

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Market Test of Experimental Product-
Global eCommerce Marketplace (GeM)
Non-Published Rates

Docket No. MT2016-1

PUBLIC REPRESENTATIVE COMMENTS

(April 19, 2016)

I. INTRODUCTION

On March 16, 2016, the Postal Service filed a notice that it intends to conduct a test of an experimental competitive product referred to as Global eCommerce Marketplace Merchant (GeM Merchant) pursuant to the requirements of 39 U.S.C. § 3641.¹ The Public Representative respectfully submits the following comments concerning the proposed market test.²

II. STANDARD OF REVIEW

The Postal Service may not conduct a market test unless it satisfies the: (1) significantly different product; (2) market disruption; and (3) correct categorization

¹ 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).

² Comments are filed in response to Notice and Order Concerning Market Test of Experimental Product—Global eCommerce Marketplace (GeM) Non-Published Rates, March 18, 2016 at 5 (Order No. 3162).

requirements of 39 U.S.C. § 3641(b). The Public Representative makes the following observations concerning whether or not the Postal Service has satisfied the applicable requirements of 39 U.S.C. § 3641(b).

Significantly different product. The market test product must be, “from the viewpoint of the mail users, significantly different from all products offered by the Postal Service within the 2-year period preceding the start of the test.” 39 U.S.C. § 3641(b)(1).

In a generic sense, GeM Merchant appears to be just another form of international parcels delivery service. The predominant purpose is to deliver a parcel from point A to point B. From this broad perspective, GeM Merchant is not significantly different from any other international parcels delivery product.

In support of this position, the Postal Service previously has downplayed the importance of additional parcels product features when describing parcels delivery markets.³ In Docket No. MC2015-7, the Postal Service argued that even though some parcel service providers offered different features (some providers offering insurance for example), the Postal Service’s parcels service occupied the same market space as the other parcels service providers’ products. The service that GeM Market adds to a basic parcels delivery service is no different than providing any other additional feature, like insurance. This may lead to the conclusion that parcels delivery services, either with or without GeM Market, occupy the same market and compete with each other. Products that compete with each other within the same market are likely to be very similar. The above would lend support to a conclusion that GeM Market is not significantly different from other parcels delivery products offered by the Postal Service within the 2-year period preceding the start of the test.

However, the Public Representative contends that the broad brush analysis presented above, which basically assumes that there is only one parcels market, does not accurately depict the 39 U.S.C. § 3641(b)(1) requirement. There are in reality many

³ See Docket No. MC2015-7, Response of the United States Postal Service to Chairman’s Information Request No. 1, Question 3, Question 3(a), December 16, 2014.

niche parcels markets within the overall parcels market. Each niche market, depending on the context of the question under consideration, can be considered as an independent, unique market of its own. The Public Representative suggests that the definition of parcels market should take into account the specific features of the parcel product under consideration. This leads to the conclusion that there is a separate market for customers seeking a parcel delivery service with the additional feature of duties and taxes calculations (and the several other additional features which for the most part are common among the service providers). From this perspective, GeM Merchant-like services occupy a unique market space more limited than an overall parcels market. The Public Representative finds no evidence that the Postal Service has offered a GeM Market-like service within this limited market space within the past two years.

Market disruption. “The introduction or continued offering of the product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns (as defined under subsection (h)).” 39 U.S.C. § 3641(b)(2).

The Postal Service asserts that it has no reasonable expectation that GeM Merchant would create an unfair or otherwise inappropriate competitive advantage for the Postal Service. It states that there are at least four companies offering similar end-to-end services.⁴ It considers one business as a small business that is offering the same end-to-end service. It discusses other small businesses that offer niche services that may serve a different market. Notice at 5.

The Public Representative contends that more information is needed to comprehensively evaluate any possible market disruptions. The Postal Service has not compared or contrasted any of the potential competitors’ services with the proposed

⁴ The Postal Service identifies Pitney Bowes Borderfree, FedEx Crossborder (formerly FedEx Bongo), UPS i-Parcel, and DHL iCart as offering services similar to the Postal Service’s proposed GeM Merchant Solution.⁴ Response to CHIR No. 1, Question 1(a). The Postal Service does not provide any price ranges for these similar services. *Id.*, Question 1(b).

GeM Market proposal. This undertaking could have better informed the Commission and the commenters. Comments from other entities involved in this marketplace may better inform the Commission of any possible market disruptions.

Regardless, the Postal Service appears to be promoting GeM Merchant as an end-to-end service. Depending upon how the Postal Service includes the cost of shipping in the final price, the Postal Service could have an otherwise inappropriate competitive advantage. The Postal Service already has the advantage of having its own established international mailing services. This could allow the Postal Service to charge a lower effective price for the shipping within the GeM Merchant product than the prices available to other mailer. It could even provide the duties and taxes feature for free as an incentive to use its shipping services. At this point in time there is not enough information concerning how shipping costs are included in the overall GeM Merchant price to determine possible market disruptions.

Correct categorization. The Postal Service must correctly identify the product as either competitive or market dominant.

The Postal Service identifies the product, for the purpose of a test under this section, as either market-dominant or competitive, consistent with the criteria under section 3642(b)(1).... Any test that solely affects products currently classified as competitive, or which provides services ancillary to only competitive products, shall be presumed to be in the competitive product category without regard to whether a similar ancillary product exists for market-dominant products.

39 U.S.C. § 3641(b)(3).

The Postal Service identifies the GeM Merchant product as competitive. It asserts that the product is designed for international packages that do not fall under the Private Express Statutes (*i.e.*, the product is unlikely to contain letters). Notice at 6. The Postal Service states that international package delivery is a component of the highly-competitive package service market. It mentions that competitors are currently offering similar services for outbound international shipments with duties paid at the time of purchase. *Id.*

The Public Representative concurs that GeM Merchant does not implicate the Private Express Statutes. See 39 U.S.C. § 3642(b)(2). The Public Representative also observes the existence of significant competition for similar services in the international market space. Although there is the future potential for the Postal Service to exhibit market power, at this time there is no evidence that it exists today.⁵ See 39 U.S.C. § 3642(b)(1).

III. DOLLAR LIMITATION

For market tests:

A product may only be tested under this section if the total revenues that are anticipated, or in fact received, by the Postal Service from such product do not exceed \$10,000,000 in any year, subject to paragraph (2) and subsection (g). In carrying out the preceding sentence, the Postal Regulatory Commission may limit the amount of revenues the Postal Service may obtain from any particular geographic market as necessary to prevent market disruption (as defined under subsection (b)(2)).

39 U.S.C. § 3641(e)(1).

The Postal Service has filed under seal a dollar figure asserting compliance with the above requirement. The Postal Service has not provided any information to support its calculations, nor have they provided any information to support the calculation of its prices.

One would assume that the Postal Service has undertaken a comprehensive financial analysis of its proposed market test. The Public Representative is disappointed with the Postal Service's reluctance, in the spirit of transparency, to share this information with the Commission.

⁵ The Public Representative suggests that a formal market power analysis need not be undertaken at this time. However, this may be required when proposing to make GeM Market a permanent product. For an example of market power analysis see Docket Nos. MC2013-57 and CP2013-75, Order Denying Request, December 23, 2014 (Order No. 2306).

Due to the lack of transparency provided by the Postal Service, the Public Representative urges the Commission to remind the Postal Service of its statutory obligations once the \$10,000,000 revenue limit is reached.

IV. REQUEST FOR EXTENDING THE MARKET TEST TO THREE YEARS

The Postal Service states that the market test will run for two calendar years beginning no sooner than April 30, 2016.⁶ It intends to offer one year negotiated service agreements to participate in the market test during these two years. Because a one year negotiated service agreement entered into during the second year of the market test will not expire until an assumed third year of the market test, the Postal Service requests that the market test be allowed to run for one additional year.⁷ No additional agreements will be entered into during the third year.

The Public Representative opposes this request as premature. The Postal Service will have at least one year to arrange for participation in the market test, which would allow for negotiated service agreements of a minimum of one year. This appears more than adequate assuming that the Postal Service has already identified its potential participant base.

The Public Representative is also concerned because the Postal Service has stated that the model contract may be modified as the market test progresses. See Notice at 1, fn.1. Thus, the market test that the Commission approves at this time may not be the same market test that is occurring two to three years from now. An application for extension closer to the two year mark will provide the Commission with an opportunity to review the market test and evaluate any changes that the Postal Service has made.

⁶ Notice at 6. "A market test of a product under this section may be conducted over a period of not to exceed 24 months." See 39 U.S.C. § 3641(d)(1).

⁷ Upon approval of the Commission, a market test may be extended for an additional 12 months. See 39 § U.S.C. 3641(d)(2).

Finally, as will be explained below, the Public Representative is concerned about the potential misuse of the market test rules. Restricting the market test to two years, at this time, will limit any possible misuse of these rules.

V. DATA COLLECTION

The Postal Service states that it will report costs, revenues, and volumes associated with each agreement on a quarterly basis. Notice at 8. Individual cost elements and Postal Service costs are discussed under seal. Response to CHIR No. 1, Question 2(a, b). The Postal Service will not separately identify administrative costs. *Id.*, Question 2(c). The Postal Service will track costs associated with any incorrect estimates of duties and taxes. *Id.*, Question 2(d). Volumes will be disaggregated by expedited versus deferred delivery. Response to CHIR No. 1, Question 5(c).

The Public Representative supports the Postal Service's proposals for data reporting and the costs disaggregation elements which were discussed under seal. The Public Representative also suggests that the presentation of data allow for disaggregation by the Postal Service's specific GeM facility, shape and weight of the mailing, the destination country, and the level/type of service provided.

The Postal Service performed an operations test of the GeM product, which terminates in July 2016. Response to CHIR No. 1, Question 3. The Postal Service, however, has not provided any financial information concerning the operations test. The Commission should request that the Postal Service provide the details of the operations test at the same level of disaggregation as suggested above before making a final decision concerning the market test.

The Postal Service states that it "anticipates" providing the Commission with each customer agreement as it is signed. Notice at 8. The Public Representative suggests that the Commission make the filing of all customer agreements as they are signed an explicit requirement. This may be helpful for the future evaluation of the

market test since the Postal Service has stated that the model contract is subject to change over the duration of the market test. See Notice at 1, fn.1.

VI. EXCESSIVE FILLINGS UNDER SEAL

The Public Representative finds it troubling that the Postal Service needlessly files its contract, and responses to CHIRs, under seal in this docket. Anyone can go on-line and see what the competitors are offering in the way of GeM Merchant type services. There is very little difference among the generalities of the product descriptions among competitors. Regardless, potential customers eventually will have to be informed of the specific differences among service providers to be able to select the service provider that fits it needs.

In this docket, the on-line descriptions of similar services were the only way to understand what the Postal Service is trying to offer through GeM Merchant. The Postal Service has gone so far as redacting what are essentially definitions of industry standard terms within its contracts. This secrecy has a chilling effect on anyone's attempt to determine whether or not they would like to participate in the market test, and on the Commission's (and commenters) ability to undertake the required statutory review.

The Public Representative suggests that the Commission look at establishing standards for what may and may not be filed under seal in these types of international contracts. There is no issue with customer specific (identifier and specific contract prices) remaining under seal. The same can be said for potential Postal Service price ranges and costs, and certain technical details (for example, custom software designs or interfaces). However, there is no reason to file under seal the descriptions of the

product (*i.e.*, the services being provided) and general contract definitions, terms and conditions.⁸

VII. POTENTIAL FOR ABUSE OF MARKET TEST RULES

The Commission has consistently taken the position that similarly situated mailers should have the opportunity to participate in a similarly featured negotiated service agreement. With most pertinent descriptive information filed under seal, potential mailers that may want to participate in the market test are placed at a distinct disadvantage. This allows the Postal Service vast latitude in picking market test participants.

The market test approach also allows the Postal Service to potentially sidestep the more rigorous review that would be required if GeM Merchant was directly offered as a negotiated service agreement. To determine whether or not this is a problem, more information would be needed on the potential market test participants, the intent of the Postal Service to offer this product to additional participants, and the general state of development of the product.

Generally, the Public Representative is not concerned with the Postal Service placing limits on market test participation, *i.e.*, number of participants, geographic locations, etc. However, the Commission should be on guard against Postal Service attempts to categorize a service as a market test for the sole purpose of excluding participation.⁹ Offering customized services only to select customers under the false guise of a market test would be discriminatory.

⁸ The Postal Service's approach is beyond silly. Anyone interested in GeM Market type services most likely already know the potential competitors' services and their general parameters. These customers would have to be informed of the specific parameters of each service before opting to contract with any one service provider.

⁹ A data reporting item may be added to identify all customers expressing an interest in the market test and the reasons for allowing participation or denying participation.

Respectfully submitted,

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