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ORDER NO. 2982

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

Before Commissioners: Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Competitive Product Prices
Priority Mail Express
Priority Mail Express Contract 31

Docket No. MC2016-61

Competitive Product Prices
Priority Mail Express Contract 31 (MC2016-61)
Negotiated Service Agreement

Docket No. CP2016-76

ORDER ADDING PRIORITY MAIL EXPRESS CONTRACT 31 TO THE COMPETITIVE PRODUCT LIST

(Issued January 6, 2016)

I. INTRODUCTION

The Postal Service seeks to add a new product identified as Priority Mail Express Contract 31 to the competitive product list.[1] For the reasons discussed below, the Commission approves the Request.

[1] Request of the United States Postal Service to Add Priority Mail Express Contract 31 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, December 24, 2015 (Request).

II. BACKGROUND

On December 24, 2015, in accordance with 39 U.S.C. § 3642 and 39 C.F.R. § 3020.30 *et seq*., the Postal Service filed the Request, along with supporting documents. In the Request, the Postal Service asserts that Priority Mail Express Contract 31 is a competitive product that establishes rates "not of general applicability" within the meaning of 39 U.S.C. § 3632(b)(3). Request at 1. Among the supporting documents, the Postal Service included a copy of the Governors' Decision authorizing the product, a contract related to the proposed new product, requested changes to the competitive product list, a statement supporting the Request, a certification of compliance with 39 U.S.C. § 3633(a), and financial workpapers. In addition, the Postal Service submitted an application for non-public treatment of materials requesting that unredacted portions of the Governors' Decision and the contract, customer-identifying information, and related financial information remain under seal. *Id.* Attachment F.[2]

The contract is intended to take effect two business days after the date that the Commission issues all necessary regulatory approval. Request, Attachment B at 3. It is set to expire three years from the effective date unless otherwise terminated or renewed by the parties. *Id*.

On December 28, 2015, the Commission issued an order establishing the two dockets, appointing a Public Representative, and providing interested persons with an opportunity to comment.[3]

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[2] In its application for non-public treatment of materials, the Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7. The Commission has consistently denied similar requests for indefinite protection. *See, e.g.*, Docket Nos. MC2011-1 and CP2011-2, Order No. 563, Order Approving Express Mail Contract 9 Negotiated Service Agreement, October 20, 2010, at 6-7.

[3] Order No. 2936, Notice and Order Concerning the Addition of Priority Mail Express Contract 31 to the Competitive Product List, December 28, 2015.

III. COMMENTS

The Public Representative filed comments on December 28, 2015.[4] No other interested person filed comments. Based on his review of the Postal Service's Request, the Public Representative concludes that Priority Mail Express Contract 31 should be categorized as a competitive product and added to the competitive product list. PR Comments at 2. The Public Representative also concludes that the contract appears to comply with 39 U.S.C. § 3633(a) during the first contract year. *Id*. He states that the Postal Service did not provide data showing that the contract will satisfy section 3633(a) in the following years, but observes that the contract's price adjustment clause may mitigate this concern over the contract's lifetime. *Id*. at 3. He also notes that the Commission can review the contract's financial results for each contract year in future Annual Compliance Determinations (ACD). *Id*.

IV. COMMISSION ANALYSIS

The Commission has reviewed the Request, the contract, the supporting data filed under seal, and the Public Representative's comments.

Product list requirements. The Commission's statutory responsibilities when evaluating the Request include assigning Priority Mail Express Contract 31 to either the market dominant or competitive product list. *See* 39 U.S.C. § 3642(b)(1); 39 C.F.R. § 3020.34. Before adding a product to the competitive product list, the Commission must determine that the Postal Service does not exercise sufficient market power that it can effectively set the price of the product substantially above costs, raise prices significantly, decrease quality, or decrease output, without the risk of losing a significant level of business to other firms offering similar products. *See* 39 U.S.C. § 3642(b)(1). In addition, the Commission must consider the availability and nature of private sector enterprises engaged in delivering the product, the views of those who use the product,

[4] Public Representative Comments on Postal Service Request to Add Priority Mail Express Contract 31 to the Competitive Product List, December 28, 2015 (PR Comments).

and the likely impact on small business concerns. *See* 39 U.S.C. § 3642(b)(3); 39 C.F.R. §§ 3020.32(f), (g), and (h).

The Postal Service asserts that it provides postal services of the kind provided under the contract in a highly competitive market, that other shippers who provide similar services constrain its bargaining position, and that it can therefore neither raise prices nor decrease service, quality, or output without risking the loss of business to competitors. Request, Attachment D at 2. The Postal Service states that the contract partner supports the Request, that expedited shipping is widely available from private firms, and that the Postal Service is unaware of any small business concerns that could offer comparable services to the contract partner. *Id*. at 3.

The Commission finds that the Postal Service does not exercise sufficient market power that it can effectively set the price of the proposed product substantially above costs, raise prices significantly, decrease quality, or decrease output, without the risk of losing a significant level of business to other firms offering similar products. The availability of other private sector providers supports this conclusion. The contract partner and the Public Representative support the addition of the Priority Mail Express Contract 31 product to the competitive product list. Further, there is no evidence of an adverse impact on small businesses. For these reasons, having considered the relevant statutory and regulatory requirements, the comments filed, and the Postal Service's supporting justification, the Commission finds that Priority Mail Express Contract 31 is appropriately classified as competitive and is added to the competitive product list.

Cost considerations. Because the Commission finds Priority Mail Express Contract 31 is a competitive product, the Postal Service must also show that the contract covers its attributable costs, does not cause market dominant products to subsidize competitive products as a whole, and contributes to the Postal Service's institutional costs. 39 U.S.C. § 3633(a); 39 C.F.R. §§ 3015.5 and 3015.7. As long as the revenue generated by the contract exceeds its attributable costs, the contract is

unlikely to reduce the contribution of competitive products as a whole or to adversely affect the ability of competitive products as a whole to contribute an appropriate share of institutional costs. In other words, if the contract covers its attributable costs, it is likely to comply with 39 U.S.C. § 3633(a).

Based on a review of the record, the Commission finds that the rates during the first year of the contract should cover the contract's attributable costs. 39 U.S.C. § 3633(a)(2). The contract contains a price adjustment provision that adjusts contract rates during subsequent contract years. Request, Attachment B at 3. The contract's price adjustments should not impact the likelihood that the rates will cover attributable costs during the subsequent contract years because the cost coverage is sufficiently high in the first year. For these reasons, the Commission also finds that the contract should not result in competitive products as a whole being subsidized by market dominant products, in accordance with 39 U.S.C. § 3633(a)(1). Similarly, the Commission finds the contract is unlikely to prevent competitive products as a whole from contributing an appropriate share of institutional costs, consistent with 39 U.S.C. § 3633(a)(3). *See also* 39 C.F.R. § 3015.7(c). Accordingly, a preliminary review of the contract indicates it is consistent with section 3633(a).

The Commission will review the contract's cost coverage and the contribution of competitive products as a whole to the Postal Service's institutional costs in the Commission's ACD to ensure that they continue to comply with 39 U.S.C. § 3633(a).

Other considerations. By its terms, the contract becomes effective two business days after the date that the Commission issues all necessary regulatory approval. Request, Attachment B at 3. The contract is scheduled to expire three years from the effective date, unless, among other things, either party terminates the contract with 30 days' written notice to the other party or it is renewed by mutual agreement.[5]

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[5] *Id.* Should both parties agree to renew the contract, any such renewal is required to follow the requirements of 39 U.S.C. § 3633 and the Commission's implementing regulations of 39 C.F.R. part 3015.

The contract also contains a provision that allows the parties to extend the contract for two 90-day periods if a successor agreement is being prepared and the Commission is notified within at least seven days of the contract expiring.[6] During the extension periods, prices will be adjusted as described in the contract. Request, Attachment B at 3. The Commission finds the two potential 90-day extension periods are reasonable because: (1) prices are automatically adjusted in the extension period; and (2) the extension(s) should assist the Postal Service's contract negotiations by providing additional flexibility.

If the instant contract is terminated prior to the scheduled expiration date, the Postal Service shall promptly file notice of such termination with the Commission in these dockets.

In conclusion, the Commission approves Priority Mail Express Contract 31 as a new product. Revisions to the competitive product list and the Mail Classification Schedule appear below the signature of this Order and are effective immediately.

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[6] *Id.* Notwithstanding the wording of the contract, it is the Commission's understanding that the Postal Service intends to provide notice of an extension at least one week prior to a contract's expiration. Advance notice of at least one week is consistent with the standard set forth in Order No. 1773. Docket Nos. MC2013-54 and CP2013-70, Order No. 1773, Order Adding Priority Mail Contract 60 to the Competitive Product List, July 8, 2013, at 3; *see also* Docket Nos. MC2013-54 and CP2013-70, Response of the United States Postal Service to Chairman's Information Request No. 1, July 1, 2013, question 2; Docket No. CP2009-38, Order No. 1523, Order Granting Motion for Temporary Relief and Providing Guidance Regarding Future Motions for Temporary Relief, November 1, 2012, at 2.

V. ORDERING PARAGRAPHS

It is ordered:

1. Priority Mail Express Contract 31 (MC2016-61 and CP2016-76) is added to the competitive product list as a new product under Negotiated Service Agreements, Domestic. Revisions to the competitive product list and the Mail Classification Schedule appear below the signature of this Order and are effective immediately.

2. The Postal Service shall promptly file notice of the instant contract's termination with the Commission in these dockets if the instant contract terminates prior to the scheduled expiration date.

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

By the Commission.

Stacy L. Ruble
Secretary

CHANGE IN PRODUCT LIST

The following material represents changes to the product list codified in Appendix A to 39 C.F.R. part 3020, subpart A—Mail Classification Schedule. These changes reflect the Commission's order in Docket Nos. MC2016-61 and CP2016-76. The Commission uses two main conventions when making changes to the product list. New text is underlined. Deleted text is struck through.

Part B—Competitive Products
2000 Competitive Product List
*****
Negotiated Service Agreements*
Domestic*
*****
<u>Priority Mail Express Contract 31</u>
*****

CHANGES TO THE MAIL CLASSIFICATION SCHEDULE

The following material represents a change to the Mail Classification Schedule. The Commission uses two main conventions when making changes to the Mail Classification Schedule. New text is underlined. Deleted text is struck through.

Part B—Competitive Products
2000 Competitive Product List
*****
Negotiated Service Agreements*
Domestic*
*****
Priority Mail Express Contract 31
*****
2500 Negotiated Service Agreements
*****
2505 Domestic
*****
2505.3 Priority Mail Express Contracts
*****

- Priority Mail Express Contract 31

Baseline Reference
Docket Nos. MC2016-61 and CP2016-76
PRC Order No. 2982, January 6, 2016
Included Agreements
CP2016-76, expires January 7, 2019
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