

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

Before Commissioners:

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

Market Dominant Product Prices
Exprès Service Multilateral Agreement (MC2010-35)
Negotiated Service Agreement

Docket No. R2011-6

ORDER ADDING INBOUND MARKET DOMINANT
EXPRÈS SERVICE AGREEMENT 1 TO THE MARKET DOMINANT PRODUCT LIST

(Issued September 26, 2011)

I. INTRODUCTION

The Postal Service seeks to add a multilateral agreement to the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product. For the reasons discussed below, the Commission finds that the instant Agreement is not functionally equivalent to any existing agreement within the foregoing product. Accordingly, the Commission establishes Inbound Market Dominant Exprès Service Agreement 1 as a new market dominant product and includes the instant Agreement within that product.

II. BACKGROUND

Pursuant to 39 U.S.C. 3622(c)(10) and 39 CFR 3010.40 *et seq.*, the Postal Service filed a notice concerning a Type 2 rate adjustment.¹ The Notice concerns the Postal Service's accession to the Exprès Service Agreement, a multilateral agreement among 24 countries that covers the delivery of cross-border letters, flats, and small packets (LC/AO) items weighing up to 2 kilograms tendered as Exprès Items and branded with the Common Logo. Notice at 1, Attachment 2 at 2. More specifically, the Exprès Service Agreement establishes a delivery confirmation service for inbound Letter Post (letters, flats, and small packets) at Universal Postal Union (UPU) terminal dues rates. Notice at 6.

The Postal Service notes that, in Order No. 549, the Commission established the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product, including two functionally equivalent agreements, 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).² In addition, it notes that subsequently the HongKong Post Agreement was included within the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1.³

The Postal Service states that the instant Agreement is expected to generate financial performance improvements, will not cause unreasonable harm in the marketplace, and is functionally equivalent to the CPG Agreement. Notice at 5-10.

¹ Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, August 12, 2011 (Notice); *see also* Notice of United States Postal Service Concerning Accession to Exprès Service Agreement, August 23, 2011.

² Docket Nos. MC2010-35, R2010-5 and 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, September 30, 2010 (Order No. 549).

³ Docket No. R2011-4, Order No. 700, Order Approving Rate Adjustment for HongKong Post–United States Postal Service Letter Post Bilateral Agreement Negotiated Service Agreement, March 18, 2011.

With respect to the latter, the Postal Service states that both the CPG and HongKong Post Agreements contain annexes which include a Small Packet with Delivery Scanning service. *Id.* at 1-2. It contends that the delivery confirmation service included in the Exprès Service Agreement is functionally equivalent to the delivery confirmation service provided with the Small Packet with Delivery Scanning service that is included in the CPG Agreement. *Id.* at 2. It identifies various similarities and differences between the agreements. *Id.* at 12-16. The Postal Service asserts that because the Exprès Service Agreement delivery confirmation service is similar to the CPG Agreement scanning service, it should be included as a functionally equivalent agreement under the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product established in Docket Nos. MC2010-35, R2010-5 and R2010-6. *Id.* at 2, 4, 16.

The Postal Service also requests that it be exempted from separate performance measurement reporting requirements under 39 CFR 3010.43. *Id.* at 10.

In Order No. 812, the Commission gave notice of the docket, appointed a Public Representative, and provided the public with an opportunity to comment.⁴

III. COMMENTS

Comments were filed by the Public Representative.⁵ No other interested person submitted comments. The Public Representative states the Postal Service makes reasonable arguments in support of its assertion that the instant Agreement will not cause unreasonable harm to the marketplace and will be available on public and reasonable terms to similarly situated mailers in accordance with 39 U.S.C. 3622, 3622(c)(10)(B) and 39 CFR 3010.40(c). *Id.* at 2. However, he questions whether the

⁴ Notice and Order Concerning Rate Adjustment for Exprès Agreement Negotiated Service Agreement, August 18, 2011 (Order No. 812).

⁵ Public Representative Comments, August 25, 2011 (PR Comments).

Exprès Service Agreement will improve the net financial condition of the Postal Service and contends that the instant Agreement is not functionally equivalent to the China Post Agreement. *Id.* at 2-4.

The Public Representative observes that the supporting financial documentation indicates the instant Agreement should cover its attributable cost. However, he maintains that some of the assumptions underlying the financial documentation are questionable, including the volume estimates and the development of unit volume-variable cost. *Id.* at 3-4.

The Public Representative also contends that the Postal Service has not demonstrated that the Exprès Service Agreement is functionally equivalent to the CPG Agreement. He asserts that the inclusion of delivery confirmation alone is insufficient to support the functional equivalence of the Exprès Service Agreement and references that it is dissimilar in not being country-specific, uses a different template, and is not limited to inbound flows. *Id.* at 2-3.

The Public Representative concludes that the Exprès Service Agreement should not be included in the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product. He suggests that the Commission initiate a proceeding to add the proposed agreement as a new product and investigate the accuracy of the Postal Service's supporting data.

IV. COMMISSION ANALYSIS

The Commission has previously found Letter Post is properly classified as market dominant. See, e.g., Order Nos. 43,⁶ 549 and 700, *supra*. The multilateral agreement at issue in this proceeding similarly involves Letter Post. Therefore, for reasons previously stated and incorporated herein, the Commission finds that the instant Agreement is properly classified as market dominant.

⁶ Docket No. RM2007-1, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007, at para. 3025 (Order No. 43).

Statutory responsibilities. The statutory and regulatory provisions of 39 U.S.C. 3622(c)(10) and 39 CFR 3010.40(a) are applicable to the instant Agreement and require the Commission to make a finding that the proposed market dominant negotiated service agreement must either (1) improve the net financial position of the Postal Service (39 U.S.C. 3622(c)(10)(A)(i)); or (2) enhance the performance of various operational functions (39 U.S.C. 3622(c)(10)(A)(ii)). Additionally, the negotiated service agreement may not “cause unreasonable harm to the marketplace” (39 U.S.C. 3622(c)(10)(B)) and “must be available on public and reasonable terms to similarly situated mailers.” 39 CFR 3010.40(c).

Financial analysis. The Postal Service asserts that the Exprès Service Agreement rates represent an improvement over default rates established by UPU for inbound Letter Post items. Notice at 1. It filed supporting financial data under seal.

The Public Representative questions the volume estimates which were provided by the International Post Corporation. PR Comments at 3. He also suggests that the unit volume-variable cost figure used in the analysis may be understated due to possible increased processing and transportation costs to qualify for remuneration under the instant Agreement. *Id.* at 3-4.

Based on its review of supporting financial data filed under seal, the Commission concludes that the projected cost coverage of the Exprès Service Agreement is sufficient. The instant Agreement represents a new service offering which affords the Postal Service an opportunity for increased remuneration.

The Postal Service states that the Agreement will not result in unreasonable harm to the marketplace. Notice at 8. The Public Representative concurs. PR Comments at 2. The Commission agrees. There is no indication that the instant multilateral Agreement will cause unreasonable harm in the marketplace.

Functional equivalency. The Postal Service contends that the delivery confirmation service in the Exprès Service Agreement is functionally equivalent to the delivery confirmation service provided with Small Packet with Delivery Scanning in the CPG Agreement. Notice at 2, 4, 12-13. In support, it asserts that the two agreements

include similar terms and conditions because they are “with one or more foreign postal operators.” *Id.* at 12. It also contends that the agreements’ benefits are comparable because delivery confirmation is (or may be) possible for foreign postal administrations for certain Letter Post items bearing a barcode with specific details for scanning. *Id.* at 13.

Further, as required, the Postal Service identifies various differences between the two agreements, including, for example, the services provided, the multilateral versus bilateral scope of the agreements, the applicable law, the calculation of settlement charges, and resolution of disputes. *Id.* at 13-15.

The Public Representative contends that the *Exprès* Service Agreement is not functionally equivalent to the CPG Agreement because the former entails only a single service (delivery confirmation), is multilateral in scope, and, unlike agreements in the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product, is not limited to inbound flows and uses a different contract template. PR Comments at 2-3.

Based on a comparison of the CPG Agreement and other existing agreements, the Commission is not persuaded that the instant Agreement is functionally equivalent. First, the Postal Service has not identified a “baseline agreement” among the agreements that comprise the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product. The Commission found the bilateral agreements in the latter sufficiently comparable to accede to the Postal Service’s request that those agreements be grouped under one product. In this proceeding, however, significant differences between the *Exprès* Service Agreement and the CPG Agreement preclude a finding of functional equivalence.

Second, the only comparison the Postal Service makes is between the delivery confirmation service provided under the *Exprès* Service Agreement and the CPG Agreement. Essentially, the Postal Service ignores the host piece, although it does note that delivery confirmation under the CPG Agreement is limited to small packets, whereas the instant Agreement encompasses Letter Post in its entirety. Notice at 14. A

simple comparison of delivery confirmation service is not dispositive of whether the agreements are functionally equivalent. If that were the case, all agreements offering similar ancillary services, *e.g.*, delivery confirmation, would be functionally equivalent regardless of whether the host mailpiece was market dominant or competitive.

Third, the Letter Post rates agreed upon in the *Exprès Service Agreement* are UPU terminal dues rates. It is a multilateral agreement, which currently has 24 signatories. *Id.* Attachment 2 at 1. In contrast, the agreements that comprise the *Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1* product are bilateral, have negotiated rates, and provide a broader range of services.⁷

Lastly, parties to the *Exprès Service Agreement* view it as a separate product offering, namely, “the Parties wish to develop this *Exprès* items service into an upmarket letter service, a product with reliable consistent delivery, track & trace features and a common logo,....” *Id.* Remuneration under the instant Agreement, in addition to the UPU rates, is tied to delivery confirmation performance. The receiving country is incentivized to achieve certain levels. Those incentives are not present in the CPG (or other) agreements.

Taken as a whole, these differences support the conclusion that the instant Agreement has market dominant characteristics distinct from those of the existing Agreement and therefore, the *Exprès Service Agreement* is not functionally equivalent to the CPG or other existing agreements.

⁷ As the Public Representative notes, the Postal Service cites the common template used for the agreements that comprise the *Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1* product as support for their functional equivalence. PR Comments at 2-3. No such similar claim is made concerning the *Exprès Service Agreement*.

In light of this conclusion, the Commission will designate the instant Agreement as Inbound Market Dominant Express Service Agreement 1 and add it as a new product to the market dominant product list.⁸

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 instant Agreement similar to the precursor agreements in Docket Nos. R2010-5, R2010-6 and R2011-4 filed under the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product. Notice at 10. The Postal Service states that it will report information on this Agreement in the Annual Compliance Report. Negotiated service agreements with substantially all components of the agreement included in the measurement of other products may be granted an exception from reporting pursuant to 39 CFR 3055(a)(3). The exception is granted.

Early termination. The Express Service Agreement has an indefinite term. The Postal Service has the right to withdraw from the Agreement. If it elects to terminate the instant Agreement, the Postal Service shall notify the Commission no later than the actual termination date.

Conclusion. The Commission adds Inbound Market Dominant Express Service Agreement 1 to the market dominant product list, and includes the instant Agreement within that product.

⁸ In the future, the Postal Service may wish to include similar multilateral agreements within this product. To the extent it does, it shall, consistent with the current practice, identify all significant differences between any new agreement and the instant Agreement. Such differences would include terms and conditions that impose new obligations, services, or new requirements on any party to the Agreement. The docket referenced in the caption should be Docket No. R2011-6.

V. ORDERING PARAGRAPHS

It is ordered:

1. The Commission establishes Inbound Market Dominant Express Service Agreement 1 as a new market dominant product.
2. The Express Service Agreement filed in this docket is included within the Inbound Market Dominant Express Service Agreement 1 (R2011-6) product.
3. If the Postal Service terminates the instant Agreement, it shall notify the Commission as set forth in the body of this Order.
4. The Postal Service request that the instant Agreement be excepted from separate reporting requirements under 39 CFR 3055(a)(3) is granted.
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