

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

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

Docket Nos. MC2010-35

Market Dominant Product Prices
Strategic Bilateral Agreement Between United States
Postal Service and Koninklijke TNT Post BV and
TNT Post Pakketservice Benelux BV (MC2010-35)
Negotiated Service Agreement

R2010-5

Market Dominant Product Prices
China Post Group–United States Postal Service
Letter Post Bilateral Agreement (MC2010-35)
Negotiated Service Agreement

R2010-6

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

(Issued September 30, 2010)

I. INTRODUCTION

The Postal Service seeks to add a new product identified as Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 (Market Dominant Multi-Service Agreements) to the market dominant product list. The Postal Service also

seeks to include two negotiated agreements within the Market Dominant Multi-Service Agreements product. The agreements are described as Strategic Bilateral Agreement Between United States Postal Service and Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV (TNT Agreement) and the China Post Group—United States Postal Service Letter Post Bilateral Agreement (CPG Agreement). 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. 3622(c)(10) and 3642, and 39 CFR 3010.40 *et seq.* and 3020.30 *et seq.* to add Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 to the market dominant product list.¹

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

- Attachment 1—proposed Mail Classification Schedule (MCS) language for Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1;
- Attachment 2—Statement of Supporting Justification required by 39 CFR 3020.32;
- Attachments 3A and 3B—redacted copies of the TNT Agreement and the CPG Agreement, respectively; and
- Attachment 4—an application for non-public treatment of materials to maintain redacted portions of the agreements and supporting documents under seal.

¹ Request of United States Postal Service to Add Inbound Market-Dominant Multi-Service Agreements with Foreign Postal Operators to the Market Dominant Product List, Notice of Type 2 Rate Adjustments, and Notice of Filing Two Functionally Equivalent Agreements (Under Seal), August 13, 2010 (Request); Erratum to China Post Group—United States Postal Service Letter Post Bilateral Agreement, August 27, 2010; Notice of Filing Revised Signature Page to Strategic Bilateral Agreement Between United States Postal Service and Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV, September 8, 2010.

The Postal Service describes the Market Dominant Multi-Service Agreements product in proposed Mail Classification Schedule language. The Postal Service states that an agreement within the product could include Letter Post matter up to 2 kilograms, associated ancillary services, services unique to an agreement, and direct entry items. It notes that there also is the possibility to include scanning, service performance, mail preparation, and shared transportation. *Id.* at 10.

In a Statement of Supporting Justification, Lea Emerson, Executive Director, International Postal Affairs, reviews the requirements of 39 U.S.C. 3622 for market dominant products in light of the objectives of 39 U.S.C. 3622(b) and the factors of 39 U.S.C. 3622(c). *Id.*, Attachment 2, at 1-4. She also addresses the criteria specified in 39 U.S.C. 3642(b) for classifying a product as market dominant or competitive. She states that a portion of Letter Post is subject to the letter monopoly. *Id.*, Attachment 2, at 5. The Postal Service further notes that the Commission has already assigned all inbound shipments of single-piece Letter Post to the market dominant category. *Id.* at 11.

The Postal Service also requests that the product be granted an exception, pursuant to 39 CFR 3055.3(a)(3), from the requirement to report service performance measurements. *Id.* at 8-9. The request is based upon the product consisting of negotiated service agreements with substantially all components of the agreements included in the measurement of other products.

The Request includes two agreements that fall under the Market Dominant Multi-Service Agreements classification. The TNT Agreement covers inbound Letter Post in the form of letters, flats, small packets, bags, containers, and International Registered Mail service for Letter Post. *Id.* at 4. It also includes a placeholder for additional ancillary services at rates yet to be determined. *Id.*

The CPG Agreement includes the same inbound Letter Post items as in the TNT Agreement, plus delivery confirmation scanning with Letter Post small packets. *Id.* The scheduled effective date for both agreements is October 1, 2010. *Id.* at 3.

The Postal Service requests that the two agreements be listed along with any subsequent functionally equivalent agreements as part of a single product grouping (Market Dominant Multi-Service Agreements) on the market dominant product list. *Id.* at 2.

The Postal Service advances reasons why the agreements are functionally equivalent. *Id.* at 12. It asserts that both agreements fit within the proposed MCS language for the Market Dominant Multi-Service Agreement product. It further asserts that the agreements are both with foreign postal operators, conform to a common description, and include similar terms and conditions. The Postal Service also identifies specific terms that distinguish the agreements from one another. *Id.* at 12-14. The differences are in the areas of electronic settlement, termination, dispute resolution, and other differences. The Postal Service contends that the agreements nonetheless are functionally equivalent to each other and “[t]he Postal Service does not consider that the specified differences affect either the fundamental service the Postal Service is offering or the fundamental structure of the contracts.” *Id.* at 14.

Under 39 CFR 3010.43, the Postal Service is required to submit data collection plans for negotiated service agreements. While indicating its willingness to provide information on mail flows within the annual compliance review process, the Postal Service proposes that no special data collection plan be established for these agreements.

In Order No. 518, the Commission gave notice of the three dockets, appointed a Public Representative, and provided the public with an opportunity to comment.² Chairman’s Information Request No. 1 (CHIR No. 1), issued September 3, 2010, sought clarification of various elements related to each negotiated agreement. The Postal

² Notice and Order Concerning Adding Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 to the Market Dominant Product List and Two Functionally Equivalent Negotiated Service Agreements, August 19, 2010 (Order No. 518).

Service filed its responses to CHIR No. 1 on September 10, 2010.³ On September 21, 2010, Chairman's Information Request No. 2 was issued requesting follow up information. The Postal Service's response was filed on September 23, 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 does not oppose the addition of the Market Dominant Multi-Service Agreements product to the market dominant product list. However, he notes that the Postal Service did not provide evidence of a review by the Postal Service Board of Governors notwithstanding a reference to a Governor's Resolution in Attachment 2, the Statement of Supporting Justification. *Id.* at 3.

The Public Representative also states that the two included negotiated agreements appear to comport with title 39. *Id.* at 2. He observes that the terms of the agreements have differences but the differences are not significant enough to affect functional equivalency. *Id.* at 3.

³ Notice of Filing Response to Chairman's Information Request No. 1; 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 Responses to Chairman's Information Request No. 2, September 23, 2010.

⁵ Notice of Filing Revised Signature Page to Strategic Bilateral Agreement Between United States Postal Service and Koninklijke 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 Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 to the Market Dominant Product List and Two Functionally Equivalent Negotiated Service Agreements, August 31, 2010 (Public Representative Comments).

IV. COMMISSION ANALYSIS

The Commission has reviewed the Request, the included TNT Agreement and CPG Agreement, the financial analyses provided 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 Market Dominant Multi-Service Agreements 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 market dominant products, a review of the provisions applicable to market dominant products. 39 U.S.C. 3622. In addition, the Commission is requested to determine whether it is appropriate for the TNT Agreement and the CPG Agreement to be included within the Market Dominant Multi-Service Agreements product.

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

The Postal Service notes that Market Dominant Multi-Service Agreements are comprised of single-piece Letter Post mail, which the Commission already has assigned to the market dominant product list in Order No. 43. Request at 11.

The Commission is required to consider whether the product is covered by the postal monopoly. 39 U.S.C. 3642(b)(2). Mail subject to the postal monopoly is categorized as market dominant. The Postal Services states that the portion of inbound letters weighing less than 12.5 ounces within the Market Dominant Multi-Service

Agreements product are covered by the letter monopoly (with exceptions). Request, Attachment 2, at 5.

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 contends that its monopoly on certain inbound letters from the Netherlands and the People's Republic of China within certain price and weight limits make it fairly certain that private entities would not be able to serve the United States market for Inbound Letter Post from these countries. *Id.* It also states that there are no similarly situated entities to TNT Post and CPG with the ability to tender Letter Post from their respective countries under similar operational conditions, or any other entities that serve as designated operators for Letter Post originating in the Netherlands or the People's Republic of China. *Id.* at 6. Therefore, the Postal Service states that it cannot envision a similarly situated mailer that could enter into a similar agreement. *Id.* It observes that other postal operators or consolidators compete in cross-border letter markets for bulk mail delivery, and liberalization in the European Union has resulted in competition in the Netherlands for the letter market. However, it states even though bulk mail is included in the instant agreements, they essentially encompass single-piece, universal service traffic, generally provided by postal operators designated by their countries' governments. *Id.*

The Postal Service also contends that there is no significant competition in this market. As a result, it believes the Market Dominant Multi-Service Agreements do not pose competitive harm in the marketplace. *Id.* It states that because the Postal Service and foreign postal operators serve as their respective countries designated operators to provide universal Letter Post service under the Universal Postal Convention, there are limited alternatives for receiving inbound single-piece Letter Post, particularly for lightweight letters from foreign countries to the United States at

reasonable costs. *Id.*, Attachment 2, at 5. The Postal Service states it is unaware of any small business concerns that offer competing services for end-to-end delivery of both bulk and single piece, non-expedited Letter Post items on a comprehensive basis. *Id.* at 6-7. Therefore, it expects there will be no significant impact on small business competitors.

No commenter opposes the proposed classification of the Market Dominant Multi-Service Agreements product as market dominant. Having considered the statutory requirements discussed above and the support offered by the Postal Service, the Commission finds, for purposes of this proceeding, that the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product may be classified as a market dominant product and added to the market dominant product list.

Provisions applicable to market dominant products. The Postal Service states that the Market Dominant Multi-Service Agreements product responds to the Commission's recommendation from the 2009 Annual Compliance Determination to pursue negotiated bilateral or multilateral rate agreements with other countries to achieve compensatory terminal dues rates and thereby improve the cost coverage for Inbound First-Class Mail International. *Id.*, Attachment 2, at 7.

The Postal Service further asserts its approach in development of a contractual model to improve the cost coverage for Letter Post with the Market Dominant Multi-Service Agreements is part of a two-pronged strategy for improvements. Initially, its short term method includes negotiation of bilateral agreements with major mail partners for Letter Post, parcel, and expedited mail services. The second method is a longer term approach and involves the improvement of the terminal dues system by working within the UPU structure. *Id.*, Attachment 2, at 5-6.

An initial review of the proposed Market Dominant Multi-Service Agreements product indicates that it comports with the provisions applicable to rates for market dominant products. The individual agreements that eventually will fall within the product

will be reviewed below for compliance with the detailed statutory requirements for market dominant products.

Request to exclude the proposed product from service performance measurement reporting. The Postal Service requests an exception from the requirement to report service performance for the Market Dominant Multi-Service Agreements product. *Id.* at 8-9. The Postal Service contends that the product is merely a grouping of other products already being measured. Negotiated service agreements with substantially all components of the agreement included in the measurement of other product may be granted and exception from reporting pursuant to 39 CFR 3055(a)(3). The exception is granted.

The TNT Agreement and the CPG Agreement. The Postal Service notes that the performance improvements in the TNT Agreement are covered within the performance incentives and penalties of terminal dues provided by the UPU Acts. *Id.* at 5. Additional improvements included the electronic settlement and placement, options for other incentives for other activities such as sortation and separation, and future delivery confirmation services for Letter Post packets. *Id.*, Attachment 2, at 2. The Postal Service states that the proposed classification language permits it to negotiate on time delivery, scanning service performance targets and standards, specifications for mail product categories and formats and other requirements subject to the agreements. *Id.* It states that the instant Market Dominant Multi-Service Agreements establish the framework for efficiency improvement activities such as electronic settlement procedures, and scanning and confirmation of delivery of Letter Post packets, which is a key service enhancement. *Id.* The Postal Service indicates that the rates in the Market Dominant Multi-Service Agreements provide superior cost coverage to the default rates set by the UPU and represent a modest increase over those in the previous agreement. It also states the new rates will have little effect on TNT Post, CPG, or American recipients. *Id.*, Attachment 2, at 3.

In CHIR No. 2, the Commission sought an explanation for the inclusion of inbound IPA and ISAL in the stream for market dominant products given that outbound IPA and ISAL are competitive products. In its response, the Postal Service states that inbound IPA and ISAL contain letters that are subject to the Private Express Statutes while outbound IPA and ISAL do not. Additionally, it explains that there is no suspension or exception to the Private Express Statutes for inbound international letters as there is for outbound international letters. It states further that because many inbound letters do not fall under any exception to the Private Express Statutes in that they weigh less than 12.5 ounces and are priced such that competitive private carriage would possibly not be available and prices would be six times or more the rate for a one-ounce single-piece First Class Mail letter. As a result, because letters subject to the Private Express Statutes may be mailed as inbound IPA and ISAL they may not be included in a product on the competitive product list. The Postal Service describes situations where some content included in inbound IPA and ISAL will fall outside the definition of a “letter” or meets some other exclusion from the Private Express Statutes. The Postal Service concludes that the complexity of extracting material which is excluded from the Private Express Statutes would be unduly burdensome.

Because the Market Dominant Multi-Service Agreements product will be comprised of negotiated service agreements, the factors of 39 U.S.C. 3622(c)(10) are applicable. The requirements of 39 U.S.C. 3622(c)(10) require a review to determine whether any such agreement (1) improves the net financial position of the Postal Service or enhances the performance of operational functions; (2) will not cause unreasonable harm to the marketplace; and (3) will be available on public and reasonable terms to similarly situated mailers. The Postal Service contends that the proposed rates result in improvement over the default rates under the UPU Acts. *Id.* at 1. The Postal Service filed information under seal regarding costs, volumes, and anticipated revenues. The Postal Service represents that the new Market Dominant Multi-Service Agreements include the framework for performance-based incentives to

promote cost reduction, increase efficiency, and possibly reduce the Postal Service's costs. *Id.*, Attachment 2, at 2. After review of both the TNT agreement and the CPG Agreement, the Commission concludes that the requirements of 39 U.S.C. 3622(c)(10)(A) are met.

Data collection plan. Because the instant agreements begin on the same date as the Postal Service's fiscal year, the Postal Service proposes that it report information on both agreements through the Annual Compliance Report, rather than a special data collection plan. *Id.* at 8-9. This proposal is approved in light of the timing of the effective dates and term of the agreements, which correspond with the Postal Service's fiscal year for revenue and reporting purposes. Reporting is to be provided at the agreement level.

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

Conclusion. The Commission approves the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 as a new product. The revision to the market dominant 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 and the CPG Agreement fall within the parameters of the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product.

V. ORDERING PARAGRAPHS

It is Ordered:

1. Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 (MC2010-35, R2010-5 and R2010-6) is added to the market dominant product list as a new product under Negotiated Service Agreements, Inbound International.
2. The Strategic Bilateral Agreement Between United States Postal Service and Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV, and the China Post Group—United States Postal Service Letter Post Bilateral Agreement are included within the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 (MC2010-35, R2010-5 and R2010-6) product.
3. If either of the instant agreements terminates earlier than the proposed two-year term, the Postal Service shall notify the Commission and file relevant contract data as set forth in the body of this Order.
4. The Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 (MC2010-35, R2010-5 and R2010-6) product is granted an exception from service performance measurement reporting pursuant to 39 U.S.C. 3055.3(a)(3).
5. 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. MC2010-35, R2010-5 and R2010-6. 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 A—Market Dominant Products

1000 Market Dominant Product List

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Negotiated Service Agreements

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Inbound International

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

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