

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

MARKET TEST OF EXPERIMENTAL PRODUCT-
GLOBAL ECOMMERCE MARKETPLACE (GEM)
NON-PUBLISHED RATES

DOCKET No. MT2016-1

**OPPOSITION OF THE UNITED STATES POSTAL SERVICE
TO THE MOTION OF THE PUBLIC REPRESENTATIVE TO UNSEAL MODEL
AGREEMENT FOR GEM MERCHANT SOLUTION MARKET TEST**
(April 4, 2016)

On March 28, 2016, the Public Representative filed a motion¹ requesting that the Commission unseal the confidential Model Agreement filed by the Postal Service in Docket MT2016-1.² The Postal Service hereby files its opposition, explaining why the information in the Model Agreement should remain confidential.

Non-Public Materials Sought Are Highly Confidential

The Postal Service may designate materials as confidential in connection with a Commission proceeding under 39 C.F.R. § 3007.20. Upon receipt of a motion to unseal, the Commission's rules require that it will determine whether to make materials filed by the Postal Service publicly available by "balancing the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in

¹ Public Representative Motion to Unseal Model Contract, PRC Docket No. MT2016-1, March 28, 2016. <http://www.prc.gov/docs/95/95459/PRMotion1.pdf>. (Motion)

² Notice of the United States Postal Service of Market Test of Experimental Product- Global Ecommerce Marketplace (GeM) Merchant Solution and Notice of Filing Gem Merchant Model Contract and Application For Non-Public Treatment of Materials Filed Under Seal, March 16, 2016 (Notice)

maintaining the financial transparency of a government entity competing in commercial markets.”³

Section 410(c)(2) of Title 39, U.S. Code, recognizes the propriety of protecting “information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed.” Courts have held that materials fall within this provision if they are (1) of a commercial nature and (2) of a type not publicly disclosed in good business practice.⁴

The materials being sought are highly confidential and commercially sensitive, as outlined in the Postal Service’s Application for Non-Public Treatment (Application) initially filed in this docket.⁵ The Postal Service stated: “redacted information in the agreement includes business sensitive information that reveals the specific processes and practices that will be employed in the provision of the services under the market test.”⁶ The non-public materials at issue consist of contract terms that reveal the precise mechanics of the new product. In the Postal Service’s view, these materials are information of a commercial nature, which under good business practice would not be publicly disclosed. Moreover, this information is highly confidential within the broader shipping services market. This is a nascent service in a very competitive niche that is not yet eligible to be offered to customers under the market test yet – in fact, it cannot be offered until the requisite 30 day period in section 3641 has concluded. Disclosure of the contract terms would more easily allow competitors to negatively characterize the

³ 39 C.F.R. § 3007.33(a)

⁴ See generally, *Carlson v. Postal Service*, 501 F.3d 1123 (9thCir. 2007)

⁵ Notice at Attachment 1

⁶ *Id.* at Attachment 1, Pg. 3

service in favor of their own brand before the service is ready to be offered. Allowing disclosure would cause a clear commercial injury to the Postal Service, as outlined in the hypothetical situations described in the Application.

Even the redacted material that is filed publicly with the Commission reveals more information than the Postal Service's competitors typically disclose about their own contracts or other commercially sensitive business arrangements. Unlike its competitors, the Postal Service has provided these commercially sensitive materials for the Commission's benefit. The rules covering Market Tests in 39 C.F.R. § 3035.3 do not require the filing of a model agreement at all, but the Postal Service has provided one in order to aid the Commission in performing its review. Should the Commission require the public disclosure of all terms of this model agreement in this instance, it would have a chilling effect on future Market Test filings. The Postal Service would be less inclined to include information not required by the Commission's rules. Ironically, the end result will be less transparency, not more. Simply put, the incentives for voluntary disclosure of information will be significantly diminished.

The Public Representative's Motion Fails to Meet the Threshold Required by 39 C.F.R. § 3007.31(a)

Requests for early termination of non-public status must contain "a specific and detailed statement justifying why the non-public materials should be made public, giving specific recognition to any pertinent rationale(s) provided in the application for relief submitted pursuant to § 3007.21 or § 3007.22."⁷ The Motion offers several justifications why

⁷ 39 C.F.R. § 3007.31(a)

access should be granted, but none are specific nor detailed, and the Motion further does not recognize the rationales provided in the Application.

First, the Public Representative argues that “[t]he Postal Service has not justified filing the Model Contract under seal in its Application of the United States Postal Service for Non-Public Treatment of Materials.”⁸ The Application does indeed state that the redacted portion of the Model Agreement “includes business sensitive information that reveals the specific processes and practices that will be employed in the provision of the services under the market test.”⁹ The Application also includes a hypothetical that describes the potential harm of a competitor acquiring the GeM Merchant Solution contract. Because this product is so new, even the obligations of the parties under the agreement and other redacted terms would reveal information about how exactly the GeM Merchant Solution will work and what types of activities will be undertaken. The Postal Service considers all of that confidential information of a commercial nature that is not publicly disclosed in good business practice, particularly given that the product is not even available to customers.

Second, the Public Representative claims that “[f]iling the Model Contract under seal also hinders public review of the proposed market test,” and that filing the Model Contract under seal does not provide potential customers with sufficient information as to whether or not they might have an interest in participating in the market test.”¹⁰ The Postal Service submits that it has indeed provided ample information throughout its cover notice of filing and attachments that would allow members of the public to determine whether this docket is relevant to their interests.

⁸ Motion at 1

⁹ Notice at Attachment 1, Pg. 3

¹⁰ Id.

Additionally, the Commission's rules clearly contemplate situations in which individual interested parties may seek access to non-public materials. The procedures under which members of the public can ask for access to non-public materials are outlined in 39 C.F.R. § 3007.40. That process will allow them to fully participate in the docket without compromising valuable confidential information of the Postal Service. Should any member of the public require more information to decide whether or not the GeM Merchant Solution Market Test is of interest, it should follow this well-established procedure. No third parties have expressed such interest by active participation in this docket. As a result, the Public Representative's proposal would put the Postal Service at risk of significant commercial harm for very little tangible result.

Conclusion

Ultimately, the Commission must balance the potential harm that would come from the disclosure of these commercially sensitive materials against the interests of transparency as required by 39 C.F.R. § 3007.33(a). The materials at issue in this case are highly confidential, and disclosure would not only cause immediate commercial injury to the Postal Service in the short term, but it would also have a significant chilling effect on the Postal Service's ability to compete in the shipping services market with future competitive contracts. Additionally, there is no obvious interest from third parties, and even if there was, their options for accessing such information are already established under the Commission's rules. The Postal Service submits that the Motion fails to meet the standards required by § 3007.33 for public disclosure of confidential

information. Accordingly, the Postal Service urges that the Commission deny the Motion.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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