**Postal Regulatory Commission**
**Submitted 2/12/2016 11:18:38 AM**
**Filing ID: 94977**
**Accepted 2/12/2016**

ORDER NO. 3069

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
Priority Mail Contract 165

Docket No. MC2016-39

Competitive Product Prices
Priority Mail Contract 165 (MC2016-39)
Negotiated Service Agreement

Docket No. CP2016-48

# ORDER ADDING PRIORITY MAIL CONTRACT 165 TO THE COMPETITIVE PRODUCT LIST

(Issued February 12, 2016)

## I. INTRODUCTION

The Postal Service seeks to add a new product identified as Priority Mail Contract 165 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 Contract 165 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, December 15, 2015 (Request).

## II. BACKGROUND

### A. The Request and Initial Commission Action

On December 15, 2015, in accordance with 39 U.S.C. § 3642 and 39 C.F.R. § 3020.30 *et seq*., the Postal Service filed the Request and supporting documents. The Postal Service asserts that Priority Mail Contract 165 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.

The Postal Service's supporting documents included a redacted copy of the Governors' Decision authorizing Domestic Competitive Agreements, a redacted contract for domestic competitive services, the requested changes to the competitive product list, its Statement of Supporting Justification, a certification of compliance with 39 U.S.C. § 3633(a), and financial workpapers. The Postal Service also submitted an application for non-public treatment of materials requesting that unredacted versions 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 2 business days after the date that the Commission issues all necessary regulatory approval. Request, Attachment B at 3. It is set to expire 3 years from the effective date unless otherwise terminated or renewed by the parties. *Id*.

---

[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 1, 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.

On December 17, 2015, the Commission issued an order establishing the two dockets, appointing a Public Representative, and providing interested persons with an opportunity to comment.[3]

B. Chairman's Information Requests and Responses

To clarify the Postal Service's Request, Chairman's Information Request No. 1 was issued, which directed the Postal Service to respond by December 28, 2015.[4] On December 28, 2015, the Postal Service filed a motion to extend the deadline to respond to CHIR No. 1 to January 5, 2016.[5] On December 29, 2015, the Commission granted this motion and, to provide interested persons an opportunity to consider the response to CHIR No. 1 in their comments, extended the comment deadline to January 12, 2016.[6]

On January 5, 2016, the Postal Service filed its responses to CHIR No. 1 under seal.[7] The responses provided additional information regarding the sources of the data, assumptions, and analyses used by the Postal Service in the financial workpapers supporting the Request. *See* Responses to CHIR No. 1.

In light of its Responses to CHIR No. 1, the Postal Service filed an errata revising the Request.[8] The Errata removed certain redactions so that the publicly available version of the contract now made visible that Priority Mail Contract 165 only applied to the contract partner's Priority Mail packages "tendered to the Postal Service for

---

[3] Order No. 2888, Notice and Order Concerning the Addition of Priority Mail Contract 165 to the Competitive Product List, December 17, 2015.

[4] Chairman's Information Request No. 1 and Notice of Filing Under Seal, December 18, 2015 (CHIR No. 1).

[5] Motion of the United States Postal Service for an Extension of Time to Respond to Chairman's Information Request No. 1, December 28, 2015.

[6] Order No. 2949, Order Granting Extension of Deadline to Respond to Chairman's Information Request No. 1 and Extending Comment Deadline, December 29, 2015.

[7] Responses of the United States Postal Service to Chairman's Information Request No. 1, Filed Under Seal, January 5, 2016 (Responses to CHIR No. 1).

[8] Notice of the United States Postal Service of Filing Errata to Request, January 7, 2016 (Errata).

same[-]day delivery in accordance with Section I.F…within the eligible ZIP Codes....” Errata, Attachment B at 1.

The Errata also corrected the Postal Service’s Statement of Supporting Justification to provide a new description of the availability and nature of enterprises in the private sector engaged in the delivery of the product, as well as the likely impact of the proposed modification on small business concerns. Errata, Attachment D at 3-4. To provide interested persons an opportunity to consider the Postal Service’s Errata, the Commission extended the comment deadline again, to January 22, 2016.[9]

On January 13, 2016, Chairman’s Information Request No. 2, with portions filed under seal, was issued.[10] The Postal Service responded to CHIR No. 2 on January 22, 2016.[11] In its responses, the Postal Service explained how it would track and treat the costs associated with Priority Mail Contract 165. *See* Responses to CHIR No. 2.

## III. COMMENTS

The Public Representative filed comments on January 21, 2016.[12] No other interested person filed comments. Based on his review of the Postal Service’s Request and supporting documentation, the Public Representative concludes that Priority Mail Contract 165 satisfies the criteria of 39 U.S.C. § 3642(b) and complies with the requirements of 39 U.S.C. § 3633(a). PR Comments at 3. Although he observes that

---

[9] Order No. 3011, Order Extending Comment Deadline, January 8, 2016.

[10] Chairman’s Information Request No. 2 and Notice of Filing Under Seal, January 13, 2016 (CHIR No. 2).

[11] Responses of the United States Postal Service to Chairman’s Information Request No. 2, with Portions Filed Under Seal, January 22, 2016 (Responses to CHIR No. 2). The Postal Service also filed a motion for late acceptance of its responses. Motion of the United States Postal Service for Late Acceptance of Responses to Chairman’s Information Request No. 2, January 22, 2016 (Motion). The Motion is granted.

[12] Public Representative Comments on Request of the United States Postal Service to Add Priority Mail Contract 165 to the Competitive Product List, January 21, 2016 (PR Comments).

the Postal Service provides no definite evidence to demonstrate that the contract will comply with the requirements of 39 U.S.C. § 3633(a) during the second and third years of the contract, he states that this concern is mitigated by the annual price adjustment clause, which may aid compliance over the contract's lifetime. *Id.* He also notes that the Commission can review the contract's financial results for each contract year in future Annual Compliance Determination (ACD) proceedings. *Id.*

Also, the Public Representative suggests that under 39 U.S.C. § 3652(a)(1) and 39 C.F.R. § 3050.21(g)(2), the Commission direct the Postal Service to provide contract-specific data, including revenue, volumes by weight step, workhours, and miles, in each ACD proceeding during this contract's lifetime. *Id.* at 2-3.

The Public Representative believes that the Postal Service should have better identified the provisions in this contract that differ from other types of Priority Mail contracts. *Id.* at 2. By way of example, he references Priority Mail Open and Distribute negotiated service agreements that provide dropship service for Priority Mail packages. *Id.* at 2 n.3. He opines that interested parties would have better understood the Request if the Postal Service had stated in the public version of the Request that this contract provides for same-day delivery and was developed from Metro Post market test data. *Id.* at 2.

## IV. COMMISSION ANALYSIS

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

### A. Redacting Non-Public Information

When redacting information from public view in its filings, the Postal Service must justify the redaction under the Commission's rules, which balance the need for the redaction against the Postal Accountability and Enhancement Act's intent to increase

transparency. *See* generally 39 C.F.R. part 3007. Information qualifies for non-public status only if the Postal Service asserts that the information meets certain statutory exemptions from disclosure.[13]

The Postal Service stated that the information it redacted would reveal the contract partner, the negotiated price structure, and the contract terms directly related to implementation of the price structure. Request, Attachment F at 3. However, in its Request, the Postal Service redacted its statement that Priority Mail Contract 165 applied to same-day delivery packages. *Compare* Request, Attachment B at 1 *with* Errata, Attachment B at 1. After the Postal Service responded to CHIR No. 1, the Postal Service filed the Errata making this information available to the public. *Id.* To provide interested persons an opportunity to consider this newly available information, the Commission extended the comment period for a second time. *See supra* n.9.

The same-day delivery service term does not qualify for non-public treatment under 39 C.F.R. part 3007.[14] Moreover, redacting this information hindered the public's ability to prepare comments and delayed the proceeding. Members of the public reviewing the Request lacked information that would inform their decision to comment and the substance of any comments. In this case, the lack of transparency in the Request was cured by the Postal Service's filing of the Errata and the Commission's second extension of the comment period. In all filings with the Commission, the Postal Service must ensure that its justification for redacting specific information complies with

---

[13] 39 C.F.R. § 3007.1(b) (citing 39 U.S.C. §§ 504(g), 3652(f), or 3654(f) as the statutory exemptions from public disclosure). The rule also exempts from disclosure any materials claimed by a third party with a proprietary interest to be protected under Federal Rule of Civil Procedure 26(c). *Id.*

[14] Other Postal Service requests for Commission approval of Priority Mail negotiated service agreements did not redact non-standard contract terms that were unrelated to the contract partner's identity or the negotiated pricing. *See, e.g.*, Docket Nos. MC2016-53 and CP2016-68, Request of the United States Postal Service to Add Priority Mail Contract 175 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, December 23, 2015, Attachment B at 1 (requesting approval of contract, including Priority Mail Open and Distribute products).

the Commission's rules and is consistent with the Postal Service's description of the redactions in its application for non-public treatment.

B. Product List Requirements

The Commission's statutory responsibilities when evaluating the Request include assigning Priority Mail Contract 165 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, 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; *see also* Errata, Attachment D at 2. The Postal Service stated that the contract partner supports the Request and that expedited shipping is widely available from private firms. Request, Attachment D at 3; *see also* Errata, Attachment D at 3.

In its initial Statement of Supporting Justification, the Postal Service stated that it "is unaware of any small business concerns that could offer comparable service for this customer." Request, Attachment D at 3. After the Postal Service responded to CHIR No. 1, the Postal Service filed the Errata revising its Statement of Supporting

Justification to state that competitors offering same-day delivery service within the eligible ZIP Codes for this contract "include a mix of large firms and small businesses." Errata, Attachment D at 3. The Postal Service further states that many couriers and smaller delivery companies specialize in same-day delivery of time-sensitive business, legal, and financial documents, time-sensitive medical items, and perishable goods. *Id.* The Postal Service states that its same-day delivery offerings should not significantly impact the same-day delivery provided by couriers and smaller companies. *Id.* at 3-4.

Ultimately based on the Errata, 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 Commission accepts the Postal Service's assertions in its Errata regarding the nature and availability of other private sector competitors offering same-day delivery. *See id*.

The contract partner and the Public Representative support the addition of the Priority Mail Contract 165 product to the competitive product list. Further, there is no evidence that Priority Mail Contract 165 will significantly affect small businesses.[15] For these reasons, having considered the relevant statutory and regulatory requirements, the comments filed, the Postal Service's Statement of Supporting Justification, and the Errata, the Commission finds that Priority Mail Contract 165 is appropriately classified as competitive and is added to the competitive product list.

Accurate Postal Service filings are essential to transparency and regulatory efficiency. The Postal Service's failure to provide accurate information relating to competitors and small business concerns in its Request diminishes the public's ability to

---

[15] Similarly, the Metro Post market test record contains no indication that offering same-day delivery will "'create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns.'" *See* Docket No. MT2013-1, Order No. 1539, Order Approving Metro Post Market Test, November 14, 2012, at 9 (quoting 39 U.S.C. § 3641(b)(2)).

understand and comment upon the proposed contract. Moreover, inaccurate information hinders and delays the Commission's review. Specifically, the initial Statement of Supporting Justification, which represented that the Postal Service was unaware of any small business concerns, did not provide accurate information for the Commission to consider when evaluating the availability and nature of competitors and the likely impact on small business concerns. *See* Request, Attachment D; 39 U.S.C. § 3642(b)(3)(A) and (C); 39 C.F.R. §§ 3020.32(f) and (h). Although the Postal Service categorizes this contract as a form of Priority Mail, this contract's application to same-day delivery packages appears to affect a particular segment of competitors, users, and small businesses. Using uniform language promotes efficient regulatory review of similar matters; however, the Postal Service must tailor its routine filings if the proposed contract has non-standard terms affecting any relevant statutory or regulatory requirements.

C. Cost Considerations

Because the Commission finds Priority Mail Contract 165 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 comply with 39 U.S.C. § 3633(a)(2). Although the contract contains a price adjustment provision that adjusts contract rates during subsequent contract years, the contract's price adjustments should not impact the

likelihood that the rates will cover attributable costs during the subsequent contract years. Request, Attachment B at 3.

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).

As the Public Representative observes, however, the Postal Service provides no definite evidence that the contract will comply with section 3633(a) during the second and third contract years. PR Comments at 3. 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).

Furthermore, to ensure that the Postal Service collects data sufficient for the Commission to complete this determination, the Commission directs the Postal Service to report contract-specific volumes, costs, and workhours on a quarterly basis for the duration of this contract. This reporting will allow the Commission to confirm that the Postal Service's financial models contain reasonable cost assumptions and accurately account for all costs associated with Priority Mail Contract 165. Each report shall be filed in these dockets within 30 days of the completion of each quarter of the fiscal year, with the first report due July 29, 2016.[16] If after four quarterly reports, the reports show this contract has not covered its costs, the Postal Service shall negotiate an amendment raising prices to cover costs or terminate this contract in accordance with Article IV of

[16] Because this contract takes effect during the second quarter of Fiscal Year (FY) 2016, the July 29, 2016 report shall include the data collected from the effective date of this contract through the end of the third quarter of FY 2016, June 30, 2016.

the contract. *See* Request, Attachment B at 3. The Postal Service shall file notice in these dockets of the requested amendment or termination within 30 days of filing the fourth report with the Commission.

D. Contract Termination and Potential Extension

By its terms, the contract becomes effective 2 business days after the date that the Commission issues all necessary regulatory approval. *Id.* The contract is scheduled to expire 3 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.[17]

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 7 days of the contract expiring.[18] 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.

---

[17] *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.

[18] *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 1 week prior to a contract's expiration. Advance notice of at least 1 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.

If this 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 Contract 165 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 February 17, 2016.

## V. ORDERING PARAGRAPHS

*It is ordered*:

1. Priority Mail Contract 165 (MC2016-39 and CP2016-48) 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 February 17, 2016.

2. The Postal Service shall report contract-specific volumes, costs, and workhours on a quarterly basis for the duration of this contract. Each report shall be filed in these dockets within 30 days of the completion of each quarter of the fiscal year, with the first report due July 29, 2016. If after four quarterly reports, the reports show this contract has not covered its costs, the Postal Service shall negotiate an amendment raising prices to cover costs or terminate this contract in accordance with Article IV of the contract. The Postal Service shall file notice in these dockets of the requested amendment or termination within 30 days of filing the fourth report with the Commission.

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

4. 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. MC2016-39 and CP2016-48. 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*
*****
Priority Mail Contract 165
*****

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 Contract 165
*****
**2500 Negotiated Service Agreements**
*****
**2505 Domestic**
*****
**2505.5 Priority Mail Contracts**
*****

- Priority Mail Contract 165

*Baseline Reference*
Docket Nos. MC2016-39 and CP2016-48
PRC Order No. 3069, February 12, 2016
*Included Agreements*
CP2016-48, expires February 16, 2019
*****