

ORDER NO. 5152

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

Before Commissioners:

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

Competitive Product Prices
Inbound E-Format Letter Post

Docket No. CP2019-155

ORDER APPROVING RANGE OF RATES FOR
INBOUND LETTER POST SMALL PACKETS AND BULKY LETTERS AND
ASSOCIATED INTERNATIONAL REGISTERED MAIL SERVICE

(Issued July 12, 2019)

I. INTRODUCTION

The Postal Service proposes a range of prices of non-general applicability for the Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail services.¹ The Commission approves the proposed prices. The Postal Service must file notice of the specific per-item and per-kilogram prices before the planned effective date of those prices.

¹ Notice of the United States Postal Service of Rates Not of General Applicability for Inbound E-Format Letter Post, and Application for Non-Public Treatment, May 20, 2019 (Notice).

II. BACKGROUND

A. Presidential Memorandum

Universal Postal Union (UPU) member countries negotiated default prices, called terminal dues, for the acceptance, processing, and delivery of Inbound Letter Post small packets and bulky letters at the 2016 UPU Congress.² The Commission expressed repeated concerns related to the UPU terminal dues system and noted that the current pricing regime results in noncompensatory terminal dues.³ Additionally, recent Annual Compliance Determination (ACD) reports describe UPU terminal dues as discriminatory because they are not equivalent to domestic postage rates in the destination country.⁴

On August 23, 2018, President Donald J. Trump issued a presidential memorandum to the Postmaster General and the Chairman of the Commission, among others, entitled “Modernizing the Monetary Reimbursement Model for the Delivery of Goods Through the International Postal System and Enhancing the Security and Safety

² Notice at 2; see Universal Postal Convention, Articles 28-30 (adopted by the 2016 Universal Postal Union Congress), available at http://www.upu.int/uploads/tx_sbdownloader/actsActsOfThe26ThCongressIstanbul2016En.pdf (UPU Convention).

³ Docket No. ACR2018, Annual Compliance Determination, April 12, 2019, at 84-85 (FY 2018 ACD); Docket No. ACR2017, Annual Compliance Determination, March 29, 2018, at 68 (FY 2017 ACD). Docket No. ACR2016, Annual Compliance Determination, March 28, 2016, at 66 (FY 2016 ACD); Docket No. ACR2015, Annual Compliance Determination, March 28, 2016, at 70 (FY 2015 ACD); Docket No. ACR2014, Annual Compliance Determination, March 27, 2015, at 53 (FY 2014 ACD); Docket No. ACR2013, Annual Compliance Determination, March 27, 2014, at 59 (FY 2013 ACD); Docket No. ACR2012, Annual Compliance Determination, March 28, 2013, at 143 (FY 2012 ACD); Docket No. ACR2011, Annual Compliance Determination, March 28, 2012, at 143-144 (FY 2011 ACD); Docket No. ACR2010, Annual Compliance Determination, March 29, 2011, at 130-131 (FY 2010 ACD); Docket No. ACR2009, Annual Compliance Determination, March 29, 2010, at 108-109 (FY 2009 ACD); Docket No. ACR2008, Annual Compliance Determination, March 30, 2009, at 81 (FY 2008 ACD); Docket No. ACR2007, Annual Compliance Determination, March 27, 2008, at 115, 118 (FY 2007 ACD).

⁴ FY 2017 ACD at 68; FY 2016 ACD at 66; FY 2015 ACD at 70.

of International Mail.”⁵ The Presidential Memorandum notes that the current terminal dues system does not “align with United States economic and national security interests[.]” Presidential Memorandum § 2(c). Specifically, the Presidential Memorandum maintains that the current terminal dues system “distorts the flow of small packages around the world by incentivizing the shipping of goods from foreign countries that benefit from artificially low reimbursement rates.” *Id.* § 2(c)(i)(C). The Presidential Memorandum directed the Secretary of State to seek agreement to reform the UPU terminal dues system so that the prices are consistent with the policies outlined in the Presidential Memorandum. *Id.* § 4(b).

Following the Second UPU Extraordinary Congress in 2018, the Department of State reported that there was insufficient progress made to reform the terminal dues system in line with the policies outlined in the Presidential Memorandum.⁶ On October 17, 2018, the White House announced that the President concurred with the Department of State’s recommendation that the United States should adopt self-declared rates for terminal dues as soon as practical, but no later than January 1, 2020. *Id.* Also, on the same day, the Secretary of State notified the UPU that the United States would withdraw as a member country, effective one year from the announcement. *Id.* The White House announcement stated that the Department of State will seek to negotiate bilateral and multilateral agreements that resolve the problems identified in the Presidential Memorandum. *Id.* It noted that “[i]f negotiations are successful, the Administration is prepared to rescind the notice of withdrawal and remain in the UPU.” *Id.*

⁵ Presidential Memorandum for the Secretary of State, Secretary of the Treasury, Secretary of Homeland Security, Postmaster General, and Chairman of the Postal Regulatory Commission, August 23, 2018, available at <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-treasury-secretary-homeland-security-postmaster-general-chairman-postal-regulatory-commission/> (Presidential Memorandum).

⁶ Statement from the Press Secretary, October 17, 2018, available at <http://www.whitehouse.gov/briefings-statements/statement-press-secretary-38/> (Press Secretary Statement).

B. Conditional Approval to Transfer of Inbound Letter Post Small Packets and Bulky Letters

In Docket No. MC2019-17, the Postal Service requested the transfer of Inbound Letter Post small packets and bulky letters and associated inbound registered mail services from the market dominant to competitive products list.⁷ In its request, the Postal Service asserted that the proposed Inbound Letter Post Small Packets and Bulky Letters product met the requirements of 39 U.S.C. § 3642.⁸ The Postal Service did not propose any prices for the Inbound Letter Post Small Packets and Bulky Letters product or associated International Registered Mail service. See Docket No. MC2019-17 Transfer Request at 9. However, the Postal Service asserted that it expects prices associated with the products to cover costs and to contribute to institutional costs. *Id.* Accordingly, the Commission conditionally approved the transfer pending the proposal, review, approval, and implementation of new prices for the Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail service.⁹

C. Notice

On May 20, 2019, the Postal Service filed notice of a proposed range of prices for the Inbound Letter Post Small Packets and Bulky Letters product and for associated International Registered Mail service. Attached to the Notice is the Governors' Decision establishing the new prices in accordance with 39 U.S.C. §§ 3632 and 3633. Notice, Attachment 2. Governors' Decision No. 19-2 provides an analysis of the proposed

⁷ See generally Docket No. MC2019-17, United States Postal Service Request to Transfer Inbound Letter Post Small Packets and Bulky Letters, and Inbound Registered Service Associated with Such Items, to the Competitive Product List, November 16, 2018 (Docket No. MC2019-17 Transfer Request).

⁸ Docket No. MC2019-17 Transfer Request at 5-8, 10-12. The Postal Service asserted that the Private Express States do not apply to Inbound Letter Post small packets and bulky letters. The Postal Service's assertions are discussed in detail in section IV.A. *infra*.

⁹ Docket No. MC2019-17, Order Conditionally Approving Transfer, January 9, 2019, at 19, 23 (Order No. 4890).

range of prices for the Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail service and asserts that the proposed range of prices comply with 39 U.S.C. § 3633(a) and 39 C.F.R. part 3015. *Id.* at 2.

The Notice also includes attachments with redacted tables showing Fiscal Year (FY) 2020 projected volumes, revenues, attributable costs, contribution, and cost coverage for the Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail services. Notice, Attachment 2A. The Notice also includes an application for non-public treatment of the unredacted version of the annex to the Governors' Decision and other supporting materials filed under seal. Notice, Attachment 1.

Proposed prices. The Postal Service proposes a range of self-declared prices for Inbound Letter Post Small Packets and Bulky Letters mailpieces from group I, II, and III countries and from group IV countries with mail flows that exceed a certain annual tonnage threshold.¹⁰ The Postal Service states that the proposed range allows the Postal Service to preserve flexibility, enabling it to institute prices for Inbound Letter Post Small Packets and Bulky Letters whether the United States remains in or withdraws from the UPU. Notice at 8. The Postal Service proposes that group IV countries with mail flows that do not exceed a certain annual tonnage threshold be subject to terminal dues established in the UPU Convention. *Id.* at 10.

The Postal Service states that the self-declared prices for the Inbound Letter Post Small Packets and Bulky Letters product “constitute a ‘line of best fit’ using a per item rate and [a] per kilogram rate that are based on the most equivalent domestic products.” *Id.* at 6. The Postal Service identifies First-Class Package Service as the most equivalent domestic product for Inbound Letter Post Small Packets and Bulky Letters weighing less than 13 ounces and Priority Mail as the most equivalent domestic

¹⁰ Notice at 8-10. For purposes of remuneration, the UPU classifies its members into four country groups, which are based on a postal development indicator developed by the UPU. See Decisions of the UPU Istanbul Congress, Resolution C 7/2016, Classification of countries and territories for terminal dues and Quality of Service Fund (QSF) purposes for the 2018–2021 period, 2017, Annex 2, available at http://www.upu.int/uploads/tx_sbdownloader/actsActsOfThe26ThCongressIstanbul2016En.pdf.

product for Inbound Letter Post Small Packets and Bulky Letters mailpieces weighing greater than 13 ounces. *Id.* at 7. The Postal Service asserts that this pricing scheme is consistent with how the designated operators exchange international mail and settle payment for those mailpieces. *Id.* at 6-7. Specifically, the Postal Service notes that designated operators do not weigh each individual piece of international mail and that the settlement process uses sampling and averages to determine the amount owed by one designated operator to another. *Id.* at 7.

The Postal Service states that the proposed range of prices covers attributable costs, avoids cross-subsidization, and does not impede competitive products' collective ability to cover the appropriate share of institutional costs in conformance with 39 U.S.C. § 3633. *Id.* at 12. Additionally, the Postal Service states the proposed range of prices is consistent with the policies outlined in the Presidential Memorandum. *Id.* at 18. The Postal Service states that the proposed range of prices fully reimburse the Postal Service for its costs, avoids a preference for designated operators over non-designated operators, and avoids a preference for foreign mailers over domestic mailers. *Id.* at 18-19. Although the prices within the proposed range for the Inbound Letter Post Small Packets and Bulky Letters product are not identical to domestic retail and commercial prices of equivalent domestic products, the Postal Service states that the proposed price range achieves rate "parity" and eliminates the economic distortion identified in the Presidential Memorandum. *Id.* at 19.

The Postal Service states that the Inbound Letter Post Small Packets and Bulky Letters product will be available only to designated operators, citing fundamental differences between designated operators and private carriers. *Id.* at 13. The Postal Service states that the risk of "cream-skimming" and operational concerns dictate that the prices be not of general applicability. *Id.* at 13-14. However, it notes that it will entertain requests to negotiate service agreements with non-designated operators for similar services. *Id.* at 14.

Private Express Statutes. The Postal Service maintains that the Private Express Statutes (PES) do not apply to the Inbound Letter Post Small Packets and Bulky Letters

product. *Id.* at 15. The Postal Service states that most Inbound Letter Post Small Packets and Bulky Letters mailpieces would fall under exceptions for letters relating to goods, or suspensions for certain advertising. *Id.* The Postal Service states that absent exceptions or suspensions, proposed maximum prices exceed the price test outlined in 39 U.S.C. § 601(b)(1) even at the lowest weight increment, and the minimum price satisfies the price test at the average weight per piece. *Id.* at 15-16. The Postal Service acknowledges that terminal dues for group IV countries with mail flows that do not exceed a certain threshold do not satisfy the PES price threshold. *Id.* However, the Postal Service asserts that because mailpieces from these countries represent a small proportion of Inbound Letter Post Small Packets and Bulky Letters mailpieces, these mailpieces “do not adversely affect satisfaction of the PES price test using the average revenue received for [I]nbound [Letter Post Small Packets and Bulky Letters] items at the average weight per piece.” *Id.* at 17.

D. Initial Commission Action and Chairman’s Information Request

On May 22, 2019, the Commission issued a notice and order initiating this docket, appointing a Public Representative, and inviting interested person to provide comments on whether the proposed prices are consistent with 39 U.S.C. §§ 3632 and 3633, 39 C.F.R. part 3015, and the policies outlined in the Presidential Memorandum.¹¹

Chairman’s Information Request No. 1 was issued on May 30, 2019.¹² CHIR No. 1 sought clarification of the Postal Service’s workpapers. CHIR No. 1, questions 1-3. CHIR No. 1 also requested a description of the steps the Postal Service will take to detect and prevent remail from group IV countries with mail flows under certain annual tonnage thresholds. CHIR No. 1, question 4. Additionally, CHIR No. 1 requested a comparison of projected costs for the Inbound Letter Post Small Packets and Bulky

¹¹ Notice and Order Concerning Rates Not of General Applicability for Inbound E Format Letter Post, May 22, 2019, at 5 (Order No. 5102).

¹² Chairman’s Information Request No. 1, May 30, 2019 (CHIR No. 1).

Letters product and associated International Registered Mail services if the United States remains in the UPU and if it withdraws from the UPU. CHIR No. 1, question 5. CHIR No 1 also requested information regarding when the Postal Service would file specific prices and the anticipated effective date. CHIR No. 1, question 6. CHIR No. 1 requested additional discussion regarding the Postal Service's decision to limit the Inbound Letter Post Small Packets and Bulky Letters product to designated operators and to exclude non-designated operators. CHIR No. 1, questions 7-10. The Postal Service responded to CHIR No. 1 on June 7, 2019.¹³

III. COMMENTS

The Lexington Institute; the Association for Postal Commerce (PostCom); Frontier of Freedom (FOF); the International Mailers Advisory Group (IMAG); the Public Representative; the Small Business & Entrepreneurship Council (SBEC); the United Parcel Service, Inc. (UPS); and the U.S. Chamber of Commerce (Chamber) provided comments in response to Order No. 5102.¹⁴ The Postal Service filed reply comments on July 1, 2019.¹⁵

¹³ Responses of the United States Postal Service to Questions 1-10 of Chairman's Information Request No. 1, June 7, 2019 (Response to CHIR No. 1).

¹⁴ Comments of the Lexington Institute, June 19, 2019 (LI Comments); Comments of the Association for Postal Commerce, June 21, 2019 (PostCom Comments); Comments Submitted by Frontier of Freedom, June 21, 2019 (FOF Comments); Comments of the International Mailers Advisory Group, June 21, 2019 (IMAG Comments); Public Representative Comments on Postal Service Notice of Rates Not of General Applicability for Inbound E-Format Letter Post, June 21, 2019 (PR Comments); Comments of Small Business & Entrepreneurship Council, June 21, 2019 (SBEC Comments); Comments of the United Parcel Service, Inc. on Notice and Order Concerning Rates Not of General Applicability for Inbound E-Format Letter Post, June 21, 2019 (UPS Comments); Comments of the U.S. Chamber of Commerce, June 21, 2019 (Chamber Comments).

¹⁵ Reply Comments of the United States Postal Service, July 1, 2019 (USPS Reply Comments). The Postal Service also filed a motion for leave to file its reply comments. Motion of the United States Postal Service for Leave to File Reply Comments, July 1, 2019 (Motion). The Commission has not authorized comments in this docket beyond the initial comments due June 21, 2019. The Postal Service's motion for leave indicates the cause for its reply comments include clarifying the Commission's statutory authority, explaining perceived mischaracterizations that could confuse the Commission, and rebutting suggestions the Commission should publicly disclose materials filed under seal. The cause articulated by the Postal Service is not sufficient to warrant unauthorized reply comments, and the Motion is denied.

A. Applicable Standard

The Public Representative, PostCom, and IMAG all observe that the Commission's review of the proposed prices is limited to determining compliance with 39 U.S.C. §§ 3632 and 3633, and 39 C.F.R. part 3015.¹⁶ For example, PostCom notes that although Order No. 5102 invites interested persons to comment on whether the proposed prices are consistent with the policies outlined in the Presidential Memorandum, the Commission's ultimate determination is governed by the requirements in 39 U.S.C. § 3633. PostCom Comments at 3-4.

Similarly, the Public Representative states that "the Commission's role in ensuring that the Postal Service adheres to the policies objectives involved is rather limited[,]" and that "the Commission's review of [the] proposed rates is limited to compliance with 39 U.S.C. [§§] 3632 and 3633 and 39 [C.F.R.] part 3015." PR Comments at 2-3. Based on her review of the Postal Service's Notice, the Postal Service's supporting workpapers and attachments, and other relevant information, she concludes that the proposed range of prices for the Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail services satisfies the requirements of 39 U.S.C. § 3633(a).¹⁷ Accordingly, she recommends that the Commission approve the proposed price range. *Id.*

The Chamber states that the Commission's review is not limited to 39 U.S.C. § 3633 and 39 C.F.R. part 3015. Chamber Comments at 5. The Chamber asserts that nothing in 39 C.F.R. part 3015 precludes the Commission from considering other statutory criteria. *Id.* In addition to the requirements of section 3633(a), the Chamber maintains that all postal prices and classification must comply with the public policy criteria contained in 39 U.S.C. §§ 101(d), 401(2), 403(c), 404a(a)(1), and 407(a). *Id.* at 5-6. The Chamber posits that the Commission has discretion to consider these

¹⁶ PR Comments at 2-3; PostCom Comments at 1; IMAG Comments at 6.

¹⁷ PR Comments at 3. Additionally, she concludes that the proposed price range is consistent with the policy objectives in the Presidential Memorandum. *Id.*

additional public policy criteria when it reviews competitive product prices and classifications. *Id.* at 6. Although any interested party can compel the Commission to consider compliance with such public policy criteria, the Chamber states that “in the interest of justice and economy of proceedings, where such issues are plainly presented, it would be better [for the Commission] to consider them before new rates and classes are placed in effect.” *Id.*

B. Postal Service Request for Approval of a Range of Prices

Several participants comment that the Commission should require the Postal Service to propose specific prices.¹⁸ There are two general arguments for requiring the Postal Service to propose specific prices. First, UPS and the Chamber state that without specific prices to review, it is difficult to determine compliance with 39 U.S.C. §§ 3632 and 3633, 39 C.F.R. part 3015, and the policies outlined in the Presidential Memorandum.¹⁹ Specifically, the Chamber argues that a price range cannot satisfy the requirement that competitive prices be “established in writing complete with a statement of explanation and justification and the [implementation date].” Chamber Comments at 5, citing 39 U.S.C. § 3632(b)(1). Furthermore, the Chamber asserts that pre-approval of a range of prices would “undermine the ability of the Commission and interested parties to raise and consider certain public policy issues prior to implementation of new rates and classes[,]” as it is difficult to evaluate these issues without specific rates. *Id.* at 6. Similarly, UPS states that it is unclear whether the proposed price range is consistent with the Presidential Memorandum’s direction that the Executive Branch pursue terminal dues that do not favor foreign mailers over domestic mailers or

¹⁸ See generally SBEC Comments; LI Comments; PostCom Comments; UPS Comments; Chamber Comments.

¹⁹ UPS Comments at 3-5; Chamber Comments at 5.

designated operators²⁰ over non-designated operators. UPS Comments at 4.

Second, Lexington Institute and SBEC state that approving the requested price range, rather than requiring specific prices, creates uncertainty regarding prices for the Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail services.²¹ Specifically, SBEC notes that requesting approval for a range of prices lacks the “pricing specificity that small businesses need in order to align their cost structures in accordance with fluctuating market conditions.” SBEC Comments at 2. Furthermore, Lexington Institute asserts that because the Postal Service requests approval for a range of rates, it signals that the Administration may be unable to deliver on its goal of “fair and nondiscriminatory rates[.]” LI Comments at 3.

PostCom and the Public Representative do not oppose the Postal Service’s request for Commission approval for a range of prices.²²

C. Proposed Rates Filed Under Seal

Several participants urge the Commission to require the Postal Service to file the proposed price ranges or default prices publicly.²³ The Lexington Institute posits that filing the proposed prices under seal is “directly counter” to the policies outlined in the Presidential Memorandum and because the proposed prices relate to products that the Commission conditionally approved to add to the competitive product list, these prices should be public. LI Comments at 2-3. Furthermore, the Lexington Institute states that

²⁰ Designated operators are “any governmental or non-governmental entity officially designated by the member country to operate postal services and to [fulfill] the related obligations arising out of the Acts of the [UPU] on its territory[.]” Universal Postal Convention Manual, Article 1.12 (2018), available at http://www.upu.int/uploads/tx_sbdownloader/actInThreeVolumesManualOfConventionEn.pdf (UPU Convention Manual). The Postal Service is the designated operator for the United States.

²¹ LI Comments at 3; SBEC Comments at 2.

²² PostCom Comments at 2; PR Comments at 3.

²³ IMAG Comments at 6; LI Comments at 1; PostCom Comments at 2; UPS Comments at 2-3; Chamber Comments at 3.

by filing the proposed price range and supporting data under seal, the Postal Service is impeding negotiations at the upcoming UPU Extraordinary Congress by “add[ing] needless complexity and secrecy to the U.S. rate structure[.]” *Id.* at 4.

Other commenters state that the lack of transparency makes it difficult for interested participants to evaluate and comment on the proposed prices.²⁴ For example, UPS asserts that filing the proposed rates and supporting workpapers under seal made it harder for relevant stakeholders to comment meaningfully on whether the proposed price range satisfies all statutory requirements and are consistent with the policies outlined in the Presidential Memorandum. UPS Comments at 2. Specifically, UPS notes that it is unable to evaluate the Postal Service’s assertions that the proposed price range satisfies the requirements of 39 U.S.C. § 3633 and that the “minimum [price] in the [proposed] range ‘generally corresponds’ to the Postal Service’s rates for First-Class Package Service and Priority Mail[.]” *Id.* at 3.

Similarly, the Chamber posits that the lack of transparency “severely handicap[s]” the ability of interested participants to provide informed comments. Chamber Comments at 3. The Chamber also notes that to address whether the proposed range of prices complies with applicable legal standards and the policies of the Presidential Memorandum, interested participants need “details of the proposed range of rates and how [the Postal Service] proposes to establish a rate from within this range; and . . . aggregated revenues and costs of the proposed products during the projected life of the proposed rates.” *Id.* Moreover, the Chamber maintains that the Postal Service’s arguments in its application for non-public treatment are “unpersuasive” and that the Commission should not afford non-public treatment to the materials the Postal Service filed under seal. *Id.* at 4.

PostCom notes that the Postal Service’s decision to not publish a default price for the Inbound Letter Post Small Packets and Bulky Letters product and the associated Inbound Registered Mail service hinders scrutiny of the proposed prices. PostCom

²⁴ FOF Comments at 1; SBEC Comments at 2; UPS Comments at 2; Chamber Comments at 3.

Comments at 4. Although it is sensitive to the need for negotiated service agreement (NSA) prices to remain non-public, PostCom states the fact that the Postal Service chose prices used in NSAs as reference points “give[s] the impression that the choice was made to provide a rationale for avoiding public disclosure of any rates whatsoever.” *Id.* at 2. PostCom encourages the Commission to require the Postal Service to file public default rates that designated operators would pay in absence of an NSA. *Id.*

D. Exclusion of Non-Designated Postal Operators

UPS and the Chamber state that the Postal Service should offer the Inbound Letter Post Small Packets and Bulky Letters product at prices within the proposed price range to non-designated operators.²⁵ UPS maintains that offering the product exclusively to designated operators is inconsistent with the aims of the Presidential Memorandum. UPS Comments at 5-6, citing Presidential Memorandum § 2(d)(ii). UPS asserts that the prices for Inbound Letter Post Small Packets and Bulky Letters should be available to any domestic mailer; essentially, the price should “mirror” the prices for domestic mail products. *Id.* at 6.

Likewise, the Chamber maintains that limiting the availability of the Inbound Letter Post Small Packets and Bulky Letters product to designated operators continues to discriminate between designated operators and non-designated operators even when these mailers “tender shipments of goods and bulky documents that are identical in all material respects.” Chamber Comments at 8 (emphasis omitted). It states that the Presidential Memorandum “condemns any ‘preference for [Inbound Letter Post small packets] that favors foreign mailers over domestic mailers [or] [designated operators] over private-sector entities providing transportation services.’” *Id.* The Chamber asserts that the Presidential Memorandum “leaves no room for ‘reasonable’ preferences[,]” and that excluding domestic mailers and non-designated operators from

²⁵ UPS Comments at 5-6; Chamber at 5-6.

the Inbound Letter Post Small Packets and Bulky Letters product is “undue and unreasonable and inconsistent” with the policies of the Presidential Memorandum. *Id.*

The Public Representative notes that the Postal Service makes reasonable arguments as to why the Inbound Letter Post Small Packets and Bulky Letters and associated Inbound Registered Mail services should be limited to designated operators. PR Comments at 3. She states that the mailpieces tendered by private carriers or consolidators could be significantly different from those tendered by designated operators. *Id.* at 3-4. Additionally, she maintains that there is “considerable risk” that making these prices available for non-designated operators could give those mailers an undue advantage. *Id.* at 4. Furthermore, she observes that the Postal Service expressed willingness to negotiate NSAs with non-designated operators, which she views as a “viable way forward for addressing equity in rates between [designated operators] and [non-designated operators].” *Id.*

E. Additional Issues

“Line of Best Fit.” Two participants comment on the Postal Service’s use of the “line of best fit”. The Public Representative agrees with the Postal Service that using the “line of best fit” method to develop per-piece and per-kilogram rates from domestic rates is a reasonable way to create rate equity between domestic and foreign mailers. PR Comments at 3. However, UPS states that the use of averages to set a range of prices is an “inexact process” that could “create winners and losers.” UPS Comments at 5. UPS asserts that the Postal Service implicitly recognizes the weaknesses of using averages to set prices because it does not base prices for domestic mailers on averages. *Id.*

Timing. FOF and SBEC observe that the UPU will hold an Extraordinary Congress in September 2019.²⁶ SBEC comments that the UPU Extraordinary Congress will determine a new “course on objectives and requirements for postal operators, which

²⁶ FOF Comments at 2; SBEC Comments at 1.

largely renders the Postal Service's advancements in [Docket No. CP2019-155] to be premature." SBEC Comments at 1. Accordingly, SBEC encourages the Commission to withhold any actions and directives in Docket No. CP2019-155 until after the UPU Extraordinary Congress. *Id.* Similarly, FOF observes that the upcoming UPU Extraordinary Congress will present the Department of State an opportunity to negotiate an equitable rate system. FOF Comments at 2. Thus, FOF, like SBEC, encourages the Commission to reserve any action until after the UPU Extraordinary Congress. *Id.*

Negative effects of withdrawing from the UPU. IMAG lists the potential negative effects if the United States withdraws from the UPU. For example, IMAG states that outbound mailers in the United States may experience rate shock as a result of designated operators increasing prices for the delivery of outbound mail originating in the United States for delivery abroad. IMAG Comments at 2-3, 7. Additionally, IMAG describes several implications of the withdrawal of the United States from the UPU, including potential disruption of mail delivery to U.S. military bases, embassies, and consulates abroad. *Id.* at 3-4. IMAG notes, however, that many of its concerns are outside the scope of the Commission's analysis of the proposed prices. *Id.* at 5.

IV. COMMISSION ANALYSIS

A. Private Express Statutes

A product subject to the PES may not be transferred from the market dominant product list. See 39 U.S.C. § 3642(b)(2). In Docket No. MC2019-17, the Postal Service asserted that Inbound Letter Post small packets and bulky letters are not subject to the PES. Docket No. MC2019-17 Request at 10-12. The Postal Service stated that many documents contained in Inbound Letter Post small packets and bulky letters do not fall within the definition of a "letter" and, therefore, are excluded from the PES. *Id.* at 10.

Additionally, the Postal Service asserted that three exceptions apply to letters sent as Inbound Letter Post small packets and bulky letters. First, the Postal Service stated that because many documents combined with goods would likely consist of

invoices and advertising relating to goods, these letters are exempt from the PES. *Id.* Second, the Postal Service asserted that, in many circumstances, Inbound Letter Post small packets and bulky letters containing letters would be expected to weigh more than 12.5 ounces and thus, it would fall outside the PES as it exceeds the weight threshold outlined in 39 U.S.C. § 601(b)(2). *Id.* Third, the Postal Service stated that when it proposes prices for the Inbound Letter Post Small Packets and Bulky Letters product, “the minimum price at an average weight per piece” could be at least six times the price for a First-Class Mail Single-Piece Letter stamp. *Id.* at 11. Accordingly, the Postal Service asserted that the remaining Inbound Letter Post small packets and bulky letters that are not covered by the first two exemptions would be covered by the price threshold exemption outlined in 39 U.S.C. § 601(b)(1). *Id.*

In its notice, the Postal Service observes that self-declared prices meet the price test.²⁷ However, the Postal Service states that group IV countries with mail flows below certain annual tonnage thresholds would be subject to the lower terminal dues that are established in the UPU Convention. *Id.* at 10. The Postal Service notes that these prices “do not independently satisfy the PES price test[.]” *Id.* at 17. The Postal Service asserts that because these mailpieces are a small proportion of Inbound Letter Post Small Packets and Bulky Letters mailpieces, “these flows in combination do not adversely affect satisfaction of the PES price test using the *average revenue* received for [Inbound Letter Post Small Packets and Bulky Letters] items[.]” *Id.* (emphasis added).

The Commission finds that the Postal Service appears to have properly interpreted the regulations concerning the cargo exception, the advertisement suspension, and the weight threshold exception of the PES for letter material sent in

²⁷ Notice at 16. The Postal Service asserts that “[g]iven the unique attributes of how [Inbound Letter Post Small Packets and Bulky Letters] items are tendered by foreign postal operators and accepted by the Postal Service . . . it would be reasonable for the Commission to consider the average weight per piece for purposes of the price test[.]” *Id.*

Inbound Letter Post Small Packets and Bulky Letters mailpieces. Mailing letter material within these exceptions is allowed by statute and is not subject to the PES prohibitions.

B. Compliance with 39 U.S.C. § 3633

The Commission reviewed the Notice, the CHIR response, the materials filed under seal, and the comments. The proposed range of prices for the Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail services are reviewed pursuant to 39 U.S.C. § 3633(a) and Commission regulations under 39 C.F.R. part 3015.²⁸ In brief, these statutory and regulatory provisions require each competitive product to cover its attributable costs (39 U.S.C. § 3633(a)(2)), prohibit the subsidization of competitive products by market dominant products (39 U.S.C. § 3633(a)(1)), and require that competitive products collectively make an appropriate contribution to the recovery of the Postal Service's total institutional costs (39 U.S.C. § 3633(a)(3)).

The Public Representative states that the proposed price range satisfies the requirements of 39 U.S.C. § 3633(a) and she recommends approval of the proposed range. PR Comments at 3. However, the Chamber states that the Postal Service's request for approval for a range of prices does not satisfy the requirement that "rates and classes . . . be established in writing complete with a statement of explanation and justification and the date as of which such rate of class takes effect." Chamber Comments at 5, citing 39 U.S.C. § 3632(b)(1).

²⁸ As noted by PostCom and the Public Representative, when conducting pre-implementation review of proposed prices for competitive products, the Commission reviews the proposed prices for compliance with 39 U.S.C. §§ 3632 and 3633, and 39 C.F.R. part 3015. However, the Commission observes that comments asserting that the proposed prices are inconsistent with the policies outlined in the Presidential Memorandum highlight issues that could be the subject of a section 3662 complaint proceeding.

In the past, the Commission has approved price ranges in limited circumstances.²⁹ Given the President's direction to institute self-declared rates no later than January 1, 2020, this situation is a unique and limited circumstance. This is not a practice, however, that is acceptable in most cases, and in changing these specific products' rates in the future, the Commission expects to be provided actual rates, not a range.

As suggested by the Public Representative, although the Postal Service proposed a range of prices, the Commission is able to review the range for compliance with 39 U.S.C. § 3633(a) by analyzing compliance at the minimum and maximum ends of the proposed price range. The Commission finds that the proposed prices, even at the minimum end of the price range, are projected to generate sufficient revenue to cover the attributable costs of the Inbound Letter Post Small Packets and Bulky Letter product and associated International Registered Mail services. This finding supports a conclusion that the proposed price range will satisfy section 3633(a)(2). In addition, in accordance with section 3633(a)(3), the Inbound Letter Post Small Packets product and associated International Registered Mail services are projected to contribute to institutional costs. Together, these findings support the conclusion that the proposed range of prices will not cause market dominant products to subsidize competitive products, as prohibited by 39 U.S.C. § 3633(a)(1). The Commission, therefore, concludes that the proposed range of prices for the Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail services comply with 39 U.S.C. § 3633(a).

In regard to the Chamber's citation of the requirements of 39 U.S.C. § 3632(b)(1), in its Notice and in Response to CHIR No. 1, the Postal Service proposes to provide notice of these specific per-piece and per-kilogram prices within the approved

²⁹ For example, in Docket Nos. CP2017-271 and CP2018-287, the Commission approved a range of discounted prices for the Inbound EMS competitive product. See *generally* Docket No. CP2017-271, Order Approving Changes in Prices Not of General Applicability for Inbound EMS 2, August 30, 2017 (Order No. 4081); Docket No. CP2018-287, Order Approving Changes in Prices Not of General Applicability for Inbound EMS 2, August 28, 2018 (Order No. 4799).

price range.³⁰ The Postal Service states that it plans to provide notice of specific per-item and per-kilogram prices at least 15 days before the effective date of those prices. Response to CHIR No. 1, question 6.b. Requiring the Postal Service to file specific rates at least 15 days before the effective date of those prices would satisfy the requirement that the Postal Service file prices with the Commission before the prices go into effect. See 39 U.S.C. § 3632(b)(3). Additionally, interested parties and the Commission will have an opportunity to evaluate the specific prices and could raise certain public policies before these prices become effective. See Chamber Comments at 6. Accordingly, the Commission directs the Postal Service to provide notice of the specific per-item and per-kilogram prices at least 15 days before the effective date of those prices.

C. Prices Filed Under Seal

Several commenters support unsealing the proposed price range or for the Postal Service to publish a default price that would apply absent a bilateral NSA.³¹ These commenters put forth two arguments. First, SBEC, UPS and the Chamber assert that, by filing the proposed price range under seal, the Postal Service obstructed the ability of interested participants to effectively evaluate and comment on the proposed prices.³² Second, commenters cite the need for transparency, especially for mailpieces that historically have not covered their costs.³³

The Commission's rules provide for interested participants to request access to material filed under seal. See 39 C.F.R. subpart C to part 3007. However, no participants requested access to the material filed under seal. Furthermore, the

³⁰ *Id.* at 9; Response to CHIR No. 1, question 6.b.

³¹ See Chamber Comments at 3; FOF Comments at 1; IMAG Comments 6; LI Comments at 1, 3; PostCom Comments at 2, 4; SBEC Comments at 2; UPS Comments at 2-3.

³² Chamber Comments at 3; SBEC Comments at 2; UPS Comments at 2-3.

³³ See FOF Comments at 1; IMAG Comments at 6; LI Comments at 1, 3; PostCom Comments at 2, 4.

Commission permits participants to request the Commission to unseal materials the Postal Service identified as non-public. See 39 C.F.R. §§ 3007.103, 3007.400(b). However, no participants requested the Commission to unseal any material the Postal Service identified as non-public pursuant to 39 C.F.R. § 3007.400(b). Additionally, Commission's rules provide that the Commission, upon its own motion, may preliminarily determine that non-public treatment of materials filed under seal by the Postal Service is not appropriate. See 39 C.F.R. § 3007.104.

When determining whether to unseal materials identified as non-public by the Postal Service, the Commission "balance[s] the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets." 39 U.S.C. § 504(g)(3)(A); see 39 C.F.R. § 3007.104(a). No participant filed a motion pursuant to 39 C.F.R. § 3007.400(b) requesting that any of the material the Postal Service filed under seal be publicly disclosed. Because no such motion was filed, the Postal Service had no opportunity to respond, as required by the regulations. See 39 C.F.R. § 3007.400(c).

The Commission values its role in providing transparency of the mail system and has demonstrated its willingness, where appropriate, to unseal Postal Service data as appropriate.³⁴ The Commission's balancing required in 39 U.S.C. § 504(g)(3)(A) of the "nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets" is fact-specific. Because the Postal Service must file specific prices at least 15 days before the planned effective date of those prices, the Commission believes it is premature now to analyze the issue, but interested parties

³⁴ See generally Docket No. ACR2018, Order Issuing the Determination to Unseal Library Reference PRC-LR-ACR2018/NP3, July 12, 2019 (Order No. 5151). In Docket No. ACR2018, the library reference at issue contained Commission analysis that highlighted key trends underlying the continued poor financial performance of the Inbound Letter Post product and the underlying data—Inbound Letter Post revenue, volume, attributable cost, and contribution data by UPU country group for FY 2014 through FY 2018, and further separated by shape for FY 2017 and FY 2018. Order No. 5151 at 13.

and the Commission may review the appropriateness of the Postal Service's designation of the material as non-public once the Postal Service files specific prices.

The Commission understands the commenters' concerns regarding the lack of transparency.³⁵ The Commission strongly encourages the Postal Service to provide greater information to the public when it files specific prices as well as to consider publishing a default price as suggested by PostCom. These measures should assist in analyzing and addressing the public policy concerns related to the product.

D. Rates of Non-General Applicability

In its notice, the Postal Service states that the Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail services are available only to designated operators. Notice at 13. The Postal Service asserts that fundamental differences between designated operators and non-designated operators justify limiting the Inbound Letter Post Small Packets and Bulky Letters product to designated operators. *Id.* For example, the Postal Service states that designated operators deliver Inbound Letter Post Small Packets and Bulky Letters mailpieces at a "handful of select international gateways which are designed to facilitate international mail exchange[.]" *Id.* at 13-14. Additionally, the Postal Service asserts that designated operators are "believed to dispatch all of their [Inbound Letter Post Small Packets and Bulky Letters mailpieces] destined for the United States to the Postal Service[.]" *Id.* at 14. The Postal Service states that non-designated operators should not be able to access the Inbound Letter Post Small Packets and Bulky Letters product at the proposed price range because there is a risk that non-designated operators would only send the most lucrative inbound packages with the Postal Service.³⁶

The Postal Service maintains that limiting the product's availability to designated operators does not give such operators "an unfair or unreasonable preference over

³⁵ FOF Comments at 1; SBEC Comments at 2; UPS Comments at 2; Chamber Comments at 3.

³⁶ *Id.*; Response to CHIR No. 1, question 8.e.

other carriers.” Notice at 14. The Postal Service states that it will entertain requests for NSAs from “[f]oreign shippers that are not designated operators and that would like to dispatch items to the United States using a non-tracked, uninsured inbound packet service[s].” *Id.*

The Public Representative states that the Postal Service makes “reasonable arguments” for limiting the product’s availability to designated operators. PR Comments at 3. For example, she notes that mailpieces tendered by private carriers or consolidators could be significantly different than mailpieces tendered by designated operators. *Id.* at 3-4. Furthermore, she observes that the Postal Service intends to address the issue of ensuring that prices for Inbound Letter Post small packets and bulky letters do not favor designated operators over non-designated operators through NSAs. *Id.* at 4; citing Notice at 14. The Public Representative considers negotiating NSAs with non-designated operators a “viable way forward for addressing equity in rates between [designated operators] and [non-designated operators].” *Id.*

The Chamber and UPS disagree. Specifically, UPS states that the Inbound Letter Post Small Packets and Bulky Letters product should be available to domestic mailers and that its prices should mirror domestic prices. UPS Comments at 6. UPS asserts that excluding non-designated operators may be contrary to the policies of the Presidential Memorandum of “promoting a system of fair and non-discriminatory rates that (1) do not favor foreign mailers over domestic mailers, and (2) do not favor [designated operators] over non-[designated operators].” *Id.* at 5-6 (internal marks omitted). Similarly, the Chamber states that the Presidential Memorandum condemns any preference that favors foreign mailers over domestic mailers or that favors designated operators over non-designated postal operators. Chamber Comments at 8, citing Presidential Memorandum § 3(a)(ii)(B)-(C). The Chamber maintains that any preference between domestic mailers and foreign mailers or between designated operators and non-designated operators is “undue and unreasonable and inconsistent” with the policies outlined in the Presidential Memorandum. *Id.*

Based on statements in the Postal Service's notice, the record does not contain sufficient information for the Commission to determine whether or not there is evidence of undue discrimination or preference in violation of 39 U.S.C. § 403(c). The Postal Service's proffer to negotiate with non-designated operators is indicative that further developments relevant to the potential evaluation of undue or unreasonable preference/discrimination under section 403(c) may be forthcoming. Because any such evaluation would necessarily be a fact-driven comparison, it is premature for the Commission to preemptively attempt to ameliorate discriminatory effects based on speculation. Moreover, section 403(c) is one of the provisions of law subject to a section 3662 complaint proceeding, which any interested person may lodge with the Commission.

V. CONCLUSION

The Commission has reviewed the Notice, the CHIR response, the materials filed under seal, and the comments filed. Proposed prices for competitive products are reviewed pursuant to 39 U.S.C. § 3633(a) and Commission regulations under 39 C.F.R. part 3015. These statutory and regulatory provisions require each competitive product to cover its attributable costs (39 U.S.C. § 3633(a)(2)), prohibit the subsidization of competitive products by market dominant products (39 U.S.C. § 3633(a)(1)), and require that competitive products collectively make an appropriate contribution to the recovery of the Postal Service's total institutional costs (39 U.S.C. § 3633(a)(3)).

The Commission finds that the proposed range of prices covers the attributable costs for the Inbound Letter Post Small Packets and Bulky Letters product and for the associated International Registered Mail services. This finding supports a conclusion that the proposed range of prices will satisfy section 3633(a)(2). In addition, in accordance with section 3633(a)(3), the cost coverage is projected to contribute to institutional costs in FY 2020; supporting the conclusion that competitive products will not be subsidized by market dominant products, as required by 39 U.S.C. § 3633(a)(1). The Commission, therefore, concludes that the proposed range of prices for the

Inbound Letter Post Small Packets and Bulky Letters product and associated International Registered Mail services comply with 39 U.S.C. § 3633(a).

In recognition of the unique and limited circumstance before it, the Commission approves the proposed range of prices. However, as this is not an acceptable practice in most cases, the Commission expects the Postal Service to provide actual prices and not a range, when proposing price changes for these products in the future.

VI. ORDERING PARAGRAPHS

It is ordered:

1. The proposed range of prices for Inbound Letter Post Small Packets and Bulky Letters mailpieces and associated International Registered Mail services comply with 39 U.S.C. § 3633 and 39 C.F.R. part 3015.
2. The Postal Service shall file notice of the specific per-item and per-kilogram prices at least 15 days before the planned effective date of those prices.

By the Commission.

Ruth Ann Abrams
Acting Secretary