

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Market Test of Experimental Product—
Customized Delivery

Docket No. MT2014-1

PUBLIC REPRESENTATIVE'S COMMENTS

(October 9, 2014)

On September 23, 2014, the Postal Service filed a notice of a market test of an experimental product called Customized Delivery.¹ The Public Representative supports the Postal Service's proposal and believes the market test is in the public interest, given its potential to offer expanded options to consumers and create a new source of contribution for the Postal Service. However, the Public Representative is concerned that the current record is inadequate for the Commission to make the statutorily required determination that Customized Delivery will not cause market disruption. The Public Representative urges the Commission to closely monitor changes to the market test, expand the data collection plan, and modify the market test's proposed duration and revenue accounting to include the unauthorized operations test. These comments also urge the Commission to deny the Postal Service's request for exemption from the \$10 million limitation without prejudice for failure to make the required showing under 39 U.S.C. § 3641(e)(2).

I. The Record is Insufficient to Determine Whether the Market Test Complies with 39 U.S.C. § 3641(b)(2).

The record currently does not contain sufficient information to assess whether Customized Delivery complies with 39 U.S.C. § 3641(b)(2). Section 3641(b)(2) requires that offering of an experimental product not disrupt the market by creating "an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns." 39 U.S.C. § 3641(b)(2). Fundamental to this assessment is how the market is defined. As described below, the current record

¹ Notice of the United States Postal Service of Market Test of Experimental Product—Customized Delivery, September 23, 2014 (Notice).

lacks information sufficient to define the market for Customized Delivery. Without a defined market, the section 3641(b)(2) inquiry becomes impossible. While outstanding or additional information requests may provide sufficient information to assess market disruption for Customized Delivery as presently offered,² Customized Delivery's amorphous description likely means the market disruption analysis will change as the experimental product evolves and changes.

A. Interpretation of 39 U.S.C. § 3641(b)(2)

Section 3641(b)(2) requires that an experimental product not cause market disruption. Introduction of an experimental product cannot "create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns." 39 U.S.C. § 3641(b)(2). The Commission recently finalized rules governing market test proceedings, and in that rulemaking, the Commission declined to further elaborate on the 39 U.S.C. § 3641(b)(2) test finding "each market test raises fact-specific inquiries that militate against attempting to define terms such as . . . unfair or otherwise inappropriate competitive advantage in a vacuum."³ The Commission has generally turned to principles of antitrust law to guide its interpretation of statutory terms associated with markets, unfair competition, and market harm.⁴

The market disruption analysis should begin with identification of the relevant market. Antitrust law and the Commission's precedent view the relevant market as comprised of two parts: the relevant product market and the geographic market. Order No. 1448 at 24. In Order No. 1448, the Commission used the Department of Justice and Federal Trade Commission horizontal merger guidelines as guidance. Concerning the relevant product market, "the Guidelines employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets." *Id.* The hypothetical monopolist test identifies reasonably substitutable products and competitors that if controlled by the monopolist would allow the monopolist to increase prices and profits. *Id.* at 24-25. The geographic

² Despite the deadlines of October 7 and 8, respectively, responses to Chairman's Information Requests No. 1 (in part) and No. 2 (in its entirety) have not been provided.

³ Docket No. RM2013-5, Order Adopting Final Rules for Market Tests of Experimental Products, August 28, 2014, at 36 (Order No. 2173).

⁴ See, e.g., Docket Nos. MC2012-14 and R2012-8, Order Approving Addition of Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market Dominant Product List, August 23, 2012, at 23-33 (Order No. 1448); Docket No. RM2013-4, Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, June 5, 2013, at 6-8 (Order No. 1739).

market is the geographic area where the hypothetical monopolist can freely increase prices and profits without causing an influx of competition from outside sources.⁵

The second step is to assess whether the experimental product will create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer in the relevant market. Similar language appears in 39 U.S.C. § 404a(a)(1), which grants the Postal Service an affirmative defense against certain types of complaints if the regulation at issue “does not create an unfair competitive advantage for itself or any entity funded . . . by the Postal Service.” 39 U.S.C. § 404a(a)(1). The Commission indicated that “principles used under other laws to evaluate unfair competition are instructive and useful” in its interpretation of section 404a(a)(1).⁶ In particular, the Commission found the antitrust “rule of reason” for determining if unfair competition has occurred persuasive but declined to adopt it in its entirety when interpreting section 404a(a)(1).⁷

The requirement in 39 U.S.C. § 3641(b)(2) is broader than the affirmative defense in 39 U.S.C. § 404a(a)(1) in two ways. First, not only must the experimental product not create an unfair competitive advantage; it must also not create an “otherwise inappropriate competitive advantage.” Second, the 39 U.S.C. § 3641(b)(2) test looks not only at possible competitive advantage for the Postal Service, but also for mailers and mandates special consideration of small business concerns. Thus, sections 404a(a)(1) and 3641(b)(2) share the concept of an “unfair competitive advantage” for the Postal Service, but section 3641(b)(2) contains additional factors that must be given consideration in the market disruption analysis.

In Order No. 2173, the Commission indicated that its interpretation of “unfair or otherwise inappropriate competitive advantage” in section 3641(b)(2) “undoubtedly will be guided by analogous precedent concerning claims of unfair competition when reviewing specific market tests.” Order No. 2173 at 38. In its discussion, the Commission described the rule of reason analysis and its focus on harm to the competitive process and consumers, rather than individual competitors. *Id.* The Public Representative supports applying the principles of the rule of reason to assess whether the offering of an

⁵ *Id.* at 25-26. Defining the geographic market is also necessary for the analysis required under 39 U.S.C. § 3641(e).

⁶ Docket No. RM2013-4, Order Establishing Final Rules Pursuant to 39 U.S.C. 404a, October 6, 2014 at 6 (Order No. 2207).

⁷ *Id.*; Order No. 1739 at 7-8.

experimental product creates an unfair competitive advantage for the Postal Service. Similarly, the principles underlying the rule of reason should be used to determine whether an experimental product creates an unfair competitive advantage for any mailers. In that analysis, potential harms to mailers' consumers would be considered. In both cases, the concerns of small businesses should be factored into the analysis.

Section 3641(b)(2) and its associated legislative history do not give insight into the meaning of "otherwise inappropriate competitive advantage." In light of the Commission's decision to evaluate statutory terms on a case-by-case basis, the Public Representative believes "otherwise inappropriate competitive advantage" should be interpreted to consider other anticompetitive behavior applicable to the experimental product. This should be analyzed on a case-by-case basis and should consider factors like whether the experimental product is priced below cost, potential harm to competitors (and particularly small business competitors), and whether the experimental product's prices are similar to prices offered by competitors.⁸ Harm to competitors by itself does not necessarily mean an "otherwise inappropriate competitive advantage" exists. For example, competitors may lose business to the Postal Service if the Postal Service is able to deliver a substitutable service at a lower price. Such lost business may harm individual competitors, but benefit the market as a whole by allowing a more efficient producer to gain market share. On the other hand, if competitors lose business because the Postal Service priced its service below cost to gain market share, the Postal Service would be using an experimental product to create an "otherwise inappropriate competitive advantage" for itself.

B. The Record Lacks the Information Necessary to Evaluate Market Disruption.

Applying the interpretation of section 3641(b)(2) proposed above, the Public Representative finds that insufficient information exists to assess whether Customized Delivery, as proposed in the Notice, will cause market disruption. Given the limited information available, Customized Delivery's relevant product market and geographic market cannot be defined. Without a market definition, one cannot evaluate whether the market will be disrupted by the introduction of Customized Delivery.

Defining the relevant product market requires identification of reasonably substitutable products and competitors that, if controlled by the Postal Service, would allow

⁸ The Postal Service asserts that inappropriate market disruption will not occur because the prices offered by competitors fall within the same range as the Postal Service's proposed prices. Notice at 5.

the Postal Service to increase prices and profits. To begin the inquiry, one must determine what the experimental product is—a seemingly simple task overcomplicated by ambiguities in the Notice. In the Notice, the Postal Service describes Customized Delivery as “a package delivery service offering that will provide customers with delivery of groceries and other prepackaged goods, primarily during a 3 a.m. to 7 a.m. delivery window.” Notice at 1. The Postal Service notes that it may also test “other possible delivery windows throughout the day.” *Id.* at 3. It later notes that Customized Delivery is unique from other postal products because “retailers can specify a unique timeframe for delivery of their goods, and their customers can specify a unique location at their delivery address where the product will be delivered.” *Id.* at 4-5.

Customized Delivery is clearly a delivery service of mailers’ products to consumers’ homes. Beyond that, the description raises several questions about what exactly is the Postal Service proposing to offer through the market test. Is the product the delivery of groceries? The delivery of groceries mixed with other goods? Can goods alone be delivered without groceries? Does “prepackaged goods” mean goods that are packaged before being given to the Postal Service for delivery or does “prepackaged goods” refer to particular types of goods? Does delivery occur primarily in early morning or can mailers choose any delivery window in a 24 hour period? Will the Postal Service pick up items to be delivered at mailers’ places of business or must mailers deliver totes to Postal Service facilities?⁹ The answers to these questions are important to defining the relevant product market because reasonably substitutable products and competitors differ depending on whether the product is early morning grocery delivery versus all-day grocery delivery versus delivery of any good at any time of day.

The relevant geographic market describes the geographic area over which the hypothetical monopolist could freely raise prices and increase profits because consumers do not have reasonable alternatives. In the Notice, the Postal Service fails to identify the geographic markets in which it plans to run the market test, stating that Customized Delivery has been operations tested in 38 ZIP Codes and that the Postal Service intends

⁹ The Notice states that during the operations test, totes are dropped off at Postal Service destination delivery units for delivery. Notice at 2. The Postal Service’s response to CHIR No. 1, question 2 stated that prices charged will depend on several factors, including “the ability of shippers to deliver goods to Postal Service facilities,” implying that drop off at destination delivery units is not a defined feature of Customized Delivery. Responses of the United States Postal Service to Chairman’s Information Request No. 1, October 8, 2014, at question 2 (Partial Response to CHIR No. 1).

to expand “customized delivery to additional major metropolitan markets across the nation.” Notice at 3. In response to CHIR No. 1, question 1, the Postal Service stated that “[p]otential geographic areas for this market test are currently being evaluated. . . . No final determinations have been made yet for the market test.”¹⁰ In order to define the geographic market, the Commission would need to know the ZIP Codes or geographic areas where Customized Delivery will be offered during the duration of the market test.

Without defined product and geographic markets, it is impossible to analyze whether market disruption as defined by 39 U.S.C. § 3641(b)(2) could result from Customized Delivery. Without a defined relevant product market, consumers may be difficult to identify. For example, one group of mailers will utilize Customized Delivery of early morning groceries, while a larger group of mailers would purchase Customized Delivery if it is for the delivery of any good at any time of day. Consumers of mailers would also have to be considered, and those consumers would differ based on the relevant product market. Similarly, the relevant product market must be defined in order to identify competitors, competitors’ prices, and small businesses that would be impacted by Customized Delivery. The geographic market must also be defined in order to identify consumers, competitors, and small businesses, as each category is likely to capture a different group depending on the individual characteristics of the particular geographic area. Sufficient information to define the relevant product and geographic markets is necessary to analyze whether the experimental product satisfies section 3641(b)(2).

C. The Commission Could Analyze Market Disruption on a Limited Basis.

If the outstanding responses to information requests contain information that has been widely reported in the media, the Commission may have sufficient information to determine that Customized Delivery (as was operations tested) will not create market disruption. Although not explained in the Notice, it has been widely published that the operations test consists of deliveries for AmazonFresh in the San Francisco metropolitan area.¹¹ As indicated by the response to CHIR No. 1, question 1, if the Postal Service has

¹⁰ Partial Response to CHIR No. 1, question 1.

¹¹ Greg Bensinger & Laura Stevens, *U.S. Mail Delivers Amazon Groceries in San Francisco*, The Wall Street Journal (September 4, 2014), <http://online.wsj.com/articles/u-s-mail-to-deliver-amazon-groceries-in-san-francisco-1409854499>; Carlos E. Castaneda, *U.S. Postal Service Looking to Expand Delivery Services After Test Program with Amazon*, CBS SF Bay Area (September 25, 2014), <http://sanfrancisco.cbslocal.com/2014/09/25/u-s-postal-service-looking-to-expand-delivery-services-after-test-program-with-amazon/>.

no specific plans except to continue the operations test, then the relevant product market can be defined by looking at the product the Postal Service is offering to AmazonFresh. According to the AmazonFresh website, customers pay a flat annual rate for unlimited free delivery of AmazonFresh orders over \$35.¹² AmazonFresh allows customers two delivery choices: orders placed by 10 a.m. will be delivered by dinner and orders placed by 10 p.m. will be delivered by breakfast. *Id.* AmazonFresh offers over 500,000 products, including traditional groceries, other products traditionally found in grocery stores,¹³ and Amazon.com products including games, books, electronics, office products, and tools.¹⁴

Based on the AmazonFresh operations test, it appears the product offered is residential delivery in fewer than 12 hours of groceries and goods sold and packaged by the mailer. The relevant product market is defined by competitors offering reasonably substitutable products, which in this case would likely include companies offering home grocery delivery (offered by Safeway, Peapod, and small businesses); local couriers working for Google Shopping Express;¹⁵ and national and local florists. Currently, the geographic market is the San Francisco metropolitan area, made up of the 38 Zip Codes where the Postal Service is engaged in Customized Delivery for AmazonFresh.¹⁶

With the market now defined as set-window delivery of prepackaged groceries, household products/goods, consumer products/goods, and flowers in less than 12 hours in the metropolitan San Francisco area, section 3641(b)(2) requires the Commission to assess whether the product will create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns. As proposed above, the first step is to apply the rule of reason analysis to assess whether the product creates an unfair competitive advantage for the Postal Service or any mailer. The rule of reason focuses on harm to the competitive process and

¹² AmazonFresh, <https://fresh.amazon.com/MembershipBenefits>.

¹³ These include pet products, fresh flowers, cleaning and laundry supplies, and paper goods.

¹⁴ AmazonFresh, <https://fresh.amazon.com/Category?cat=shopamazon>.

¹⁵ Google Shopping Express pairs with stores such as Target, Toys R' Us, and Office Depot to offer same day delivery through local couriers in San Francisco. Reuters, *Google Launches Same Day Delivery in San Francisco Bay Area*, Reuters U.S. (March 28, 2013), <http://www.reuters.com/article/2013/03/28/net-us-google-deliveryservice-idUSBRE92R0FN20130328>. See also Google Shopping Express, <https://www.google.com/shopping/express/#HomePlace:s=0&c=60&mall=SanFrancisco>.

¹⁶ It is unclear whether the operations test is on-going. AmazonFresh in San Francisco appears to be offering early morning delivery as of the date of this filing, so the Public Representative is assuming that the Postal Service is continuing to provide delivery for AmazonFresh. See AmazonFresh, https://fresh.amazon.com/help?ref_=nav_help.

consumers. In this case, consumers include AmazonFresh, as well as customers of AmazonFresh. Based on the information available, it seems unlikely there will be competitive harm to the marketplace generally or to either set of consumers specifically. In general, consumers benefit from more choices and increased competition—and Customized Delivery competes with several other entities providing similar services in the San Francisco metropolitan market. The Public Representative notes a possible harm to small business consumers that the Commission should explore through additional information requests. In its Notice, the Postal Service states that it will ensure that its revenues will not exceed \$50 million in any year “by providing some qualifying criteria and limitations relating to technical and logistics capability for participating retailers.” Notice at 7. Since no additional information concerning the “qualifying criteria and limitations . . . for participating retailers” is provided, the Commission should seek further clarification of the Postal Service’s statement and ensure that such “qualifying criteria and limitations” do not prevent small businesses from accessing Customized Delivery.¹⁷

The second step is to evaluate whether Customized Delivery will create an otherwise inappropriate competitive advantage for the Postal Service or any mailer. As described above, this analysis considers other competition-related factors like the price of the experimental product and potential harm to competitors (particularly small business competitors). The Postal Service states that “the prices offered by the Postal Service would not create an inappropriate market disruption” because “[t]he prices offered by competitors for grocery delivery typically fall within the price range that the Postal Service intends to test.” Notice at 5. Outstanding responses to information requests should verify that the prices for Customized Delivery in San Francisco are within the same price range as competitors offering a similar service.¹⁸ The Postal Service states that it “does not expect this market test to have a significant impact on small businesses, as the delivery of groceries and other prepackaged goods by small courier services and delivery firms already exists in the marketplace.” Notice at 5. In San Francisco, one would assume there are a significant number of small courier services and delivery firms engaged in comparable delivery for Google Shopping Express.¹⁹ Assuming the prices are comparable

¹⁷ “Qualifying criteria and limitations” also raise a question of possible discrimination among users of the mail in violation of 39 U.S.C. § 403(c).

¹⁸ Chairman’s Information Request No. 2, October 2, 2014, questions 1 and 3 (CHIR No. 2).

¹⁹ See note 15 *supra* for a discussion of Google Shopping Express.

and Customized Delivery provides no enhancements or unique benefits, competitors, including small business competitors, are unlikely to be harmed by the Postal Service entering the competitive market. Outstanding responses to information requests should further clarify the reasons why the Postal Service concludes small courier services and delivery firms will not be harmed by Customized Delivery. See CHIR No. 2, questions 1 and 3. If the outstanding responses to information requests provide adequate information about the Postal Service's arrangement with AmazonFresh and provide additional information about pricing and small business competitors, the Commission should be able to conclude that offering Customized Delivery (as operations tested with AmazonFresh) in the metropolitan San Francisco area will not create market disruption.

D. The Commission Should Require that the Postal Service Report Changes that Impact the Market Disruption Analysis.

Although the record may contain sufficient information to find that grocery and goods delivery in the San Francisco metropolitan area will not cause market disruption pursuant to 39 U.S.C. § 3641(b)(2), the Commission should reassess Customized Delivery's compliance with 39 U.S.C. § 3641(b)(2) each time the Postal Service changes the products delivered or the geographic area where Customized Delivery is being tested. Applying 39 C.F.R. § 3035.6 to the remainder of this proceeding will allow the Commission to review the market test's continued compliance with 39 U.S.C. § 3641(b)(2), as the market test evolves.²⁰ As the Postal Service expands the market test to include other mailers, the relevant product and geographic markets may have to be redefined. For

²⁰ In Order No. 2173, the Commission adopted final rules for market tests of experimental products. In accordance with 5 U.S.C. § 553, the rules will become effective October 14, 2014. See Market Tests of Experimental Products, 79 Fed. Reg. 54,522 (September 11, 2014) (to be codified at 39 C.F.R. pt. 3035). In *Landgraf v. USI Film Products*, the Supreme Court held that “[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994). The D.C. Circuit applied the principles of *Landgraf* to the question of whether new or amended agency regulations apply to pending proceedings. When considering if a rule was improperly applied retroactively, the D.C. Circuit has emphasized that “[i]n the administrative context, a rule is retroactive if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.” *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002)(internal quotations omitted)(citing prior D.C. Circuit decisions applying *Landgraf* to the administrative context). “The critical question is whether a challenged rule establishes an interpretation that changes the legal landscape.” *Id.* (internal quotations omitted). A rule is not retroactively applied if it is a procedural rule regulating “secondary rather than primary conduct” and a new regulation does not change the legal landscape and can be applied to pending cases “if a new regulation is substantively consistent with prior regulations or prior agency practices, and has been accepted by all Courts of Appeals to consider the issue.” *Id.* at 859-60. Because most of part 3035 is procedural and has not changed the legal landscape, the Commission should apply part 3035 to this proceeding, particularly with regard to future actions, including future changes to the market test and data collection during the market test.

example, if the Postal Service uses the market test to deliver other unique “prepackaged goods” like dry cleaning or legal documents, the relevant product market would need to be redefined accordingly. As the Postal Service expands its offering of Customized Delivery to metropolitan areas beyond San Francisco, the relevant geographic market will need to be redefined. These changes will impact the 39 U.S.C. § 3641(b)(2) analysis. Thus, in accordance with 39 C.F.R. § 3035.6, the Postal Service should file advance notice of these types of changes so the Commission can consider whether the change alters compliance with 39 U.S.C. § 3641(b)(2).

II. The Commission Should Deny the Postal Service’s Request for Exemption from the \$10 Million Limitation.

The Commission should deny the Postal Service’s request for exemption from the \$10 million limitation without prejudice because the record is insufficient to support the findings the Commission must make in order to grant an exemption pursuant to 39 U.S.C. § 3641(e)(2). In its Notice, the Postal Service requests an exemption from the standard \$10 million revenue limitation. Notice at 7. In order to grant the exemption, the Commission must find that the experimental product: (1) is likely to benefit the public and meet an expected demand; (2) is likely to contribute to the financial stability of the Postal Service; and (3) is not likely to result in unfair or otherwise inappropriate competition. 39 U.S.C. § 3641(e)(2). In the Notice, the Postal Service states that “the market test is likely to benefit the public and meet an unexpected demand” and “the product is likely to contribute to the financial stability of the Postal Service, by generating more package deliveries that do not currently move within the postal system.” Notice at 7. The Postal Service fails to analyze whether the experimental product will likely result in unfair or otherwise inappropriate competition.

Although the Public Representative is concerned that the Postal Service’s assertions of “public benefit” and likelihood of “contribution to the financial stability of the Postal Service” are inadequately justified,²¹ she does believe that the public will benefit from increased competition, and that if the experimental product is successful, it will provide additional contribution to the Postal Service. However, the Postal Service failed to assert that the experimental product “is not likely to result in unfair or otherwise

²¹ See, e.g., Partial Response to CHIR No. 1, question 2 (explaining that neither the prices nor projected annual revenues for Customized Delivery have been established).

inappropriate competition” and provided no explanation on the record from which the Commission can make such a finding.²²

In Order No. 2173, the Commission declined to use its rules to define “unfair or otherwise inappropriate competition,” finding “it unnecessary to define additional terms at this time” and that “the best course of action is to proceed on a case-by-case basis to evaluate these terms.” Order No. 2173 at 36-37. Given that the record in this case is devoid of any evidence the Commission could use to evaluate the likelihood of the experimental product resulting in unfair or otherwise inappropriate competition, the Public Representative urges the Commission to deny the Postal Service’s request for exemption from the \$10 million limitation without prejudice until the record is clarified.²³

III. The Commission Should Include the Operations Test Period When Calculating the Market Test’s Statutory Revenue and Durational Limits.

The Postal Service operated without authority when it conducted operational testing of Customized Delivery. While not clear from the record at this time, The Wall Street Journal reported that the AmazonFresh San Francisco operations test began in early August 2014 and was expected to run for 60 days.²⁴ Section 3641(c)(1) requires that the Postal Service file a notice with the Commission and in the Federal Register “at least 30 days before initiating a market test.” Under the law, a market test is the only vehicle for the Postal Service to test an experimental product, and conducting a test several months prior to the statutorily mandated notice period violates 39 U.S.C. § 3641(c)(1). By renaming an

²² The Public Representative notes that the Postal Service does state that experimental product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, as required by 39 U.S.C. § 3641(b)(2). Notice at 4, 5. “[U]nfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer” in 39 U.S.C. § 3641(b)(2) has a different meaning and context than “unfair or otherwise inappropriate competition” in 39 U.S.C. § 3641(e)(2). This is because an experimental product can never create an “unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer,” while the experimental product can result in “unfair or otherwise inappropriate competition” unless the Postal Service seeks exemption from the \$10 million revenue limitation for the experimental product.

²³ The request is also premature at this time. Denying the exemption has the additional benefit of giving the Postal Service time to gather data, calculate revenues from the experimental product, and assess whether an exemption is necessary at all. Refiling the exemption request at a later date in accordance with the requirements 39 C.F.R. § 3035.16 will provide the Commission with the additional information necessary to support the findings it must make under 39 U.S.C. § 3641(e)(2).

²⁴ Greg Bensinger & Laura Stevens, *U.S. Mail Delivers Amazon Groceries in San Francisco*, The Wall Street Journal (September 4, 2014), <http://online.wsj.com/articles/u-s-mail-to-deliver-amazon-groceries-in-san-francisco-1409854499>. It is unclear from the record whether the operations test lasted 60 days and ended in early October or is on-going until the market test’s proposed start date of October 24, 2014. AmazonFresh in San Francisco appears to continuing to offer early morning delivery as of the date of this filing, so the Public Representative believes the test may be on-going. See AmazonFresh, https://fresh.amazon.com/help?ref_=nav_help.

unapproved market test an “operations test,” the Postal Service created a run-around several of the fundamental provisions in section 3641. For example, 39 U.S.C. § 3641(d) states that a market test cannot exceed 24 months (unless a sole 12 month extension is granted). A several-month operations test preceding an actual market test creates a mechanism for the Postal Service to test experimental products for a period longer than permitted by law. Similarly, because the revenues from an “operations test” will presumably not be factored into the total revenue limitations for market tests that Congress set forth in 39 U.S.C. § 3641(e), operations testing also provides the Postal Service with a run-around the statutory revenue limitations for market tests.

The Postal Service acted without authority in operations testing Customized Delivery. The Public Representative urges the Commission to hold that this violated 39 U.S.C. § 3641(c) and is impermissible without Commission notice and approval. In addition, to ensure that the Customized Delivery market test complies with 39 U.S.C. § 3641(d) and (e), the Commission should find that the several month period of the operations test counted toward the 24 month durational limit and that the revenues collected from the operations test count toward section 3641(e)’s total revenue calculation.

IV. The Commission Should Expand the Scope of Data Collection.

The Commission should order the Postal Service to collect and report data as envisioned in 39 C.F.R. § 3035.20.²⁵ In its Notice, the Postal Service proposed to collect the following data: volume of packages delivered via Customized Delivery; total revenue generated; work hours, travel times, and other cost data; and administrative and start-up cost data. Notice at 8. The Postal Service’s data collection plan appears to conform in general terms to rule 3035.20, but the Postal Service’s plan leaves out several pieces of information included in the Commission’s rule. For example, the Postal Service states that it will report results to the Commission, but it does not elaborate on the frequency of data reporting. As envisioned by the rule, the Commission should order the Postal Service to report quarterly data within 40 days of the close of each fiscal quarter. With respect to the specific data collected, the Commission should clarify that both volume and revenue data must be reported for each fiscal quarter, consistent with rule 3035.20(a)(1) and (3).

The Postal Service’s plan proposes to collect the volume of packages delivered via Customized Delivery. *Id.* Considering Customized Delivery appears to be primarily

²⁵ As described in note 20 *supra*, the Commission can apply new procedural regulations to pending proceedings.

delivery of totes, the Postal Service should be directed to collect data on the volume of totes in addition to data on the “volume of packages.” More specifically, in this market test, volumes are synonymous with the number of the unique QR code assigned to each tote delivered by the Postal Service. *Id.* at 2. The Postal Service states that totes (presumably by QR Codes) are scanned using iPhones “at key steps in the process to provide tracking visibility through to delivery.” *Id.* at 3. To ease the burden of reporting volumes, the Postal Service should provide the Commission with the quarterly scan data in a Microsoft Excel or Access, or a SAS, electronic database file. Providing a database file would eliminate the need for the Postal Service to sort, tabulate or otherwise prepare a summary of the volume data for the Commission. Moreover, the database file would provide additional information about Customized Delivery, without imposing additional burdens on the Postal Service. If packages are delivered via Customized Delivery at the same time as, but not in, a tote, data on this package volume should be collected separately, identified by packages with and without QR codes. With respect to revenue, the Postal Service should collect revenue data from totes and non-tote package volumes separately.

Rule 3035.20(a)(2) requires data collection plans to include “attributable” costs and “product specific” costs. The Postal Service proposes to report “work hours, travel times, and other cost data” and “administrative and start-up cost data.” *Id.* at 8. To the extent this cost data constitute attributable and product specific costs, respectively, the data should be labeled as such for reporting purposes.

Rule 3035.20(c) envisions the Postal Service reporting revenue data from the market test disaggregated by geographic market. As discussed in section I.B, the Postal Service has not provided sufficient information to assess the geographic market for this market test. In the interim, the Public Representative suggests that revenue data be reported in groups of contiguous or predominantly contiguous 5-digit ZIP Codes. This approach will allow the Commission to assess the San Francisco market separately from other metropolitan areas that may be added to the market test at a later date.

Finally, the Commission should to require the Postal Service to advise it if the Postal Service is unable to collect data required by the data collection plan, explain why the data cannot be collected, and propose an alternative to, or a surrogate for, the required data in its quarterly data reports. As the Commission explained in Order No. 1460, “[t]he collection of relevant data is essential for market tests to have meaning and value to the

Postal Service, mailers, other interested persons, and the Commission.”²⁶ As it did in Order No. 1460, the Commission should emphasize the importance of thorough data collection during market tests and require that the Postal Service advise the Commission of any issues with data collection in the quarterly reports. *Id.*

V. Conclusion

The record before the Commission in this proceeding raises several significant issues. The present record contains insufficient information to evaluate whether Customized Delivery will cause market disruption as described in 39 U.S.C. § 3641(b)(2). While it appears the market test could be approved on a limited basis, reevaluation of market disruption would need to occur as the relevant product market and geographic market change and evolve. In addition, the Commission should modify the market test’s proposed duration and revenue calculation to account for the unauthorized offering of Customized Delivery several months prior to the date permitted by 39 U.S.C. § 3641(c) and expand the scope of data collected by the Postal Service during the market test. Finally, the Commission should deny the Postal Service’s request for exemption from the \$10 million limitation without prejudice, as the Postal Service failed to make the required showing under 39 U.S.C. § 3641(e)(2).

Respectfully Submitted,

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²⁶ Docket No. MC2012-31, Order Approving Addition of Postal Services to the Mail Classification Schedule Product Lists, September 7, 2012 at 17-18 (Order No. 1460).