

ORDER NO. 5444

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

Competitive Product Prices
First-Class Package Service Contract 55 (MC2016-148)
Negotiated Service Agreement

Docket No. CP2016-185

ORDER APPROVING AMENDMENT THREE TO
FIRST-CLASS PACKAGE SERVICE NEGOTIATED SERVICE AGREEMENT,
GRANTING MOTION FOR TEMPORARY RELIEF, AND PROVIDING GUIDANCE

(Issued March 3, 2020)

I. INTRODUCTION

The Postal Service seeks to amend a First-Class Package Service negotiated service agreement and moves for temporary relief.¹ For the reasons discussed below, the Commission approves the Amendment and grants the Motion for Temporary Relief.

¹ USPS Notice of Amendment to First-Class Package Service Contract 55 and Motion for Temporary Relief, February 28, 2020 (Notice). The amendment is an attachment to the Notice (Amendment). The motion for temporary relief is included in the Notice (Motion for Temporary Relief).

In Order No. 3352, the Commission approved the First-Class Package Service Contract 55 negotiated service agreement (Existing Agreement).² On February 28, 2020, the Postal Service filed notice that it has agreed to the Amendment to the Existing Agreement.

The Postal Service intends for the Amendment to become effective three business days after the date that the Commission completes its review of the Notice. Notice at 1.

II. COMMISSION ANALYSIS

The Commission has reviewed the Notice and the accompanying materials filed under seal.

Cost considerations. The Commission reviews competitive product prices to ensure that each product covers its attributable costs, does not cause market dominant products to subsidize competitive products, and contributes to the Postal Service's institutional costs. 39 U.S.C. § 3633(a); 39 C.F.R. §§ 3015.5 and 3015.7. As long as the revenue generated by the product exceeds its attributable costs, the product is unlikely to reduce the contribution of competitive products as a whole or to adversely affect the ability of competitive products as a whole to contribute an appropriate share of institutional costs. In other words, if a product covers its attributable costs, it is likely to comply with 39 U.S.C. § 3633(a).

The Existing Agreement is set to expire March 3, 2020. Notice at 1. The Amendment revises the expiration date of the contract to May 2, 2020. Notice, Attachment A at 1.

² See Docket Nos. MC2016-148 and CP2016-185, Order Adding First-Class Package Service Contract 55 to the Competitive Product List, June 6, 2016 (Order No. 3352). The contract was later amended. See Order Approving Amendment to First-Class Package Service Negotiated Service Agreement, February 1, 2017 (Order No. 3768); Order Approving Amendment Two to First-Class Package Service Negotiated Service Agreement, December 2, 2019 (Order No. Order No. 5327).

The Amendment does not materially affect the underlying financial analysis of the Existing Agreement. Thus, the Commission finds that the Existing Agreement, as amended, comports with the provisions applicable to rates for competitive products in 39 U.S.C. § 3633(a) and 39 C.F.R. § 3015.7.

Timeliness. The Notice is untimely.³ Additionally, the Postal Service failed to file the motion for late acceptance required by Order No. 4866. See *id.* Exacerbating the untimely filing is the fact that the Amendment does not take effect until three business days after the Commission completes its review. Notice at 1. To be effective at extending the Existing Agreement, the Amendment would have needed to be approved by the Commission no later than February 27, 2020, one day before the date the Postal Service actually filed the Amendment with the Commission.

The Commission dealt with a similar situation in Docket No. CP2016-93, where it denied as moot an untimely amendment that was both unaccompanied by the required motion for late acceptance and that by its terms would be ineffective at extending the agreement.⁴ In the instant docket, however, the Postal Service specified that its filing delay was caused by international travel of a key Postal Service official and uncertainty regarding whether the parties would reach agreement. Notice at 2. This information covers the substantive portion of the missing motion for late acceptance, and its detail that was lacking from the notice filed in Docket No. CP2016-93. The Commission finds this explanation sufficient to approve the Amendment, but reminds the Postal Service of its obligation to file a motion for late acceptance.

The Commission's approval of the Amendment, however, is not the end of the matter, because the Amendment does not take effect until after the contract expires and would therefore be ineffective at extending Existing Agreement. Cognizant of this fact,

³ See Docket No. CP2017-253, *et al.*, Order Approving Modifications and Providing Guidance Regarding Extending Negotiated Service Agreements, October 30, 2018, at 4 (Order No. 4866) (requiring notices of modification to be filed at least seven days prior to contract expiration).

⁴ Docket No. CP2016-93, Order Denying as Moot Amendment Three to Parcel Select Negotiated Service Agreement, July 12, 2019 (Order No. 5149).

the Postal Service filed its Motion for Temporary Relief to extend the Existing Agreement until the Amendment can take effect. Normally, motions for temporary relief are also required to be filed at least one week prior to the expiration of the contract. Order No. 4866 at 5. Untimely motions for temporary relief must meet the higher burden of demonstrating “compelling circumstances” justifying the relief sought. *Id.* However, the standards governing motions for temporary relief in Order No. 4866 are intended to apply when the Postal Service seeks temporary relief in lieu of submitting a signed amendment. By contrast, in the instant docket the Postal Service seeks temporary relief only to extend the existing agreement to cover the signed Amendment’s three-business-day delayed implementation period.

Because the contract has not already expired and the Commission would approve the Amendment were it not for the delayed implementation clause, the Commission will, *exceptionally*, grant the Postal Service’s motion and continue to list the Existing Agreement on the Mail Classification Schedule between the expiration of the contract today and the effective date of the Amendment on March 6, 2020. In keeping with Commission precedent, the Postal Service is required to charge the customer rates of general applicability during the interim period while the contract has lapsed.⁵

The Commission notes that delayed implementation dates in extension amendments frustrate the Commission’s purpose in requiring amendments to be filed at least seven days prior to contract expiration by reducing the time available for the Commission’s review. If the Postal Service desires to include delayed implementation clauses, it should instead file such amendments farther in advance. Accordingly, the Commission advises that when determining compliance with Order No. 4866, the Commission will calculate the filing deadline as seven days prior to the *earlier* of either (1) the contract’s expiration date; or (2) the last date on which the amendment or modification would need to be approved for the amendment or modification to be

⁵ Docket No. CP2016-39, Order Approving Amendment One to First-Class Package Service Negotiated Service Agreement, December 21, 2018, at 4 (Order No. 4944).

effective at extending the contract. As the Postal Service is now on notice that inclusion of delayed implementation clauses will require such amendments to be filed farther in advance, the Commission will not grant future motions for temporary relief to accommodate such clauses.

Other considerations. The Postal Service states that the Amendment shall become effective three business days after the date that the Commission completes its review. Notice at 1. The Existing Agreement, as amended, is set to expire May 2, 2020. Notice, Attachment A at 1.

If the Existing Agreement, as amended, is terminated prior to the scheduled expiration date, the Postal Service shall promptly notify the Commission.

In conclusion, the Commission approves the Existing Agreement, as amended, and grants the Motion for Temporary Relief.

III. ORDERING PARAGRAPHS

It is ordered:

1. The Commission approves the First-Class Package Service Contract 55 negotiated service agreement, as amended.
2. The Postal Service's Motion for Temporary Relief is granted. The Commission will continue to list First-Class Package Service Contract 55 on the Mail Classification Schedule until the effective date of the Amendment. The Postal Service shall charge the contract partner rates of general applicability as described in the body of this order.

3. The Postal Service shall notify the Commission if the Existing Agreement, as amended, terminates prior to the revised expiration date, May 2, 2020.

By the Commission.

Erica A. Barker
Secretary