

BEFORE THE
POSTAL REGULATORY COMMISSION

Market Test of Experimental Product- :
Global eCommerce Marketplace (GeM) : **Docket No. MT2016-1**
Non-Published Rates :

**COMMENTS OF UNITED PARCEL SERVICE ON
POSTAL SERVICE NOTICE OF GLOBAL ECOMMERCE
MARKETPLACE PROPOSED MARKET TEST**

(April 19, 2016)

United Parcel Service, Inc. (“UPS”) respectfully submits these comments in response to Commission Order No. 3162, pursuant to which the Commission established the above referenced docket to receive comments from interested persons on a Postal Service Notice of Proposed Market Test, the Global eCommerce Marketplace (“GeM”) Merchant.¹

I. Overview

Cross-border online consumer purchasing is increasing rapidly at an annual rate of 28%. See Frank Tong, *Almost Half of Global Web consumers Will Purchase Across Borders By 2020*, Internet Retailer (June 16, 2015), available at <https://www.internetretailer.com/2015/06/16/almost-half-web-consumers-will-buy-across-borders-2020>. In fact, according to the Wall Street Journal, “[c]ross-border

¹ See 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 (“Notice”) at 1, Dkt No. MT2016-1 (Mar. 16, 2016).

purchases accounted for around 20% of all global online trade in 2014.” Loretta Chao, *FedEx to Expand E-Commerce Reach in China*, Wall Street Journal, (March 21, 2016), available at <http://www.wsj.com/articles/fedex-to-expand-e-commerce-reach-in-china-japan-1458601231>. And those numbers are expected to rise at an exponential rate “growing 27% a year until 2020.” *Id.*

As a result of this increase in outbound international e-commerce, several of the major international parcel companies, including UPS, DHL, PitneyBowes, and FedEx, have sought ways in which to help domestic online retailers sell to international consumers. See Response Of The United States Postal Service To Chairman’s Information Request No. 1 at Response 1.a (“ChIR Response No. 1”), Dkt. MT2016-1 (April 6, 2016). For example, UPS, DHL, PitneyBowes, and FedEx have all now integrated software into their e-commerce platforms that allows international customers to, among other things, see all costs related to their order, choose from a variety of local payment options, select a shipping option that balances cost and speed, and track their international delivery. Specifically, UPS uses a product known as i-Parcel; PitneyBowes uses Borderfree; FedEx uses Crossborder; and DHL uses iCart. See *id.* These products ensure that international orders move smoothly through customs, eliminating unexpected costs upon delivery.

Until recently, the Postal Service did not have a comparable product. But now, hoping to compete more aggressively in the lucrative and ever-expanding outbound international delivery market, the Postal Service wants in on the action. To that end, the Postal Service now proposes in this docket that it be permitted to conduct a market test of an experimental competitive product known as GeM Merchant. Like i-Parcel,

Crossborder, Borderfree, and iCart, GeM Merchant will allow domestic online merchants to offer their international customers the ability, at the time of purchase, to prepay the estimated duties and taxes that the foreign country's customs agency would assess upon the shipment's arrival in the foreign destination. In doing so, GeM Merchant will "generate more international package deliveries that do not currently exist within the postal system" and will therefore compete directly with i-Parcel, Crossborder, Borderfree, and iCart. Notice at 5

Before the Postal Service may proceed with its market test, however, it must affirmatively demonstrate that GeM Merchant satisfies various statutory and regulatory conditions, including that the product will not cause market disruption. *See* 39 U.S.C. § 3641(b); *see also* Order Adopting Final Rules For Market Tests Of Experimental Products, Dkt No. RM2013-5 at 7 (Aug. 28, 2014) (recognizing that it is the Postal Service's burden to satisfy the statutory conditions). Specifically, the Postal Service must establish that the experimental product cannot "create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer" 39 U.S.C. § 3641(b)(2).² The Postal Service has neither met this burden nor attempted to do so. In fact, the opposite is true. As the limited materials provided by the Postal Service make clear³, GeM Merchant will disrupt the exceedingly competitive private market for

² In addition to the requirement that the market test not create an unfair or inappropriate competitive advantage, Section 3641(b) also requires that the market test involve a product that is "significantly different" from all products offered by the Postal Service during the previous two years, and that the product be categorized as either market dominant or competitive. *See* 39 U.S.C. § 3641(b)(1) & (3).

³ UPS is also concerned with the Postal Service's continued lack of transparency when participating in the market test approval process. The Postal Service's initial notice provided little specific details about the product, and redacted almost all relevant contract provisions, even when the contact they provided is merely a

outbound international package delivery by leveraging its advantages as a state-owned enterprise and a Universal Postal Union (“UPU”) designated operator. As a result, GeM Merchant will provide an unfair and inappropriate competitive advantage for the Postal Service. For this reason, discussed more fully below, the Commission should reject the Postal Service’s proposed market test and order it to terminate any ongoing pilots of GeM Merchant.

Alternatively, if the Commission determines that GeM Merchant satisfies the requirements of § 3641, UPS requests that the product be classified as a market-dominant product, and be subjected to the appropriate disclosure and approval requirements that accompany market-dominant products.

II. **GeM Merchant Creates An Unfair And Inappropriate Competitive Advantage For The Postal Service.**

GeM Merchant will disrupt the “very competitive” outbound international shipping market and will create an unfair and inappropriate competitive advantage for the Postal Service by leveraging the Postal Service’s advantages derived from its status as a UPU designated operator, pursuant to which the Postal Service enjoys rate, customs, and security privileges that are not available to private carriers. See Opposition Of The United States Postal Service To The Motion Of The Public Representative To Unseal Model Agreement For Gem Merchant Solution Market Test (“Opposition”) at 2, MT2016-1 (April 4, 2016).

“model”. Since filing their initial Notice, the Postal Services has continuously rebuffed efforts by the PRC Public Representative and the PRC itself to obtain critical information. Accordingly, UPS asks the Commission to require the Postal Service to provide all necessary information, including the entire model contract, so third parties can fully understand what is being proposed.

First, as a UPU designated operator, the Postal service is able to provide its customers discounted terminal dues, which are charged by international posts for delivery of mail and packages. Although the exact rates are confidential,⁴ it is generally understood that they are below market and often below cost. As a result, these discounted dues, which cannot be accessed through private sector carriers like UPS, result in competitive distortion.

Second, as a UPU designated operator, the Postal Service is afforded special treatment under customs laws which exempt it from many requirements that are applied to private sector volume, both by the U.S. Customs and Border Protection agency and by other countries around the world.⁵ For example, the UPU-authorized customs declaration forms for postal shipments are much simpler than the paperwork required for private delivery companies, like UPS. UPU customs declarations (the "CN 22" and "CN 23" forms) require the mailer to provide minimal information about his or her shipment in a label attached to the postal package.

Third, the security procedures the Postal Service is required to follow are far less onerous than the requirements faced by private delivery companies, like UPS. For example, various security measures require airlines to transmit to security authorities in the destination country electronic data giving specific information on each shipment to

⁴ UPS has previously raised concerns with the level of secrecy that surrounds terminal dues rates, even when they are used for market-dominant products. See Comments Of United Parcel Service On Postal Service Notice Concerning Type 2 Rate Adjustment And China Post Group Negotiated Service Agreement at 7-8, R2015-6 (Sept. 19, 2015).

⁵ See, Dieke, et al, Main Developments in the Postal Sector (2010-2013) ("Dieke") at 63, Bad Honnef (Aug. 2013), available at http://ec.europa.eu/internal_market/post/doc/studies/20130821_wik_md2013-final-report_en.pdf.

be boarded on a plane *before* the plane takes off from the origin airport. International airlines must have the ability to locate and unload any shipment that is subject to a "do not load" order from the destination country. For private carriers, developing the data systems and operational procedures necessary to comply with security requirements has been a challenging and costly task. The Postal Service, however, provides virtually no advance electronic information for risk assessment, including detailed manifests and entry information. Moreover, the Postal Service is exempt from liability for noncompliance with entry procedures. See James I. Campbell Jr., et al., Study on the External Dimension of the EU Postal Acquis at 13 (November 2010), available at http://ec.europa.eu/internal_market/post/doc/studies/2010-wik-external-dimension_en.pdf.

These aforementioned advantages "provide significant competitive benefits for USPs since they are not available to competing providers of postal services." Dieke at 63. And there is little doubt that the Postal Service will unfairly leverage these unique benefits in implementing and launching GeM Merchant to the detriment of UPS, FedEx, DHL, PitneyBowes, and consumers everywhere. Accordingly, the Postal Service should not be permitted to market test GeM Merchant, as it has failed to carry its burden of demonstrating that the product will not disrupt the outbound international shipping market by creating an unfair or inappropriate competitive advantage for itself.

To be sure, the Postal Service makes little effort to dispute this conclusion. In fact, the Postal Service's Notice actually *supports* it. Specifically, in making its case that that GeM Merchant will not "create an 'unfair or otherwise inappropriate' competitive advantage," the Postal Service effectively proves UPS's point that GeM Merchant's

entrance into the outbound international shipping market will effect a significant disruption to the market. Notice at 5. Specifically, the Postal Service contends that GeM Merchant “is designed to improve the international experience for merchants and recipients” and will do so by “generat[ing] more international package deliveries that do not currently exist within the postal system” and by competing with “at least four companies [*i.e.* UPS, FedEx, PitneyBowes, and DHL] [that] offer[] similar end-to-end services.” *Id.* Additionally, the Postal Service states that one of its “strategic objectives” in launching GeM Merchant is to “gain market share in a specific segment through price competition.” ChIR Response No. 1 at Response 1. These statements suggest that market disruption is, in fact, the likely outcome of GeM Merchant’s entrance into the outbound international shipping market by competing directly with i-Parcel, Crossborder, Borderfree, and iCart and doing so by unfairly trading on the benefits conferred upon the Postal Service as a UPU operator, including paying below-market terminal dues rates, to gain market share.

Tellingly, the Postal Service never mentions that the very system they will be using to process international volume for this product offers significant advantages not available to private sector competitors. But the fact that the Postal Service wants to use exclusive UPU advantages as part of a competitive product offering should on its face raise red flags to the Commission. Indeed, it is a clear indication that the current market will likely suffer harm with the addition of the proposed experimental product. It is well-established that competition suffers and ultimately the consumer is hurt if an entity enjoying monopoly privileges enters into a market and uses those advantages to gain market share. *See, e.g., Post & Parcel, USPS Seeks e-Commerce Market Share with*

Priority Mail Price Cut (Jul. 2, 2014), available at <http://postandparcel.info/61751/news/markets/usps-seeks-e-commerce-market-share-with-priority-mail-price-cut/> (“The US Postal Service is moving to snap up market share in e-commerce shipping with a lowering of its business prices.”); Trefis, USPS’ Rate Reductions May Pose A Threat To UPS And FedEx’s Market Share (Aug. 21, 2014), available at [http://www.trefis.com/stock/ups/articles/252456/usps%E2%80%99-rate-reductions-may-
pose-a-threat-to-ups-andfedex%E2%80%99s-market-share/2014-08-21](http://www.trefis.com/stock/ups/articles/252456/usps%E2%80%99-rate-reductions-may-pose-a-threat-to-ups-andfedex%E2%80%99s-market-share/2014-08-21) (“Therefore, a reduction in rates by USPS, followed by an increase in rates by UPS and FedEx, will lead to USPS’ rates being significantly lower than that of UPS and FedEx. E-commerce players will likely shift to USPS given its lower rates, leading to a decline in UPS and FedEx’s market share.”).

The Postal Service often defends these UPU-based competitive advantages by arguing that they come at a cost – namely, the requirement to provide universal service to incoming mail under their treaty obligations.⁶ Nowhere does U.S. law provide exceptions to customs and security provisions because of Universal Service Obligations. Similarly, there is no sound legal or policy basis for giving the Postal Service inappropriate advantages in small competitive markets simply because it is a universal service provider or party to an international agreement. The fact remains that these material competitive advantages exist and would allow the Postal Service to monopolize the outbound international shipping market for this type of service through artificially low pricing and customs privileges, both of which are inaccessible to their private sector counterparts.

⁶ See Reply Comments of the United States Postal Service at 6-8 (“Reply Comments”), Dkt. PI2012-1 (Aug. 31 2012).

Additionally, the Postal Service has previously argued that the terminal dues system and UPU customs privileges somehow create “efficiencies” that ultimately benefit the consumer through lower prices. See Reply Comments at 4. This argument would only have merit if postal operators were actually the most efficient – *i.e.*, the actual lowest cost provider through fair, undistorted competition. However, this is demonstrably not the case. Multiple analyses, including the Commission’s own report developed by Copenhagen Economics, refute this assertion, finding that the terminal dues system, and other arrangements like it, create economic distortions that lessen, not maximize, social welfare, and interrupt efficient markets. See *The Economics of Terminal Dues*, U.S. Postal Regulatory Commission at 34-51 (Sept. 30, 2014), available at

http://www.prc.gov/sites/default/files/reports/The%20Economics%20of%20Terminal%20Dues_final%20report%20300914.pdf.

It is also noteworthy that on June 16, 2015, in a hearing before the Governmental Operations Subcommittee of the House Oversight and Government Reform Committee, which has jurisdiction over the Postal Service, representatives from the Postal Regulatory Commission, the State Department, the USPS Inspector General, and the private sector testified that the terminal dues system was deeply flawed, primarily because rates were not cost-based and often failed to cover costs. The Postal Service itself argued that “the status quo is unsustainable” with regard to rates for small packages up to 2 kilograms (4.4 lbs). Statement of Randy S. Miskanic Acting Chief Information Officer and Executive Vice President United States Postal Service Before the Subcommittee on Government Operations United States House of Representatives

at 4 (June 16, 2015), available at <https://oversight.house.gov/wp-content/uploads/2015/06/Mr.-Miskanic-Statement-Bio.pdf>.

In short, the Postal Service may not disrupt private markets by conducting market tests where, as here, it enjoys significant and inappropriate competitive advantages. While the Commission cannot completely eliminate the competitive disparities derived from the Postal Service's status as a UPU designated operator, it can mitigate the material market harm that would occur to an already-competitive market if the Postal Service were permitted to put those disparities to use at the expense of the private sector. The burden lies with the Postal Service to demonstrate compliance with Section 3641, and the GeM Merchant Notice fails to demonstrate that this product would not be disruptive and anticompetitive. As such, the Commission should reject the market test for failing to satisfy 39 U.S.C. § 3641(b)(2).⁷

III. **Should The Commission Approve Market Tests For GeM Merchant, It Should Classify This Product As Market-Dominant.**

Alternatively, if the Commission determines that, despite the unfair competitive landscape and the likelihood for market disruption, the Postal Service should be allowed to proceed with the GeM Merchant test, this product should be reclassified as a market-dominant product, and all information about the product – including its costs, pricing and

⁷ UPS notes that in purporting to “summarize” the § 3641(b) factors, the Postal Service relies on factors that are not relevant to its request that it be permitted to conduct market tests for GeM Merchant. Specifically, the Postal Service maintains that GeM Merchant is “likely to benefit the public and meet an expected demand” and “likely to contribute to the financial stability of the Postal Service.” But these factors are not relevant under § 3641(b); instead, these factors relate to whether the Commission should lift the statutory \$10 million cap on revenue under § 3641(e)(2) – an issue that is not presently before the Commission.

model agreement – should be made public, and the product should be offered to similarly situated mailers through the Negotiated Service Agreement process.

Market-dominant products are those for which “the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality or decrease output without losing a significant level of business to other firms offering similar products.” 39 U.S.C. §3642(b). Presently, the Postal Service has not demonstrated what its costs would be for this product – with the exception of noting that the Postal Service will attribute *zero* administrative costs to GeM Merchant. See ChIR Response No. 1 at Response No. 2. Like virtually all other information regarding GeM Merchant, this information has been filed under seal, leaving the public to guess whether the Postal Service will be able to predatorily price them out of the market. Given the material advantages that the Postal Service will enjoy for GeM Merchant as a designated UPU operator, it is entirely possible that the Postal Service will be able to set prices so low that no rational profit-seeking competitor would remain in the market.

Indeed, other products where the Postal Service uses terminal dues and customs privileges to undercut competitive markets are classified as market-dominant. See Order Approving Additional Inbound Market Dominant Multi-Service Agreement With Foreign Postal Operators 1 Negotiated Service Agreement (With China Post Group), R2015-6 (Sept. 28, 2015). Simply put, the Postal Service cannot have it both ways: either the service is competitive and may not enjoy inappropriate competitive advantages that are a product of its status as a designated UPU operator; or the product is market-dominant and must be fully transparent.

The Postal Service admits that even providing price ranges for other offerings in this market would be impossible. See ChIR Response No. 1 at Response No. 1. The Commission cannot allow a product to move forward with such scant information if there is a danger that the product should have been classified as market dominant. If this product were to be targeted “to gain market share in a specific segment through price competition,” competitors would not know whether the service is being priced appropriately until the competitive harm outlined in the preceding section had already taken place. *Id.*

IV. The Postal Service Has Failed To Provide Adequate Information To Fully Evaluate GeM Merchant.

The Commission, potential competitors, and the public are impeded from making determinations regarding GeM Merchant’s compliance with applicable federal law because the information regarding GeM Merchant has been mostly filed under seal. See Notice at 1. This hinders market participants, competitors, and the public from adequately assessing whether or not their interests are affected by the Postal Service’s offering. In fact, as noted by the Public Representative, potential customers are not even being supplied with “sufficient information as to whether or not they might have an interest in participating in the market test.” Public Representative Motion to Unseal Model Contract at 1, MT2016-1 (Mar. 28, 2016).

This undermines both the letter and spirit of the Postal Accountability and Enhancement Act of 2006, which sought to increase the transparency of Postal Service operations, accounting and product offerings. See H.R. Rep. No. 109-66 at 43 (2005) (noting that one of the principles for postal reform is to “ensure that important factual information on the Postal Service's product costs and performance is accurately

measured and made available to the public in a timely manner”). In the rapidly-developing world of e-commerce, the Postal Service has effectively precluded market participants from providing adequate input on this experimental product, would-be customers from participating or even fully understanding a new and potentially fruitful opportunity, and the public from assessing whether this offering comports with applicable federal law.

Such opacity is unacceptable from both a legal and public policy standpoint. The Commission cannot approve – and the Postal Service may not conduct – a market test that fails to meet the criteria of Section 3641. Until the Postal Service publically provides sufficient detail regarding the nature of the proposed product and how the product will comply with Section 3641, the Commission should reject the proposed market test.

In addition, UPS is concerned with what appears to be disregard for the Commission’s request to provide the unredacted sections of the Model Agreement requested in Chairman’s Information Request Number 2. The Commission already received a copy of the unredacted Model Agreement, filed with the original notice, under seal. This renders the Postal Service’s continued filing of the requested Model Agreement provisions under seal entirely redundant, and inconsistent with the Commission’s request.

V. Conclusion

The Postal Service is entitled to enter competitive markets only where it will not disrupt them through the use of inappropriate competitive advantages. That burden is not met here. Instead, the Postal Service has utterly failed to provide the Commission

with any evidence that it will not unfairly disrupt the admittedly “very competitive niche” market for outbound international shipping by leveraging its unique competitive advantages as a UPU operator – advantages that are not available to its competitors like UPS, DHL, PitneyBowes, and FedEx. See Opposition at 2. As such, the Postal Service’s proposed market test is clearly inconsistent with the requirements of 39 U.S.C. 3641(b)(2) and for that reason, the Commission must reject this proposed market test. Alternatively, the Commission should reclassify this product as market-dominant and require corresponding transparency and disclosure regarding the market test.

Respectfully submitted,

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