

ORDER NO. 5437

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

Before Commissioners:

Robert G. Taub, Chairman;
Michael Kubayanda, Vice Chairman;
Mark Acton;
Ann C. Fisher; and
Ashley E. Poling

Transfer of Inbound Market Dominant
Exprès Service Agreement 1, Inbound
Market Dominant Registered Service
Agreement 1, Inbound Market Dominant
PRIME Tracked Service Agreement,
Australian Postal Corporation - United
States Postal Service Bilateral Agreement,
and Canada Post Corporation - United
States Postal Service Bilateral Agreement
Negotiated Service Agreements to the
Competitive Product List

Docket No. MC2020-73

ORDER APPROVING TRANSFER OF MARKET DOMINANT NEGOTIATED SERVICE
AGREEMENTS TO THE COMPETITIVE PRODUCT LIST

(Issued February 19, 2020)

I. INTRODUCTION

On December 13, 2019, the Postal Service filed a notice with the Commission, pursuant to 39 U.S.C. § 3642 and 39 C.F.R. § 3020.30 *et seq.*, requesting the transfer of five negotiated service agreements (NSAs) from the Market Dominant product list of

the Mail Classification Schedule (MCS) to the Competitive product list.¹ These agreements include: Inbound Market Dominant Express Service Agreement 1, Inbound Market Dominant Registered Service Agreement 1, Inbound Market Dominant PRIME Tracked Service Agreement, Australian Postal Corporation (Australia Post) – United States Postal Service Bilateral Agreement, and Canada Post Corporation (Canada Post) – United States Postal Service Bilateral Agreement. Request at 1-2. The Request refers to the first three of these NSAs as “the three PRIME agreements.” *Id.* at 2. For the reasons given below, the Commission approves the Request.

II. BACKGROUND

The Postal Service filed the instant Request, along with supporting documentation. See Request, Attachments 1-10. The Request proposes to remove the aforementioned five NSAs from sections of the Market Dominant product list of the MCS and to add the agreements to the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product in the Competitive product list. These changes are identified in proposed revisions to the MCS. Request, Attachment 3.

On December 17, 2019, the Commission issued an order noticing the Request, appointing a Public Representative, and providing interested persons with an opportunity to submit comments.² On January 3, 2020, the Commission issued Chairman’s Information Request No. 1.³ The Postal Service replied to CHIR No. 1 on January 10, 2020.⁴ The Commission issued Chairman’s Information Request No. 2 on

¹ United States Postal Service Request to Transfer the Inbound Market Dominant Express Service Agreement 1, Inbound Market Dominant Registered Service Agreement 1, Inbound Market Dominant PRIME Tracked Service Agreement, Australian Postal Corporation – United States Postal Service Bilateral Agreement, and Canada Post Corporation – United States Postal Service Bilateral Agreement to the Competitive Product List, December 13, 2019, at 1-2 (Request).

² Notice and Order Concerning Transfer of Market Dominant Negotiated Service Agreements to the Competitive Product List, December 17, 2019 (Order No. 5354).

³ Chairman’s Information Request No. 1, January 3, 2020 (CHIR No. 1).

⁴ Response of the United States Postal Service to Chairman’s Information Request No. 1, with Portions Filed Under Seal, January 10, 2020 (Response to CHIR No. 1).

January 22, 2020.⁵ The Postal Service responded on January 29, 2020.⁶ The Public Representative filed comments on January 3, 2020.⁷ No other comments were received.

III. COMMENTS

The Public Representative states that “[t]he five NSAs meet all the criteria necessary to make the transfer to the competitive product list permissible.” PR Comments at 5. She explains that the Commission “previously determined that the Postal Service does not exercise sufficient market power over Inbound Letter Post small packets and bulky letters” and that the instant NSAs “set out negotiated prices for E-Format items, the same type of items that make up Inbound Letter Post small packets and bulky letters.” *Id.* at 4. For this reason, the Public Representative concludes that the market power provisions of 39 U.S.C. § 3642(b)(1) “should not prevent the transfer of the five NSAs.” *Id.*

The Public Representative determines that “the prices in the three PRIME agreements and the Australia Post bilateral agreement should generate sufficient revenues to cover cost and therefore meet the requirements of 39 U.S.C. § 3633(a).” *Id.* at 5. She also concludes that “the inbound portions of the Canada Post bilateral included in the market dominant product list . . . should not cause the Canada Post bilateral competitive product to fail to cover cost.” *Id.* For that reason, she avers that “the transfer of the five NSAs would not cause market dominant products to subsidize competitive products nor prevent competitive products from collectively contributing the appropriate share of the institutional costs of the Postal Service as determined by the Commission.” *Id.*

⁵ Chairman’s Information Request No. 2, January 22, 2020 (CHIR No. 2).

⁶ Response of the United States Postal Service to Chairman’s Information Request No. 2, January 29, 2020 (Response to CHIR No. 2).

⁷ Public Representative Comments, January 3, 2020 (PR Comments).

IV. COMMISSION ANALYSIS

The Commission reviews the Request for compliance with the requirements of 39 U.S.C. §§ 3642 and 3633. 39 U.S.C. § 3642 contains requirements for transferring a product from the Market Dominant to the Competitive product list. 39 U.S.C. § 3633 lists provisions that must be complied with once a product is transferred to the Competitive product list. The transferred products must also be functionally equivalent to the umbrella competitive product to which they are being added. The requirements of sections 3642 and 3633, as well as the functional equivalence of the instant NSAs to the baseline agreement for the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product, are discussed below and applied to the Request.

A. Section 3642

39 U.S.C. § 3642(b)(1) provides that all Commission determinations on section 3642 requests must be in accordance with the statutory definitions for Market Dominant products and Competitive products, which are based on sufficiency of market power to effectively set the price of products 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). Subsection (b)(2) provides that a product is ineligible for transfer from the Market Dominant product list to the Competitive product list if it is covered by the postal monopoly. 39 U.S.C. § 3642(b)(2). Subsection (b)(3) requires the Commission to give due regard to three considerations: (1) the availability and nature of private sector enterprises engaged in delivering the product; (2) the views of those using the product; and (3) the likely impact on small business concerns within the meaning of section 3641(h). 39 U.S.C. § 3642(b)(3).

1. Consistency with Statutory Product Classification Definitions

The Postal Accountability and Enhancement Act established two statutory product categories. The Market Dominant category consists of those products over which the Postal Service exercises sufficient market power such that it can effectively set the price substantially above costs, raise prices significantly, decrease quality, or decrease output, without risking significant loss of business to other firms offering similar products. 39 U.S.C. § 3642(b)(1). The Competitive category consists of all other products. *Id.*

The Postal Service asserts that approval of the Request would be consistent with past practices regarding the MCS.⁸ The Commission has previously determined that the Postal Service does not possess sufficient market power over letter post small packets and bulky letters to satisfy the criteria of 39 U.S.C. § 3642(b)(1). Order No. 4980 at 14. The Postal Service states that the instant agreements concern and “provide services related to” these products and are subject to the same market pressures that were identified in Order No. 4980. Request at 12.

While not dispositive, no commenters have identified any issue of the Postal Service’s market power as it relates to the market for tracking and delivery confirmation services, of the type provided for in the PRIME agreements and bilaterals. Further, the Commission, in its review, notes a lack of any data or information that would suggest the Postal Service exercises market power over tracking and delivery confirmation services.

The Commission accepts the Postal Service’s representation that the instant NSAs “compete with the tracking and delivery confirmation services . . . that are offered with competing services by private sector operators.” Request, Attachment 1 at 3. The Commission finds that the transfer is consistent with the statutory product classification

⁸ Request at 11-13 (citing Docket No. MC2019-17, Order Conditionally Approving Transfer, January 9, 2019 (Order No. 4980)).

definitions under 39 U.S.C. § 3642(b)(1), provided that such transfer is consistent with other applicable requirements.

2. Status of Product Relative to Postal Monopoly

A product may not be transferred from the Market Dominant product list if it is subject to the Private Express Statutes (PES). 39 U.S.C. § 3642(b)(2).

The Postal Service asserts that the Canada Post NSA does not implicate the PES because letter post small packets and bulky letters qualify for exceptions to the statutes. Request, Attachment 1 at 5 (citing Order No. 4980). Furthermore, the Postal Service avers that, since the three PRIME agreements and the Australia Post bilateral concern tracking, delivery scanning, and registered service for underlying host pieces, the PES “are not germane” to those NSAs. Request, Attachment 1 at 5.

As the Commission noted in Order No. 4980, “[m]ailing letter material within [certain] exceptions is allowed by statute, [and] is not subject to the PES prohibitions.” Order No. 4980 at 16. In that order, the Commission found that the PES did “not prevent the transfer” of letter post small packets and bulky letters because these products fell within the PES exceptions. *Id.*

The Commission finds that the instant NSAs fall outside the scope of the PES. The Canada Post NSA concerns letter post small packets and bulky letters, which Order No. 4980 determined qualify for exceptions from the PES. *Id.* The three PRIME agreements and the Australia Post agreement only provide services associated with letter post small packets and bulky letters and do not provide physical delivery, which is required to implicate the PES. They are therefore eligible for transfer to the Competitive product list, provided such transfer is consistent with other applicable requirements.

3. Additional Statutory Considerations

The Commission must also consider the availability and nature of private sector enterprises engaged in the delivery of the product, the views of those using the product, and the likely impact on small business concerns. 39 U.S.C. § 3642(b)(3). Based upon

the record before it, the Commission concludes that the Postal Service adequately addressed the impact on private sector competitors, customers, and small business concerns.

a. Availability and Nature of Private Sector Enterprises

In its Request, the Postal Service asserts that the instant NSAs “compete primarily against similar shipping services offered by integrators, such as FedEx, UPS, and DHL, and freight forwarders and consolidators.” Request, Attachment 1 at 5.

No commenters have contested the availability of private sector alternatives. This suggests a lack of opposition to the transfer on the grounds that private sector alternatives are not available.

The Commission concludes that the availability and nature of private sector enterprises that provide these services have been adequately addressed.

b. Product Users’ Views

The Postal Service states that “[c]ustomers of certain foreign postal operators have been sending to the United States a certain amount of Inbound Letter Post small packets and bulky letters with tracking, delivery confirmation, or registered service pursuant to” the instant NSAs. *Id.* at 6. The Postal Service comments that these foreign postal operators “are likely to expect that tracking, delivery confirmation, and registered service . . . would continue . . .” *Id.*

If transferred, neither the products, nor the rates, will change. The classification of the products as Market Dominant or Competitive will not affect the availability or terms and conditions of service. While not dispositive, the absence of opposition from users suggests that they find the proposal unobjectionable. The Commission finds that the views of those using the product have been adequately considered.

c. Impact on Small Business Concerns

The Postal Service states that “[t]he transfer that is the subject of this docket is unlikely to result in any disproportionate impact on small business concerns.” *Id.* The Postal Service notes that the users of the services provided through the instant NSAs are foreign postal operators and the transfer does not result in a price change. *Id.* at 6-7.

No small business filed comments in this docket. This suggests a lack of opposition to the transfer. The available information supports the Postal Service’s contention that the proposed transfer is unlikely to have a material impact on small business concerns. The likely impact of the proposed transfer on small business concerns has been adequately considered.

For the reasons discussed above, the Commission finds that the Request satisfies the applicable section 3642 criteria.

B. Section 3633(a)

The Commission has reviewed the Request, supporting documentation, and the Public Representative’s comments in light of the criteria in 39 U.S.C. § 3633(a). In order for the Commission to approve the proposed prices, the Postal Service must show that the proposed prices cover the product’s attributable costs, do not cause Market Dominant products to subsidize Competitive products as a whole, and contribute to the Postal Service’s institutional costs. 39 U.S.C. § 3633(a); 39 C.F.R. §§ 3015.5 and 3015.7. The Commission finds that the prices presented in the Request should not lead to the subsidization of Competitive products by Market Dominant products; should cover attributable costs; and should have a positive effect on the contribution that competitive products make to institutional costs. Accordingly, the rates for the instant NSAs should satisfy the relevant statutory criteria and regulatory requirements of 39 U.S.C. § 3633(a) and 39 C.F.R. § 3015.7. The Commission will have the opportunity to review these agreements annually in its Annual Compliance Determination process.

C. Functional Equivalence

The Postal Service's proposed MCS language consolidates the instant NSAs into the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product. In the current MCS, the Australia Post and Canada Post agreements are included in the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product, while the three PRIME agreements are each separate products. MCS §§ 1602.3-1602.6. In order to consolidate these agreements into the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product, the agreements must be functionally equivalent to the baseline agreement for that product.⁹

In Order No. 2148, the Commission clarified that either the bilateral agreement with Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV (Docket No. R2010-5) or with the China Post Group (Docket No. R2010-6) can be used as the baseline agreement for the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product.¹⁰ In Order No. 3742, the Commission determined that the Australia Post agreement was functionally equivalent to the China Post Group agreement in Docket No. R2010-6 because the agreements "share similar cost and market characteristics."¹¹

The Postal Service avers that the three PRIME agreements and part of the Australia Post agreement are functionally equivalent because they have a "close similarity between the remuneration components." Response to CHIR No. 1, question 2. As the Postal Service explains, each of the PRIME agreements has a delivery

⁹ See Docket Nos. MC2010-34 and CP2010-95, Order Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 to the Competitive Product List and Approving Included Agreement, September 29, 2010 (Order No. 546).

¹⁰ Docket No. R2013-9, Order Granting, in Part, Motion for Partial Reconsideration of Order No. 1864 and Modifying, in Part, Order No. 1864, August 11, 2014 (Order No. 2148).

¹¹ Docket No. R2017-2, Order Approving Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement with Australia Post, January 10, 2017, at 7 (Order No. 3742).

confirmation service that is similar to the service provided in the Australia Post bilateral.
Id.

The Commission determines that the instant NSA agreements are functionally equivalent to the baseline agreements for the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product. The three PRIME agreements are functionally equivalent to the Australia Post agreement because of the similarity of service provided and remuneration components. The Australia Post agreement, in turn, is functionally equivalent to the baseline agreement, as the Commission determined in Order No. 3742.

V. CONCLUSION

The Commission approves the product list modifications identified in the Request. The proposed MCS revisions are accepted for purposes of the draft MCS, subject to revision, as appropriate, for consistency with the MCS as adopted.

VI. ORDERING PARAGRAPHS

It is ordered:

1. The Commission approves the product list modifications identified in the United States Postal Service Request to Transfer the Inbound Market Dominant Express Service Agreement 1, Inbound Market Dominant Registered Service Agreement 1, Inbound Market Dominant PRIME Tracked Service Agreement, Australian Postal Corporation – United States Postal Service Bilateral Agreement, and Canada Post Corporation – United States Postal Service Bilateral Agreement to the Competitive Product List, filed December 13, 2019. Those changes consist of: (1) the transfer of the Inbound Market Dominant Express Service Agreement 1, Inbound Market Dominant Registered Service Agreement 1, Inbound Market Dominant PRIME Tracked Service Agreement, Australian Postal Corporation – United States Postal Service Bilateral Agreement, and Canada Post Corporation

- United States Postal Service Bilateral Agreement from the Market Dominant product list to the Competitive product list and (2) the consolidation of these products into the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product. These changes are effective as set forth in the body of this Order.
2. The proposed Mail Classification Schedule language is accepted for purposes of the draft MCS, subject to revision, as appropriate, for consistency with the MCS as adopted.
 3. The Secretary shall arrange for publication in the *Federal Register* of an updated product list reflecting the changes made in this Order.

By the Commission.

Erica A. Barker
Secretary

CHANGES TO THE MAIL CLASSIFICATION SCHEDULE

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

Part A—Market Dominant Products
1000 Market Dominant Product List

- 1600** **Negotiated Service Agreements***
 Domestic*
 International*
 Inbound Market Dominant Multi-Service Agreements with Foreign
 Postal Operators
~~Inbound Market Dominant Exprés Service Agreement 1~~
~~Inbound Market Dominant Registered Service Agreement 1~~
~~Inbound Market Dominant PRIME Tracked Service Agreement~~

1602 **International**

1602.1 Description

The Postal Service enters into contracts, on a mailer-specific basis, to provide international services and respective rates that are available only to mailers meeting defined eligibility requirements.

1602.2 Negotiated Service Agreement Groups

- Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 (1602.3)
- ~~Inbound Market Dominant Exprés Service Agreement 1 (1602.4)~~
- ~~Inbound Market Dominant Registered Service Agreement 1 (1602.5)~~
- ~~Inbound Market Dominant PRIME Tracked Service Agreement (1602.6)~~

1602.3 **Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1**

1602.3.1 Description

- a. Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 provide prices for acceptance, transportation within the United States, and delivery of inbound Letter Post tendered by foreign postal operators. In particular, such agreements establish negotiated rates for inbound priority and/or non-priority letter trays, flat trays, ~~small packets weighing up to 2 kilograms (4.4 pounds)~~, bags, and/or containers, including ~~registered mail bags, M-bags, and transit items~~. These items may also include direct entry letters, and flats, ~~and small packets~~ bearing domestic postage and indicia. Such agreements may also establish negotiated rates

for services ancillary to such items and for customized market-dominant services developed for application solely in the context of the agreement.

1602.3.5 Products Included in Group (Agreements)

Each product is followed by a list of agreements included within that product.

- Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1

Baseline Reference

Docket Nos. MC2010-35, R2010-5 and R2010-6

PRC Order No. 549, September 30, 2010

Included Agreements

~~Canada Post Agreement, R2018-2, expires December 31, 2019~~

~~Australia Post Agreement, R2017-2, expires TBD~~

~~1602.4 Inbound Market Dominant Exprés Service Agreement 1~~

Reference

~~Docket No. R2011-6~~

~~PRC Order No. 876, September 26, 2011~~

Expires

~~Ongoing~~

~~1602.5 Inbound Market Dominant Registered Service Agreement 1~~

Reference

~~Docket No. MC2016-168 and R2016-6~~

~~PRC Order No. 3471, August 17, 2016~~

Expires

~~Ongoing~~

~~1602.6 Inbound Market Dominant PRIME Tracked Service Agreement~~

Reference

~~Docket No. MC2017-71 and R2017-3~~

~~PRC Order No. 3755, January 17, 2017~~

Expires

~~Ongoing~~

Part B—Competitive Products
2000 Competitive Product List

2500 **Negotiated Service Agreements**

2515 **Inbound International**

2515.10 **Inbound Competitive Multi-Service Agreements with Foreign Postal Operators**

2515.10.1 Description

- a. Inbound Competitive Multi-Service Agreements with Foreign Postal Operators provide prices for acceptance, transportation within the United States, and delivery of any combination of Inbound Letter Post Small Packets and Bulky Letters, Inbound Air Parcel Post, Inbound Surface Parcel Post, Inbound Direct Entry, International Direct Sacks – Airmail M-Bags, and/or Inbound EMS (Express Mail Service) tendered by foreign postal operators. These constituent services may include other services that the relevant foreign postal operator offers to its customers under differing terms, but that nevertheless are processed and delivered in a similar manner within the United States Postal Service’s network. Such agreements may also establish negotiated prices for services ancillary to such items and for customized competitive services developed for application solely in the context of the agreement.
- b. Inbound Competitive Multi-Service Agreements with Foreign Postal Operators may set forth general operating terms and conditions, on-time delivery and scanning service performance targets and standards, specifications for mail product categories and formats, processes for indemnity, and shared transportation arrangements that modify the requirements generally applicable to the services covered by each agreement.
- c. Items tendered under Inbound Competitive Multi-Service Agreements with Foreign Postal Operators items are either sealed or not sealed against inspection, according to the general nature of each underlying service.

2515.10.2 Size and Weight Limitations

Size and weight requirements are the requirements for Inbound Letter Post Small Packets and Bulky Letters, Inbound Air Parcel Post at UPU Rates, Inbound Surface Parcel Post (at UPU Rates), Inbound Direct Entry, International Direct Sacks – Airmail M-Bags, and Inbound EMS (Express Mail Service), respectively, subject to any applicable country-specific modifications.

2515.10.3 Price Categories

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

- Bilateral/Multilateral Agreements

2515.10.4 Optional Features

The Postal Service may offer such optional features as may be mutually agreed with the relevant foreign postal operator.

2515.10.5 Products Included in Group (Agreements)

Each product is followed by a list of agreements included within that product.

- Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1

Baseline Reference

Docket Nos. MC2010-34 and CP2010-95

PRC Order No. 546, September 29, 2010

Included Agreements

Canada Post Corporation, CP2018-96, expires December 31, 2019

Inbound Competitive PRIME Exprès Service Agreement 1,
MC2020-73, expires TBD

Inbound Competitive PRIME Registered Service Agreement 1,
MC2020-73, expires TBD

Inbound Competitive PRIME Tracked Service Agreement 1,
MC2020-73, expires TBD

Australia Post Agreement, MC2020-73, expires TBD
