

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

Before Commissioners:

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

Competitive Product Prices
Express Mail
Express Mail Contract 6

Docket No. MC2010-6

Competitive Product Prices
Express Mail Contract 6 (MC2010-6)
Negotiated Service Agreement

Docket No. CP2010-6

ORDER CONCERNING EXPRESS MAIL CONTRACT 6
NEGOTIATED SERVICE AGREEMENT

(Issued December 15, 2009)

I. INTRODUCTION

The Postal Service seeks to add a new product identified as Express Mail Contract 6 to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

II. BACKGROUND

At the end of October 2009, the Postal Service filed a formal request and associated supporting information pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Express Mail Contract 6 to the Competitive Product List.¹ The Postal Service asserts that the Express Mail Contract 6 product is a competitive product “not of general applicability” within the meaning of 39 U.S.C. 3632(b)(3). This Request has been assigned Docket No. MC2010-6.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract has been assigned Docket No. CP2010-6.

In support of its Request, the Postal Service filed the following materials: (1) a redacted version of the Governors’ Decision authorizing certain types of Express Mail contracts;² (2) a redacted version of the contract;³ (3) a requested change in the Mail Classification Schedule product list;⁴ (4) a Statement of Supporting Justification as required by 39 CFR 3020.32;⁵ (5) a certification of compliance with 39 U.S.C. 3633(a);⁶ and (6) an application for non-public treatment of the materials filed under seal.⁷ The redacted version of the contract provides that the contract is terminable on 30 days’

¹ Request of the United States Postal Service to Add Express Mail Contract 6 to Competitive Product List and Notice of Filing (Under Seal) of Contract and Supporting Data, October 28, 2009 (Request). On October 29, 2009, the Postal Service filed errata to its Request. See Notice of the United States Postal Service of Filing Errata to Request and Notice, October 29, 2009. Accordingly, the filing of the entire set of documents related to this Request was not completed until October 29, 2009.

² Attachment A to the Request, reflecting Governors’ Decision No. 09-14, October 26, 2009.

³ Attachment B to the Request.

⁴ Attachment C to the Request.

⁵ Attachment D to the Request.

⁶ Attachment E to the Request.

⁷ Attachment F to the Request.

notice by either party, but could continue for three years from the effective date subject to annual price adjustments. Request, Attachment B.

In the Statement of Supporting Justification, Mary Prince Anderson, Acting Manager, Sales and Communications, Expedited Shipping, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to coverage of institutional costs, and will increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. Request, Attachment D, at 1. W. Ashley Lyons, Manager, Regulatory Reporting and Cost Analysis, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). *Id.*, Attachment E.

The Postal Service filed much of the supporting materials, including the supporting data and the unredacted contract, under seal. The Postal Service maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, certain terms and conditions, and financial projections, should remain confidential. *Id.*, Attachment F, at 2-3.⁸

In Order No. 330, the Commission gave notice of the two dockets, appointed a public representative, and provided the public with an opportunity to comment.⁹ On November 2, 2009, Chairman's Information Request No. 1 (CHIR No. 1) was filed. The due date for responding to CHIR No. 1 was set as November 9, 2009. On November 13, 2009, the Postal Service filed a partial response to CHIR No. 1.¹⁰ Seeking

⁸ In its application for non-public treatment, the Postal Service requests an indefinite extension of non-public treatment of customer-identifying information. *Id.* at 7. For the reasons discussed in PRC Order No. 323, that request is denied. See, e.g., Docket No. MC2010-1 and CP2010-1, Order Concerning Priority Mail Contract 19 Negotiated Service Agreement, October 26, 2009 (Order No. 323).

⁹ PRC Order No. 330, Notice and Order Concerning Express Mail Contract 6 Negotiated Service Agreement, October 30, 2009 (Order No. 330).

¹⁰ Notice of the United States Postal Service of Filing Responses to Chairman's Information Request No. 1, Question 1, Subparts (b)-(d), Under Seal, November 13, 2009 (Partial Response to CHIR No. 1). With its Partial Response to CHIR No. 1, the Postal Service also filed a motion for late acceptance which contained an explanation of the reason for the delay and the issues with responding to the remaining information requests. Motion of the United States Postal Service for Late Acceptance of Responses to Chairman's Information Request No. 1, November 13, 2009. The motion is granted.

clarification of information contained in the Postal Service's November 13, 2009 partial response, Chairman's Information Request No. 2 (CHIR No. 2) was filed on November 16, 2009.¹¹ The Postal Service responded to CHIR No. 2 on November 19, 2009.¹² On December 9, 2009, the Postal Service filed its response to the outstanding questions in CHIR No. 1.¹³

III. COMMENTS

Comments were timely filed by the Public Representative on November 9, 2009.¹⁴ No comments were submitted by other interested parties. The Public Representative states that the Postal Service's filing meets the pertinent provisions of title 39 and the relevant Commission rules. *Id.* at 1-3. He further states that the agreement is fair to the parties and employs pricing terms favorable to the customer, the Postal Service, and thereby, the public. *Id.* at 4-5. The Public Representative also believes that the Postal Service has provided appropriate justification for maintaining confidentiality in this case. *Id.* at 3.

¹¹ Notice of Filing of Chairman's Information Request No. 2 Under Seal, November 16, 2009.

¹² Notice of the United States Postal Service of Filing Response to Chairman's Information Request No. 2, Under Seal, November 19, 2009.

¹³ Notice of the United States Postal Service of Filing Response to Chairman's Information Request No. 1, Question 1(a), Under Seal, December 9, 2009 (Remaining Response to CHIR No. 1). With its Remaining Response to CHIR No. 1, the Postal Service filed a motion for late acceptance of that response. Motion of the United States Postal Service for Late Acceptance of Response to Chairman's Information Request No. 1, Question 1(a), December 9, 2009. The motion is granted, although the Postal Service should be aware that the significant delay in the Commission's decision in this case is directly related to the delay in the Postal Service's filing of this response.

¹⁴ Public Representative Comments in Response to United States Postal Service Request to Add Express Mail Contract 6 to the Competitive Product List, November 9, 2009 (Public Representative Comments).

IV. COMMISSION ANALYSIS

The Commission has reviewed the Request, the contract, the financial analysis provided under seal that accompanies the Request, the responses to CHIR Nos. 1 and 2, and the comments filed by the Public Representative.

Statutory requirements. The Commission's statutory responsibilities in this instance entail assigning Express Mail Contract 6 to either the Market Dominant Product List or to the Competitive Product List. 39 U.S.C. 3642. As part of this responsibility, the Commission also reviews the proposal for compliance with the Postal Accountability and Enhancement Act (PAEA) requirements. This includes, for proposed competitive products, a review of the provisions applicable to rates for competitive products. 39 U.S.C. 3633.

Product list assignment. In determining whether to assign Express Mail Contract 6 as a product to the Market Dominant Product List or the Competitive Product List, the Commission must consider whether

the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products.

39 U.S.C. 3642(b)(1). If so, the product will be categorized as market dominant. The competitive category of products consists of all other products.

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

The Postal Service asserts that its bargaining position is constrained by the existence of other shippers who can provide similar services, thus precluding it from taking unilateral action to increase prices without the risk of losing volume to private companies. Request, Attachment D, ¶ (d). The Postal Service also contends that it

may not decrease quality or output without risking the loss of business to competitors that offer similar expedited delivery services. *Id.* It further states that the contract partner supports the addition of the contract to the Competitive Product List to effectuate the negotiated contractual terms. *Id.*, ¶ (g). Finally, the Postal Service states that the market for expedited delivery services is highly competitive and requires a substantial infrastructure to support a national network. It indicates that large carriers serve this market. Accordingly, the Postal Service states that it is unaware of any small business concerns that could offer comparable service for this customer. *Id.*, ¶ (h).

No commenter opposes the proposed classification of Express Mail Contract 6 as competitive. Having considered the statutory requirements and the support offered by the Postal Service, the Commission finds that Express Mail Contract 6 is appropriately classified as a competitive product and should be added to the Competitive Product List.

Cost considerations. In its initial filings, the Postal Service presented an incomplete financial analysis of Express Mail Contract 6. The incomplete initial filings did not allow the Commission to undertake the required analysis of Express Mail Contract 6 until the Postal Service fully responded to CHIR Nos. 1 and 2. Because the Postal Service did not fully respond to CHIR No. 1 until December 9, 2009, the Commission could not begin its analysis until that time. Even then, further informal follow-up to the Postal Service's responses to CHIR No. 1 were necessary for a complete understanding of the data.

Based on the data and explanations submitted, the Commission finds that Express Mail Contract 6 should cover its attributable costs (39 U.S.C. 3633(a)(2)), should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and should have a positive effect on competitive products' contribution to institutional costs (39 U.S.C. 3633(a)(3)). Thus, an initial review of proposed Express Mail Contract 6 indicates that it comports with the

provisions applicable to rates for competitive products. The Commission's analysis is provided in Library Reference PRC-CP2010-6-NP-LR1 which is being filed under seal.

Other considerations. The Postal Service shall notify the Commission if termination occurs prior to the scheduled termination date. Following the scheduled termination date of the agreement, the Commission will remove the product from the Competitive Product List.

Further, while the Commission currently believes that the contract is expected to comply with the applicable requirements of 39 U.S.C. 3633, the Commission seeks to ensure that it is provided with the proper level of detail to make appropriate findings in the FY 2010 Annual Compliance Determination (ACD) with respect to this contract. To that end, the Postal Service should view Library Reference PRC-CP2010-6-NP-LR1 as illustrative of the granularity of the information to be reported with respect to this contract.

In conclusion, the Commission approves Express Mail Contract 6 as a new product. The revision to the Competitive Product List is shown below the signature of this Order and is effective upon issuance of this Order.

V. ORDERING PARAGRAPHS

It is Ordered:

1. Express Mail Contract 6 (MC2010-6 and CP2010-6) is added to the Competitive Product List as a new product under Negotiated Service Agreements, Domestic.
2. The Postal Service shall notify the Commission if termination occurs prior to the scheduled termination date.
3. The Postal Service shall view Library Reference PRC-CP2010-6-NP-LR1 as illustrative of the level of detail of information that the Commission seeks with

respect to this contract in connection with the FY 2010 Annual Compliance Determination proceeding.

4. The Secretary shall arrange for the publication of this Order in the *Federal Register*.

By the Commission.

Shoshana M. Grove
Secretary

CHANGE IN MAIL CLASSIFICATION SCHEDULE
CHANGE IN PRODUCT LIST

The following material represents changes to the product list codified at 39 CFR Appendix A to Subpart A of Part 3020—Mail Classification Schedule. These changes are in response to Docket Nos. MC2010-6 and CP2010-6. The Commission uses two main conventions when making changes to the product lists. The addition of text is indicated by underscoring. Deleted text is indicated by a strikethrough.

Part B—Competitive Products

2000 Competitive Product List

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Negotiated Service Agreements

Domestic

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Express Mail Contract 6 (MC2010-6 and CP2010-6)

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