

ORDER NO. 1840

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

Before Commissioners:

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

Competitive Product Prices
Parcel Select Contract 3 (MC2012-32)
Negotiated Service Agreement

Docket No. CP2012-40

ORDER APPROVING AMENDMENT TO
PARCEL SELECT CONTRACT 3 NEGOTIATED SERVICE AGREEMENT

(Issued September 27, 2013)

I. INTRODUCTION

The Postal Service seeks to amend Parcel Select Contract 3.¹ For the reasons discussed below, the Commission approves the contract, as amended.

In Order No. 1414, the Commission approved Parcel Select Contract 3.² On August 28, 2013, the Postal Service filed notice that it has agreed to an amendment to

¹ Notice of United States Postal Service of Amendment to Parcel Select Contract 3, with Portions Filed Under Seal, August 28, 2013 (Notice). The Amendment is Attachment A to the Notice (Amendment).

² See Docket Nos. MC2012-32 and CP2012-40, Order Adding Parcel Select Contract 3 to the Competitive Product List, July 25, 2012 (Order No. 1414).

the existing Parcel Select Contract 3. The Amendment changes the mechanism for the annual adjustment of prices. Notice, Amendment 1-2.

The Postal Service intends for the Amendment to become effective on the day after the date that the Commission completes its review of the Notice. *Id.* at 1. The Postal Service asserts that the “supporting financial documentation and financial certification initially provided in this docket remain applicable.” Notice at 1.

In Order No. 1820, the Commission requested supplemental information about the minimum volume requirement under the Amendment, the prices for contract year 2, and the applicability of the Amendment.³ The Postal Service responded to the request on September 4, 2013, stating its intent to file an additional amendment with the Commission.⁴ On September 6, 2013, Chairman’s Information Request No. 1 was issued setting a response deadline of September 10, 2013.⁵ The Postal Service filed its response on September 12, 2013.⁶

II. COMMENTS

Comments were filed by the Public Representative.⁷ No other interested person submitted comments. The Public Representative asserts that the contract meets the requirements of 39 U.S.C. § 3633(a). *Id.* at 2.

³ Notice and Order Concerning Amendment to Parcel Select Contract 3 and Request for Supplemental Information, August 30, 2013, at 2-3 (Order No. 1820).

⁴ Response of United States Postal Service to Request for Supplemental Information, with Portions Filed Under Seal, September 4, 2013 (Postal Service Response).

⁵ Chairman’s Information Request No. 1, September 6, 2013 (CHIR No. 1).

⁶ Response of United States Postal Service to Chairman’s Information Request No. 1, September 12, 2013 (Response to CHIR No. 1). The Response to CHIR No. 1 was accompanied by a Postal Service motion for late acceptance citing the absence of key personnel and the press of other business. Motion of United States Postal Service for Late Acceptance of Response to Chairman’s Information Request No. 1, September 12, 2013. It asserts that no person was prejudiced by the delay in filing. *Id.* That motion is granted.

⁷ Public Representative Comments on Postal Service Notice of Amendment to Parcel Select Contract 3, September 6, 2013 (PR Comments).

III. COMMISSION ANALYSIS

The Commission has reviewed the Notice, the Postal Service Response and the accompanying materials filed under seal, the Response to CHIR No. 1, and the comments filed by the Public Representative.

Cost considerations. The Commission reviews competitive product prices to ensure that they meet the applicable requirements of 39 U.S.C. § 3633(a) and 39 C.F.R. § 3015.7. The rates contemplated by the Amendment and the rates filed with the Postal Service Response are expected to cover their attributable costs. Thus, the Commission finds that the contract, as amended, comports with the provisions applicable to rates for competitive products in 39 U.S.C. § 3633(a) and 39 C.F.R. § 3015.7.

Notice requirements. Parcel Select Contract 3 has a three-year term, commencing August 1, 2012. Order No. 1414 at 5. The second contract year began August 1, 2013.

Pursuant to 39 U.S.C. § 3632(b)(3) and 39 C.F.R. § 3015.5, the Postal Service must file notice of any adjustment to a rate or class not of general applicability at least 15 days before the rate takes effect. In this docket, the Postal Service filed notice of the Amendment on August 28, 2013. Notice at 1. Notice of the rates for contract year 2 was not provided until September 4, 2013. See Postal Service Response.

Pursuant to 39 U.S.C. § 3632(b)(3) and 39 C.F.R. § 3015.5, the Commission approves the rates filed for contract year 2 prospectively, effective with the issuance of this Order. The mere inclusion of Paragraph I.F.2 in the contract as filed is not tantamount to pre-approval by the Commission of the elective rates the Postal Service may charge in lieu of rates derived pursuant to the formula set forth in Paragraph I.F.1 of the initial contract. Rates charged pursuant to the latter paragraph do not require a separate notice filed with the Commission, whereas rates charged pursuant to the former do.

The Commission has previously advised the Postal Service that it must provide notice of rate adjustments made pursuant to the terms of a negotiated service

agreement, particularly when such rate adjustments are not determined by “objective, external events.”⁸ For example, if contract rates change pursuant to the terms of a particular contract that allows the Postal Service to change rates at its discretion, such discretionary rates must be filed with the Commission no later than 15 days prior to the rate changes’ effective date.⁹ This will provide the Commission with sufficient time, as contemplated by the statute, to ensure the discretionary rates comport with the requirements of 39 U.S.C. § 3633(a).

The Commission discussed the requirement to provide notice of rate adjustments pursuant to negotiated service agreements in Order Nos. 216 and 1761 and distinguished the levels of review required for discretionary and non-discretionary changes in rates. Consistent with that distinction, the Commission clarifies when the Postal Service is required to give notice of changes in rates pursuant to 39 U.S.C. § 3632(b)(3) for subsequent years of a multi-year contract. If a contract’s terms provide for a rate adjustment to be made according to a pre-determined schedule (*e.g.*, at the beginning of a contract year or at the end of every quarter) and a pre-determined formula that is based on objective, external factors, (*e.g.*, changed annually based on the average change in prices of general applicability for that product), the Commission will not require subsequent rate change filings with respect to that contract.¹⁰ The Postal Service will be deemed to have satisfied the notice requirements of section

⁸ See, *e.g.*, Docket No. CP2013-65, Order Approving Addition of Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement (with Deutsche Post), June 26, 2013, at 6 (Order No. 1761). See also Docket No. CP2009-29, Order Concerning Filing of Additional Global Direct Contracts Negotiated Service Agreement, May 15, 2009 (Order No. 216); Docket No. CP2009-48, Order No. 384, Order Concerning Change in Prices in Accordance with Order No. 216, January 8, 2010.

⁹ Such rate changes should be filed in the Competitive Product docket corresponding to the Commission’s initial approval of the agreement.

¹⁰ This is a departure from previous policy. Order Nos. 216 and 1761 indicated that simple notice of rate changes based on objective, external factors would be required but that the Commission would take no formal action on such notice. In practice, however, it appears that the Postal Service has not submitted such notice. As explained below, this practice has not prevented the Commission from determining in advance whether rates changed according to a pre-determined formula based on objective, external factors are likely to comply with 39 U.S.C. § 3633.

3632(b)(3) for changes in rates for subsequent years of a contract on the date it initially files the contract provided the rate adjustments under the contract occur on a pre-determined schedule pursuant to a pre-determined formula tied to objective, external events.¹¹ When a subsequent year's rate changes are based on a pre-determined formula tied to objective, external events, the Commission can, in advance, evaluate whether the subsequent year's rates are likely to continue to comply with § 3633. Because the Commission has notice at the time of the initial filing of what the rates are likely to be in subsequent years, the rates for subsequent years can take effect without additional notice. The Commission's post hoc review of such rates, during the annual compliance review process, provides a means to remedy any deficiency, if necessary. However, rates proposed for subsequent years that are discretionary with the Postal Service, *i.e.*, that are not based on a pre-determined formula that is tied to objective, external events, are not pre-approved and notice must be filed with the Commission at least 15 days before their effective date.

Notice of rates for contract year 3. The Amendment, which is intended to apply to prices effective beginning August 1, 2014, alters how prices are to be adjusted under the contract. The modified pricing provision is not based on objective, external events because the potential rates may reflect an unknown amount of "banked" adjustment authority. Accordingly, notice of rates proposed pursuant to the Amendment must be filed not later than 15 days before the effective dates of such rates.

Other considerations. Within 30 days of the termination of the contract, as amended, the Postal Service shall file the annual (by contract year) costs, volumes, and revenues disaggregated by weight and zone associated with the contract.

In conclusion, the Commission approves Parcel Select Contract 3, as amended.

¹¹ The Commission considers rate adjustments based on changes to published rates to be tied to objective, external events.

IV. ORDERING PARAGRAPHS

It is ordered:

1. As set forth in the body of this Order, the Commission approves the Amendment. Parcel Select Contract 3, as amended, is effective September 27, 2013.
2. As set forth in the body of this Order, rates under the Amendment are effective September 27, 2013.
3. The Postal Service shall, not later than 15 days before the beginning of contract year 3, file with the Commission notice of the rates that will be in effect for contract year 3.
4. Within 30 days after the Parcel Select Contract 3, as amended, terminates, the Postal Service shall file the annual (contract year) costs, volumes, and revenues disaggregated by rate category and weight associated with the contract.
5. As discussed in the body of this Order, changes in rates pursuant to a negotiated service agreement that are not made according to a pre-determined schedule and a pre-determined formula based on objective, external factors must be noticed with the Commission filed at least 15 days in advance of the effective date of such rates.

By the Commission.

Shoshana M. Grove
Secretary