decision and an unredacted analysis. Also filed under seal are the cost and revenue data and the certification of compliance with 39 U.S.C. 3633(a)(1), (2), and (3). The Postal Service asserts "that the contract, related financial information, the customer's name and the portions of the Governors' Decision and accompanying analysis that provides prices, terms, and conditions should remain confidential." *Id.*

After its initial review, the Commission sought additional information with respect to several issues in this case. Toward that end, it issued Commission Information Request No. 1 on July 29, 2008.³ The Postal Service promptly responded providing the requested clarifying information on August 4, 2008.⁴

As noted above, the Postal Service filing in this docket was made pursuant to rule 3015.5 and rule 3020.30 *et seq.* As a consequence, the Commission will review the filing under both rule 3015 and part 3020, subpart B.

² The draft Mail Classification Schedule remains under review. The Commission anticipates providing interested persons an opportunity to comment on the draft MCS in the near future.

³ Commission Information Request No. 1, July 29, 2008.

⁴ See Notice of Response of the United States Postal Service to Commission Information Request No. 1, August 4, 2008.

II. COMMENTS

Comments were filed by United Parcel Service (UPS),⁵ the Public Representative,⁶ and David B. Popkin.⁷

UPS urges the Commission to require public disclosure of the proposed contracts subject to adequate safeguards to allow meaningful public review. It believes that if interested parties are denied access to this information, the complaint process under section 3662 will be largely rendered a nullity. UPS Comments at 2.

Along the same lines, Popkin expresses concern that because the Postal Service's filing was largely under seal, the public cannot comment meaningfully on it. Popkin Comments at 2. In addition, Popkin offers several observations about the filing in this case and waiver of signature upon delivery. *Id.* at 3.

The Public Representative comments on several aspects of the Postal Service's filings in this case including (1) confidentiality; (2) pricing, cost coverage, and contribution; and (3) the specific agreement. With respect to confidentiality, the Public Representative argues that the Postal Service should justify the limits of all confidentiality requests to comport with the spirit of Federal Rules of Civil Procedure 26(c) and the Freedom of Information Act. Public Representative Comments at 3. With respect to pricing, cost coverage and contribution, the Public Representative acknowledges that the pricing in the negotiated service agreement (NSA) comports with the provisions of title 39. With respect to the specific agreement, the Public

⁵ Comments of United Parcel Service in Response to Order Concerning Modification of the Mail Classification Schedule and Prices Under Express Mail Negotiated Service Agreement, July 31, 2008 (UPS Comments).

⁶ Public Representative Comments in Response to United States Postal Service Request to Modify the Mail Classification Schedule and Prices Under Express Mail Negotiated Service Agreement, July 31, 2008 (Public Representative Comments).

⁷ Initial Comments of David B. Popkin, July 31, 2008 (Popkin Comments). Popkin also filed a Letter of Intervention and Request for Information. Letter from David B. Popkin to Steven W. Williams, Notice of Intervention and Request for Information, July 30, 2008 (Letter). The Commission notes that notices of intervention are not necessary for the filing of comments in these types of proceedings and are, in fact, discouraged. Where appropriate, motions may be filed under Commission rule 3001.21.

Representative believes that it promotes an increased Express Mail volume, specifically pieces that are less costly to process. *Id.* at 5.

III. COMMISSION ANALYSIS

A. Statutory Requirements

The statutory responsibility of the Commission, in this instance, is to assign a new product to either the market dominant list or the competitive product list. 39 U.S.C. 3642. As part of this responsibility, the Commission also will preliminarily review the proposal for compliance with the requirements of the Postal Accountability and Enhancement Act (PAEA) of 2006. For proposed competitive products, this includes a review of the provisions applicable to rates for competitive products. 39 U.S.C. 3633.

The Postal Service contends that adding the Express Mail Contract 1 product will result in processing Express Mail pieces that are less costly for the Postal Service than the average Express Mail piece. See Request, Attachment A. It believes that its financial analysis shows that these cost savings can be accomplished while ensuring that the contract covers its attributable costs, does not result in subsidization of competitive products by market dominant products, and increases contribution from competitive products. *Id.*; Request, Attachment C, at 1.

The Commission has reviewed the financial analysis provided under seal that accompanies the agreement as well as the comments filed by interested persons. Based on the information provided, the Commission finds that the proposed product submitted should cover its attributable costs (39 U.S.C. 3633(a)(2)); should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and should have a positive effect on competitive products' contribution to institutional costs (39 U.S.C. 3633(a)(3)). Thus, a preliminary review of the proposed Express Mail Contract 1 product indicates that it comports with the provisions applicable to rates for competitive products.

In determining whether to assign the Express Mail contract as a product to the market dominant product list or the competitive product list the Commission must consider whether

[T]he 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.

39 U.S.C. 3642(b)(1). If this is the case, the product will be categorized as market dominant. The competitive category of products shall consist of all other products.

In Order No. 43, the Commission issued regulations establishing a modern system of rate regulation, including a list of competitive products. PRC Order No. 43, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007, ¶¶ 3061, 4013. Among other things, the Commission determined that each NSA would initially be classified as a separate product. The specific Express Mail Contract 1 filed in this docket will be classified as a new product.

The Commission is further required to consider the availability and nature of enterprises in the private sector engaged in the delivery of the product, the views of those that use the product, and the likely impact on small business concerns. 39 U.S.C. 3642(b)(3).

The Postal Service asserts that its bargaining position is constrained by the existence of other shippers who can provide similar services. Thus, the market precludes the Postal Service from taking unilateral action to increase prices without the risk of losing volume to private companies. Request, Attachment C, at 2-3. The Postal Service also contends that the Postal Service may not decrease quality or output without risking the loss of business to competitors that offer similar expedited delivery services. *Id.* at 2. It further states that the user/NSA partner supports the addition of the contract to the product list to effectuate the negotiated contractual terms. *Id.* at 3. Finally, the Postal Service states that due to the fact that Express Mail requires a substantial infrastructure to support a national network, large shippers serve the market

under consideration. Accordingly, the Postal Service is unaware of any small business concerns that could offer comparable service for this customer. *Id.*

No commenter opposes the proposed regulatory classification of the Express Mail Contract 1 as competitive, and no late-filed comments were received.⁸ Having considered the statutory requirements, the argument put forth by the Postal Service, and the public comment, the Commission finds that Express Mail Contract 1 is appropriately classified as a competitive product and should be added to the competitive product list. The revisions to the competitive product list are shown below the signature of this Order, and shall become effective upon publication in the *Federal Register*.

B. Updating the Mail Classification Schedule

The Express Mail contract contains a provision for early termination of the contract. The Postal Service shall promptly notify the Commission of an early termination, but in no event later than the actual termination date. The Commission then will remove the contract from the Mail Classification Schedule at the earliest possible opportunity.

C. Confidentiality

The Commission is aware that the treatment of information as confidential is a sensitive issue. The Postal Service, the Public Representative, United Parcel Service, and Popkin all express valid concerns with respect to documents submitted under seal. Very shortly, the Commission will address these issues on a broader level and establishing procedures to determine the degree of confidentiality to be accorded to this type of information. Interested persons will have an opportunity to comment on appropriate procedures governing the treatment of confidential information filed by the Postal Service.

⁸ See Public Representative Comments at 2.

It is Ordered:

1. The Express Mail Contract 1 will be added to the competitive product list as a separate product under Negotiated Service Agreements, Domestic as Express Mail Contract 1 (MC2008-5).
2. The Secretary shall arrange for publication of the amended product list in the *Federal Register*.

By the Commission.

Steven W. Williams
Secretary

CHANGE IN MAIL CLASSIFICATION SCHEDULE

CHANGE IN PRODUCT LIST

The following material represents changes to the Product List codified at 39 CFR Appendix A to Subpart A of Part 3020—Mail Classification Schedule. These changes are in response to Docket No. MC2008-5. The underlined text signifies that the text is new, and shall appear in addition to all other Mail Classification Schedule text.

PART B—COMPETITIVE PRODUCTS

2000 COMPETITIVE PRODUCT LIST

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NEGOTIATED SERVICE AGREEMENTS

Domestic

Express Mail Contract 1 (MC2008-5)

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