

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Competitive Product Prices
Global Direct
Negotiated Service Agreements

Docket No. MC2009-9

Competitive Product Prices
Global Direct Contract (MC2009-9)
Negotiated Service Agreement

Docket No. CP2009-10

Competitive Product Prices
Global Direct Contract (MC2009-9)
Negotiated Service Agreement

Docket No. CP2009-11

PUBLIC REPRESENTATIVE COMMENTS
IN RESPONSE TO ORDER NO. 137

(December 2, 2008)

The Public Representative hereby offers comments on the United States Postal Service's request to add Global Direct Negotiated Service Agreements to the Competitive Product List¹ in response to the Commission's notice and request for comment.²

¹ Request of the United States Postal Service to Add Global Direct Negotiated Service Agreements to the Competitive Products List, and Notice of Filing (Under Seal) Two Functionally Equivalent Agreements, November 17, 2008 (Request) The Postal Service filed an unredacted copy of the contract and supporting materials under seal.

² See PRC Order 137, Notice and Order Concerning Global Direct Contracts Negotiated Service Agreement, November 20, 2008, at 4-5.

Overview

The Public Representative acknowledges that these Negotiated Service Agreements (NSAs) comport with the PAEA statutory requirements by covering their costs, and appear to be functionally equivalent.

Two closely related concerns arising from the offering of this Global Direct competitive product merit the Commission's close attention and study following the conclusion of the instant mail classification case.

1) Actual competition may be barred in Competitive Product services involving material components such as terminal dues to which participation is limited to the Postal Service by international arrangement or treaty;

2) Inadequate terminal dues rates impose a barrier to market entry for international direct entry products and deter potential competitors.

Nature of the Agreements

Global Direct agreements are a direct entry bulk international mail service that provides business customers with a less expensive and more effective way to enter bulk mail into another country so that it resembles mail originating in that other country.³ It is a useful alternative to setting up separate operations in the receiving country.⁴ The Postal Service accepts such mail within the United

³ See Request, Attachment 1, Section d.

⁴ Ibid.

States, transports it to another country and enters it into the mail stream of the receiving country.⁵ The Global Direct mail bears the postage/indicia of the receiving country and also has a return address within that receiving country.⁶ Such direct entry mail offers many business advantages for business mailers.⁷

Antecedent Global Direct Products

The Postal Service offered similar products for a number of years.⁸ The Postal Service offered Global Direct-Mexico services from November 1993 through April 2003.⁹ In 1995, the Service began testing a “seamless” direct entry service into Japan, and a year later announced that their Global Package Link product would expand to several other countries.¹⁰ In August 1998, the Postal Service announced Global Direct-Canada.¹¹

⁵ *Id.*

⁶ *Id.*

⁷ See generally, Yorgey, Lisa A., The Global End Game, *Target Marketing*, October 1, 2000; Hengst, Rainer, Plotting Your Global Strategy (Part II), *Direct Marketing*, September 30, 2000.

⁸ See *id.* at §§ d, g.

⁹ See Campanelli, Melissa, USPS Ends Global Direct-Mexico, *DM News*, April 8, 2003.

¹⁰ See Postal Service Plans to Offer Marketing Via Global Direct Mail, *Greensboro News & Record*, August 23, 1996.

¹¹ See USPS: Postal Service Offers New Service to Help Direct Marketers Reach Canadian Customers, *M2 Presswire*, August 1998.

The Public Interest

Important public interests associated with these negotiated contracts are adequacy of cost coverage, appropriate categorization of the product, and overall transparency. The Public Representative is satisfied that this set of negotiated service agreements meet these statutory and other significant criteria.

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

The Public Interest in Adequate Cost Coverage

An essential public interest in competitive products contracts of this sort is to ensure that these contracts adequately cover their costs so cross-subsidization by market dominant products does not occur.¹² There is a strong public interest in ensuring that these products pay their own way and are not supported by mailing prices paid by the general public or other mailers of market dominant products.¹³ The undertaking of these contracts is obliged by law to enable competitive products as a whole to cover their costs, and to contribute a minimum of 5.5 percent to the Postal Service's total institutional costs.¹⁴

¹² See § 3633 (a)(1) & (2).

¹³ *Id.*

¹⁴ See § 3633 (b).

The Public Representative, after reviewing the materials under seal in this proceeding and appropriate consultation with technical staff, acknowledges that the provisions of the CP2009-10 and CP2009-11 contracts, including the pricing structure, overtly comport with the requirement that they will generate sufficient revenue to cover attributable costs for the services provided, enable competitive products as a whole to cover their costs, and as a whole to contribute a minimum of 5.5 percent to the Postal Service's total institutional costs. These factors should assure that there is no subsidization of these NSAs by market dominant products.

The Public Interest in Appropriate Categorization of NSAs

In an earlier docket requesting establishment of a Competitive Product, the Public Representative expressed misgivings about the categorization of an umbrella product that included Global Direct.¹⁵ The Postal Service offered clarification and the Commission found the Service's evidence persuasive and determined that Global Direct is properly classified as a Competitive Product.¹⁶

¹⁵ See Public Representative Comments in Response to United States Postal Service Request to Add Global Plus Negotiated Service Agreements to the Competitive Products List, August 27, 2008.

¹⁶ See PRC Order No. 112, Order Concerning Global Plus 2 Negotiated Service Agreements, October 3, 2008, at 7. In addition, as noted above, the Global Direct antecedent products have a long history of use by bulk business customers.

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

Public Interest in Transparency

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

The Postal Service has taken noticeable steps toward that end, both in its NSA filings and, significantly, in its preparation for annual compliance reporting. However, the Public Representative offers one recommendation: the Postal Service should include in its NSA public filings whenever possible a copy of the redacted contract within the immediate docket rather than simply incorporating it by reference from a previous docket. This makes it easier for the public to view the relevant documents in one location rather than have to conduct a hunt to locate them.

Public Interest in Increased Options for Mailers

As noted above, deployment of NSAs of this type offer many business advantages to mailers who may find worthwhile business opportunities across an international border.

Lack of Access to the Terminal Dues Entry Rates Serve to Block Competitors From Offering This Competitive Product

Under the PAEA, each competitive product is required to cover its attributable costs.¹⁷ Most international mail to and from the United States is handled under provisions of international multilateral treaty agreements signed under the auspices of the Universal Postal Union (UPU) international agreements that delineate terminal dues.¹⁸ These terminal dues rates are available to postal operators that are signatories to the agreement, but not private competitors.

In direct entry contracts of the Global Direct type, the Postal Service accepts payment from the mailer and pays the terminal dues fees to the receiving country's postal operator. Other competitors performing the same function and bringing mail into that country for posting would be required to pay the higher domestic rates of the receiving country, unless those competitors were

¹⁷ See 39 U.S.C. 3633(a)(2).

¹⁸ Terminal Dues are the reimbursement payments made by a sending country to a receiving country for delivery services rendered on letters and other mailed items. The U.S. has a distinct bilateral agreement with one nation (Canada).

somehow able to access the terminal dues rates or else negotiate a more favorable delivery rate from the receiving country's postal operator. Under present circumstances, competitors would be unlikely to be able to access the terminal dues rates or alternatively to exert substantial negotiating power to effectuate a bilateral agreement.

This has the effect of allowing the Postal Service to either block or greatly hinder competitors in what is intended to be a Competitive Product market.¹⁹

The Public Representative recognizes that the transition to the new regulatory system is not something that occurs overnight. The Postal Service and its regulator must respect longstanding international arrangements and the needs of international diplomacy and commerce. Furthermore, there may be very good reasons for encouraging low terminal dues in order to foster increased international trade and business and improved opportunities for communications between the U.S. and citizens of other countries.

Nor does the Public Representative wish to impute that this arrangement is somehow nefarious or was concocted to block legitimate competition. Instead, it appears to be the aftermath of an ongoing set of carefully negotiated international postal arrangements that has not necessarily kept pace with changes in the domestic postal statute.

¹⁹ A related area of concern is that terminal dues, negotiated as part of a framework that includes considerations of inbound as well as outbound mail, may not always rise to the actual cost of delivering a mailpiece.

Still, arrangements of this type establish a structure that may frustrate the language and intent of the PAEA by erecting unnecessary hurdles to competition in the handling of bulk international outbound mail, a Competitive Product clearly specified as such by law.²⁰

The law is clear that international postal policies and agreements should not hinder competition. § 404a of the PAEA says in part that the Postal Service may not promulgate any rule or regulation that has the effect of precluding competition or establish unfair competitive advantage.²¹ § 407 of PAEA says in part: "It is the policy of the United States...(2) to promote and encourage unrestricted and undistorted competition in the provision of international postal services and other international delivery services, except where provision of such services by private companies may be prohibited by law of the United States...."²² Another section, § 407(b)(1), says the Secretary of State should not conclude any treaty, convention, or other international agreement (including those regulating international postal services) if such treaty, convention, or agreement would, with respect to any competitive product, grant an undue or unreasonable preference to the Postal Service...."²³

²⁰ 39 U.S.C. 3631 (a)(4).

²¹ See 39 U.S.C. 404a (a)(1).

²² 39 U.S.C. 407 (a)(2).

²³ 39 U.S.C. 407 (b)(1).

Any service which is bound by obligations under UPU treaty or bilateral agreement and participation in which is effectively limited to official posts only cannot in point of fact fulfill the requirements of a Competitive Product.

Thus difficulties arise in classifying as a Competitive Product under § 3631 the Global Direct product (and bulk international mail in general) appears to be at odds with the terminal dues regime currently in existence (much of which was emplaced prior to PAEA).

A Study is Recommended

The Public Representative recommends that the Commission conduct a study of this issue. Such a special study might be conducted on a stand-alone basis, or as part of a notice and comment Public Inquiry docket, or within the context of the Annual Compliance Review, or as part of the § 701 “look back” evaluation study required by the PAEA.²⁴ A thoughtful and deliberate examination of this issue in the proper forum would help accomplish the intent of Congress.

²⁴ See Pub.L. 109-435, Title VII, § 701, Dec. 20, 2006, 120 Stat. 3242 (39 USC 501 (uncodified note requiring Assessments of Ratemaking, Classification, and Other Provisions)).

Summary

In conclusion, the agreement satisfies the statutory requirements for a Competitive Product, comports with the public interest and should be approved by the Commission. However, it is also essential for the Commission to evaluate the anti-competitive and other injurious effects of inadequate terminal dues established via negotiated bilateral mail agreements.

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

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