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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
Inbound Competitive Multi-Service Agreements with
Foreign Postal Operators
Docket Nos. MC2010-34

Competitive Product Prices
Strategic Bilateral Agreement Between United States
Postal Service and Koninklijke TNT Post BV and
TNT Post Pakketservice Benelux BV (MC2010-34)
Negotiated Service Agreement
CP2010-95

ORDER ADDING INBOUND COMPETITIVE MULTI-SERVICE AGREEMENTS WITH FOREIGN POSTAL OPERATORS 1 TO THE COMPETITIVE PRODUCT LIST AND APPROVING INCLUDED AGREEMENT

(Issued September 29, 2010)

I. INTRODUCTION

The Postal Service seeks to add a new product identified as Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (Competitive Multi-Service Agreements) to the competitive product list. The Postal Service also seeks to include a negotiated agreement with Koninklijke TNT Post BV and TNT Post Pakketservice

Benelux BV (TNT Agreement) within the Competitive Multi-Service Agreements product. For the reasons discussed below, the Commission approves the requests.

II. BACKGROUND

On August 13, 2010, the Postal Service filed a request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* to add Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 to the competitive product list.[1] The Postal Service asserts that Competitive Multi-Service Agreements are a competitive product "not of general applicability" within the meaning of 39 U.S.C. 3632(b)(3). It further asserts that the Governors have established prices and classifications not of general applicability for Inbound Competitive Multi-Service Agreements in Governors' Decision No. 10-3. *Id.* at 1. This classification request has been assigned Docket No. MC2010-34.

The Postal Service's Request includes the following five attachments:

- Attachment 1—Statement of Supporting Justification required by 39 CFR 3020.32;
- Attachment 2—a redacted copy of Governors' Decision No. 10-3, which establishes prices and classifications for Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1, proposes descriptive Mail Classification Change (MCS) language, provides pricing formulas, and includes the certification of prices and certification of the Governors' vote;
- Attachment 3—a redacted copy of the TNT Agreement;
- Attachment 4—a certified statement required by 39 CFR 3015.5(c)(2); and
- Attachment 5—an application for non-public treatment of materials to maintain redacted portions of the agreement and supporting documents under seal.

[1] Request of United States Postal Service to Add Inbound Competitive Multi-Service Agreements with Foreign Postal Operators to the Competitive Product List, and Notice of Filing (Under Seal) of Enabling Governors' Decision and Negotiated Service Agreement, August 13, 2010 (Request).

The Postal Service states that the proposed Competitive Multi-Service Agreements product creates rates for competitive inbound international mail exchanged between postal operators. An agreement included within the product could include traditional mail services such as Air Parcel Post (Air CP), Surface Parcel Post (Surface CP), and Express Mail Service (EMS), as well as ancillary services. *Id*. at 3. The Postal Service contends that this will permit pricing for any combination of services within agreements that meet the pricing criteria of the Governors' Decision. *Id.* This also would enhance the Postal Service's pricing flexibility and ease administrative burdens by enabling it to negotiate multiple inbound competitive services at once rather than filing separate agreements for regulatory review. *Id.* at 7.

In a Statement of Supporting Justification, Lea Emerson, Executive Director, International Postal Affairs, asserts that the services to be provided under contract will cover their attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.*, Attachment 1. She addresses the criteria specified in 39 U.S.C. 3642(b) for classifying a product as market dominant or competitive. She also notes that Competitive Multi-Service Agreements are consistent with the Commission's finding in Order No. 43 that Surface CP at Non-UPU Rates, EMS, and Air CP be considered competitive products. *Id.*

The Postal Service proposes classification language for the Competitive Multi-Service Agreements product that would permit the establishment of unique operating terms and conditions that modify the default arrangements of the Universal Postal Union (UPU). *Id.* at 4. The Postal Service also states that the proposed language covers nontraditional services exchanged among postal operators, *e.g.*, inbound direct entry, and other services offered by a foreign postal operation to customers under terms other than those not commonly used, but which are processed and delivered similar to an existing service within the Postal Service's network. *Id.* at 3-4.

The Request includes the first agreement to fall under the Competitive Multi-Service Agreements classification. This agreement with Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV governs rates for Inbound Air Parcel Post (Air CP), Surface Parcel Post (Surface CP) and Express Mail Service (EMS). *Id.* at 4-5. The Postal Service proposes that additional agreements functionally equivalent to the TNT Agreement be added to the competitive product list as price categories under the Competitive Multi-Service Agreements product. *Id.* at 6. The TNT Agreement has been assigned Docket No. CP2010-95.

The TNT Agreement is scheduled to commence October 1, 2010, and covers two one-year periods with different rates for the second period. *Id.* at 4-5. The agreement contains negotiated rates that are adjusted in the second year to maintain cost coverage. *Id*. The Postal Service identifies various terms included in the agreement, *e.g.,* performance metrics and electronic settlement and payment processes and incentives for optional activities. *Id.* at 4-5. The Postal Service notes that the agreement also establishes performance metrics for late delivery and late or missing information with associated penalties. Finally, the Postal Service asserts that the terms of the TNT Agreement conform to the classification language proposed for the Competitive Multi-Service Agreements product.

Joseph Moeller, Manager, Regulatory Reporting and Cost Analysis, Finance Department, United States Postal Service, certifies that the TNT Agreement complies with 39 U.S.C. 3633(a). *Id.*, Attachment 4. He asserts that the prices for the TNT Agreement "should cover its attributable costs and preclude the subsidization of competitive products by market dominant products." *Id.*

In Order No. 517, the Commission gave notice of the two dockets, appointed a public representative, and provided the public with an opportunity to comment.[2] On September 3, 2010, Chairman's Information Request No. 1 (CHIR No. 1) was issued,

[2] Notice and Order Concerning Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Operators to the Competitive Product List and Negotiated Service Agreement, August 19, 2010 (Order No. 517).

which sought clarification of various elements related to the proposed Competitive Multi-Service Agreements. The Postal Service filed its responses to CHIR No.1 on September 10, 2010.[3] On September 20, 2010, Chairman's Information Request No. 2 was issued requesting supplemental information. The Postal Service's response was filed on September 24, 2010.[4] The Postal Service also filed a revised signature page to the TNT Agreement.[5]

III. COMMENTS

Comments were filed by the Public Representative.[6] No other interested person submitted comments. The Public Representative states that the Competitive Multi-Service Agreements product "is consistent with the policies of 39 U.S.C. 3632, with regard to Action of the Governors; section 3622, Modern rate regulation; and section 3642, with regard to adding new products to the Mail Classification List, notice and publication." Public Representative Comments at 2. He also states that the proposed TNT Agreement appears to comport with title 39. *Id*. at 1.

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[3] Notice of Filing Response to Chairman's Information Request No. 1, September 10, 2010. *See also* Notice of the United States Postal Service of Filing Nonpublic Materials in Response to Chairman's Information Request No. 1, September 10, 2010. The Postal Service filed an accompanying Motion for Late Acceptance of Response to Chairman's Information Request No. 1, September 10, 2010. The motion is granted.

[4] Notice of Filing Response to Chairman's Information Request No. 2, September 23, 2010. *See also* Notice of the United States Postal Service of Filing Nonpublic Materials in Response to Chairman's Information Request No. 2, September 24, 2010.

[5] Notice of Filing Revised Signature Page to Strategic Bilateral Agreement Between United States Postal Service and Konninlijke TNT Post BV and TNT Post Pakketservice Benelux BV, September 8, 2010.

[6] Public Representative Comments in Response to United States Postal Service Filing Adding Inbound Multi-Service Agreements with Foreign Postal Operators 1 to [Competitive] Product List and Negotiated Service Agreement, September 1, 2010. *See also* Public Representative Notice of Errata for Comments in Response to United States Postal Service Adding Inbound Multi-Service Agreements with Foreign Postal Operators 1 to Competitive Product List and Negotiated Service Agreement (Public Representative Comments). The Public Representative also filed an accompanying motion for late acceptance of comments, September 1, 2010. The motion is granted.

IV. COMMISSION ANALYSIS

The Commission has reviewed the Request, the included TNT Agreement, the financial analysis filed under seal, CHIR responses, and the comments filed by the Public Representative.

Statutory requirements. The Commission's statutory responsibilities in this instance entail assigning the Competitive Multi-Service Agreements product 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. In addition, the Commission is requested to determine whether it is appropriate for the TNT Agreement to be included within the Competitive Multi-Service Agreements product.

Product list assignment. In determining whether to assign the Competitive Multi-Service Agreements 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 shall consist of all other products.

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 or decrease service without the risk of losing volume to private companies. Request, Attachment 1, at 3. It also contends that the Competitive Multi-Service Agreements product relates to the exchange between the Postal Service and foreign postal operators of competitive services which include inbound EMS, Air CP, and Surface CP which have been determined to be competitive

products because of their exclusion from the letter monopoly and the level of competition in the market for these services. *Id.* at 2-3. The Postal Service further asserts that it may not increase prices or offer prices substantially above cost without the risk of losing inbound volume to a private competitor in the international shipping industry. *Id.* at 2-3.

The Commission is required to consider whether the product is covered by the postal monopoly. 39 U.S.C. 3642(b)(2).

The Postal Service asserts that the services in the Competitive Multi-Service Agreements product for shipment of merchandise using EMS and parcels are excluded from the Private Express Statutes' prohibition on private carriage of letters over post routes. *Id.* at 3. The Postal Service contends that most items would exceed the 12.5 ounce cap on the letter monopoly in 39 U.S.C. 601(b)(2). *Id.* Additionally, it states that the rates for Air CP, Surface CP, and EMS exceed the scope of the reserved area in 39 U.S. C. 601(b)(1). *Id.*

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 states that foreign postal operators are free to enter into negotiated agreements to tender inbound parcels and expedited items, and that the foreign postal operators are aware of the availability of competitive services from private enterprises. The Postal Service concludes that the various bilateral agreements it has entered into in the past reflect foreign postal operators' interest in this type of product and satisfaction with the Postal Service's product given the foreign postal operators' awareness of the competition. *Id.* at 4.

The Postal Service states that the market for internal expedited and parcel delivery services is highly competitive and there should be little impact on small business. It states that the addition of the instant product provides an additional

shipping option for both small businesses in the U.S. and foreign postal operators' customers. *Id.* at 4-5.

No commenter opposes the proposed classification of the Competitive Multi-Service Agreements product as competitive. The Commission notes that it previously determined that Inbound Surface Parcel Post at non-UPU Rates, as well as EMS and Air Parcels tendered at negotiated rates are appropriately classified as competitive.[7] The Competitive Multi-Service Agreements product is comprised of the above mentioned products. Having considered the statutory requirements and the support offered by the Postal Service, the Commission finds that the Competitive Multi-Service Agreements product is appropriately classified as a competitive product and should be added to the competitive product list.

Provisions applicable to competitive products. Based on the data submitted and the comments received, the Commission finds that the Competitive Multi-Service Agreements product 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 the proposed Multi-Service Agreements product indicates that it comports with the provisions applicable to rates for competitive products.

TNT Agreement. The Commission is asked to determine whether the TNT Agreement falls within the parameters of the Competitive Multi-Service Agreements product. No commenter opposes the inclusion of the TNT Agreement within the Competitive Multi-Service Agreements product.

In CHIR No. 2 the Commission requested supplemental information on the Postal Service's calculation of applicable penalties under the TNT Agreement. The Postal

[7] Docket No. RM2007-1, Order No. 43, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007.

Service's response provides adjustments in the treatment of Air CP and EMS which results in improved cost coverage for these Competitive Multi-Service Agreements.

The Commission finds that the TNT Agreement is consistent with the terms of the Governors' Decision and the proposed classification language. Therefore, the TNT Agreement shall be included within the Competitive Multi-Service Agreements product.

As in the case of its market dominant product filing for multi-service agreements, the TNT Agreement is expected to become effective October 1, 2010. As a result, in light of the timing of the effective dates and term of this agreement which corresponds with the Postal Service's fiscal year for revenue reporting purposes, it is not required to file additional costs, volumes, and revenues data separate from its reporting in the Annual Compliance Report for each fiscal year. Reporting is to be provided at the agreement level.

The Postal Service shall promptly notify the Commission if the TNT Agreement terminates earlier than its proposed term, but no later than the actual termination date. The Commission will then remove the TNT Agreement from the Mail Classification Schedule at the earliest possible opportunity. In addition, within 30 days of an early expiration, the Postal Service shall file costs, volumes, and revenues data associated with the contract.

Conclusion. The Commission approves the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 as a new product. The revision to the competitive product list is shown below the signature of this order and will be effective October 1, 2010. The Commission also finds that the TNT agreement falls within the parameters of the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product.

V. ORDERING PARAGRAPHS

It is Ordered:

1. Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010-34 and CP2010-95) is added to the competitive product list as a new product under Inbound International.

2. The Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV negotiated agreement is included within the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010-34 and CP2010-95) product.

3. The Postal Service shall notify the Commission if the Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV agreement terminates earlier than its proposed term by no later than the actual termination date.

4. The Secretary shall arrange for the publication in the *Federal Register* of an updated product list reflecting the change made in this Order.

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. MC2010-34 and CP2010-95. The Commission uses two main conventions when making changes in the product lists. The addition of text is indicated by underscore. Deleted text is indicated by a strikethrough.

PART B—Competitive Products

2000 Competitive Product List

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Negotiated Service Agreements

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Inbound International

Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010-34 and CP2010-95)

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