

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

**UNITED STATES POSTAL SERVICE RESPONSE TO THE COMMENTS OF
UNITED PARCEL SERVICE**
(April 28, 2016)

The Postal Service hereby responds to the comments of the United Parcel Service (UPS) submitted on April 19, 2016.¹ UPS urges the Commission to block or, alternatively, over-regulate a market test of an experimental product based on little more than UPS's speculative fears. Whatever theoretical merit there might be to UPS's contentions, this proceeding is not the right venue for the Commission to rule on them.

**I. THE GeM MERCHANT SOLUTION WILL NOT UNFAIRLY DISRUPT
THE RELEVANT MARKET, NOTWITHSTANDING ANY POTENTIAL
RELATION TO INTERNATIONAL POSTAL LAWS**

UPS asserts that because the Postal Service is a participant in the Universal Postal Union (UPU) system, that fact alone gives it an unfair advantage against private competitors. Specifically, UPS alleges that both the UPU terminal dues rates underlying the product's price ranges (which were filed non-publicly and to which UPS has not applied for access) and the Postal Service's use of UPU-based customs documentation result in market disruption in conflict with the market test requirement in 39 U.S.C. § 3641(b)(2). This simplistic argument is flawed for multiple reasons.

¹ Comments of United Parcel Service on Postal Service Notice of Global eCommerce Marketplace Proposed Market Test, PRC Docket MT2016-1 (Apr. 19, 2016) [hereinafter "UPS Comments"].

First, UPS wrongly assumes that the GeM Merchant Solution will use international postal services and UPU-based documentation. In reality, the Postal Service will use a variety of commercially available international delivery services for this product.² Those private companies are expected to handle a significant portion of the volume of this product, and that volume will be sent through commercial customs channels just like a UPS shipment would. Thus, to the extent that UPS is concerned about supposedly advantageous features of international postal shipments, the Postal Service has largely mitigated that concern in the specific instance of this experimental product.

Indeed, UPS's allegations seem aimed less at the GeM Merchant Solution market test and more at a broad disparagement of the UPU system in general, with this proceeding merely service UPS as a convenient occasion to air its grievances. To be sure, a number of other, well-established competitive international products use the UPU system of treaty-based rates and customs clearance procedures: First-Class Package International Service, International Priority Airmail, International Surface Air Lift, International Direct Sacks—Airmail M-Bags, Inbound Parcel Post (at UPU Rates), Priority Mail Express International, and Priority Mail International, not to mention numerous negotiated service agreements based on those products. Those products are not at issue in this proceeding, however. If anything, the robust and healthy status of the competitive markets surrounding these products rebuts UPS's presumption that the Postal Service's mandatory fulfillment of UPU obligations *per se* produces unfair market distortion.

² See Response of the United States Postal Service to Chairman's Information Request No. 1, PRC Docket No. MT2016-1 (Apr. 6, 2016), at 7.

Second, as the Postal Service has maintained elsewhere,³ any putative benefits arising from its UPU designated-operator status come with tradeoffs. For example, UPS's assertion that there is no rational link between customs treatment and universal service⁴ is incorrect: obviously, simplified customs documentation is designed to accommodate the individuals and small businesses that, thanks to UPU designated operators' universal service obligations, comprise a large component of the Postal Service's customer base, whereas UPS and other private operators remain free to cater to sophisticated business account-holders.⁵ Moreover, postal items do not necessarily receive the same speed in customs clearance as privately carried items. Meanwhile, UPS and other private carriers benefit from efficiencies that come from integrated global supply chains, while the postal supply chain is fragmented: a handicap that might offset any hypothetical benefits that the UPU system has to offer. The fact remains that the current UPU system has operated for many years, and during this time the international delivery market has been marked by vibrant competition.

Third, UPS can only speculate that rates set through the UPU system might be "below market and often below cost."⁶ Unless UPS is willing to offer insight into its own (as well as its competitors') rates for competing services, the PRC has no record basis to validate UPS's hypothetical comparison. At the same time, it is entirely possible that UPS's and other competitors' own economic advantages, such as expedited customs

³ See Reply Comments of the United States Postal Service in Response to Order No. 26, PRC Docket No. RM2007-1 (Oct. 9, 2007) [hereinafter "USPS RM2007-1 Reply Comments"], at 64-69.

⁴ See UPS Comments at 8.

⁵ See USPS RM2007-1 Reply Comments at 67-68 (discussing *United Parcel Serv. of Am. v. Canada*, ___ ICSID Rep. ___ (W. Bank 2007) [hereinafter "*UPS v. Canada*"], available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ups-00.pdf>).

⁶ UPS Comments at 5.

clearance and integrated global networks, allow them to offer competitive pricing comparable to, or even below, the prices that the Postal Service might test for GeM.⁷

Finally, UPS's comments are speculative and ill-timed. The entire purpose of a time-limited market test is to gauge how the market will respond to the experimental product and whether it will be commercially viable. UPS's blend of doomsaying and shopworn complaints⁸ offers no legitimate reason not to allow the experiment to proceed. If the experiment leads the Postal Service to make this a permanent product, then UPS will have an opportunity to test its hypotheses against the real-world experience of the market test. In the meantime, the Commission will continue to oversee this product in a number of ways, including regular filing of market test data, the annual compliance report, and the filing of individual agreements. These many regulatory checks will ensure that the Postal Service is not exercising undue power in this market niche.

⁷ See Reply Comments of Amazon Fulfillment Services, Inc., PRC Docket No. RM2016-2 (Mar. 25, 2016), at 12 fn.6 (“In any event, any analysis of the competitive advantages conferred by economies of scale and scope must also consider the economies of scale and scope that UPS and FedEx enjoy from lines of business in which the Postal Service’s share is much smaller (international service) or nonexistent (parcels weighing more than 70 pounds, heavy freight, supply chain management, international trade consulting, corporate financing, billing and collection services, and document services).”); see also *UPS v. Canada* at 49-50 (citing UPS and other private couriers’ “secure shipping routes and trade chain controls,” “the need for expedited clearance by couriers to meet time-sensitive and time-definite delivery standards,” and “the existence of contractual relationships between couriers and their clients” as key points of distinction between courier and postal shipments).

⁸ Through its comments, UPS attempts to inject into this proceeding its myopic fixation with the September 2014 Priority Mail price change. UPS Comments at 7-8 (citing online news articles that cast the “Priority Mail Price Cut” as a “Threat to UPS and FedEx’s Market Share”). Of course, domestic Priority Mail pricing has nothing to do with any UPU-based terms for international mail. Moreover, numerous parties have demonstrated the lack of a clear causal connection between the price change and any purported market effects; why competitive products are priced artificially high, not artificially low; and why vigorous competition and lower prices are good for consumers, so long as prices are above marginal costs. *E.g.*, Initial Comments of the United States Postal Service on UPS Proposals One and Two, PRC Docket No. RM2016-2 (Jan. 27, 2016), at 37-47; Comments of Amazon Fulfillment Services, Inc., PRC Docket No. RM2016-2 (Jan. 27, 2016), at 12-14, 69-74; Public Representative Comments, PRC Docket No. RM2016-2 (Jan. 27, 2016), at 44-52.

II. UPS HAS OFFERED NO VALID REASON TO CLASSIFY GeM MERCHANT SOLUTION AS MARKET-DOMINANT

UPS offers no legally cognizable justification for its alternative position that the GeM Merchant Solution should be classified as market dominant instead of competitive. UPS's entire argument is based on the same erroneous premises discussed in the previous section: that the GeM Merchant Solution will rely on UPU-based processes, and that the use of the UPU system will somehow allow the Postal Service to slash rates so drastically that established private sector mailers will be forced out of this market entirely.⁹ Apart from the dubious merits of UPS's argument, it bears no relation to the actual standards for product classification under 39 U.S.C. § 3642(b). For a product to be considered market-dominant, the Postal Service must exercise "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 risk of losing a significant level of business to other firms offering similar products." It is hard to see how, as a new entrant in a very competitive market, the Postal Service could be conceived to exercise *de facto* monopoly power in the way that Section 3642(b) contemplates. Indeed, UPS's fear is not that the Postal Service will raise prices in a monopolistic way that harms consumers, but rather that it will lower them so beneficially to consumers that UPS will be unable to compete. Whatever concern that might pose in the context of market disruption, it is not a basis to classify a product as market-dominant under Section 3642(b).

Because UPS cannot come up with a statutory basis for market-dominant treatment, UPS essentially urges the Commission to create a new rule whereby any

⁹ UPS Comments at 11.

product that “uses terminal dues and customs privileges” must be treated as market-dominant. Needless to say, such a standard has no basis in law or Commission practice. As noted above, the Commission has correctly determined that numerous postal products warrant competitive product status in light of Section 3642(b), regardless of their relation to the UPU system.¹⁰ Indeed, Congress itself acknowledged that such products could properly be classified as competitive.¹¹ There is simply no valid reason why the Commission should adopt the *per se* classification rule that UPS appears to propose.

To the extent that UPS is arguing that unreasonable harm to the marketplace should be a criterion for market-dominant classification, a glance at Section 3642(b) reveals that that is simply not the case. Unreasonable harm to the marketplace may be a criterion for allowing a NSA or a market test to proceed at all, but it does not demarcate whether a product is market-dominant or competitive. Indeed, a threat of unreasonable harm to a marketplace presupposes that the marketplace is competitive in the first place. UPS’s argument appears particularly disingenuous in light of its own

¹⁰ UPS overlooks two crucial points in its misbegotten invocation of a market-dominant negotiated service agreement (NSA) for inbound international mail. See *id.* at 11 (citing Order No. 2731, Order Approving Additional Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement (with China Post Group), PRC Docket No. R2015-6 (Sept. 28, 2015)). First, the Commission actually discredited UPS’s contention that that agreement would “undercut competitive markets.” Compare *id.* at 11 with Order No. 2731 at 11-12. Second, “terminal dues and customs privileges” were not the reason why that NSA was classified as market-dominant. As the Commission explained in the original order classifying such a NSA, the relevant inbound international mail under the NSA contains items subject to the Private Express Statutes, and there is no significant competition for the relevant services. Order No. 549, Order Adding Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 to the Market Dominant Product List and Approving Included Agreements, PRC Docket Nos. MC2010-35, R2010-5, and R2010-6 (Sept. 30, 2010), at 7-8. Neither of those conditions applies to the experimental product in this proceeding. 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, PRC Docket No. MT2016-1 (Mar. 16, 2016), at 6.

¹¹ 39 U.S.C. § 3631(a)(1), (2), (4) (establishing “priority mail,” “expedited mail,” and “bulk international mail” as competitive products).

identification of various products with which this new USPS product will “compete directly.”¹² If anything, it is not the Postal Service, but UPS, that “cannot have it both ways.”¹³ Given the realities of the relevant market, there is no plausible basis to conclude that the GeM Merchant Solution is anything but a competitive product.

Instead of arguing that this product would meet statutory requirements for a market dominant classification, UPS seems to propose that a perceived need for transparency is sufficient reason to classify something as market dominant, and sees the classification as a way to force disclosure of “all information about the product – including its costs, pricing and model agreement.”¹⁴ A perceived need for transparency is not a reason to classify as market dominant under Section 3642. The Postal Service has not yet filed the financial workpapers detailing the costs of this product because that is not required for a market test under Section 3641. Indeed, one of the purposes of a market test is to collect data on an experimental product’s costs. If the Postal Service decides to make this a permanent product at the end of the market test, then it will file all required documentation prescribed by the Commission rules, and UPS will have the same ability as any other interested party to request access to any non-public material.¹⁵

¹² UPS Comments at 3.

¹³ *See id.* at 11.

¹⁴ *Id.* at 11.

¹⁵ It bears noting that UPS raised similar objections about transparency in the context of the NSA in Docket No. R2015-6. There, the Commission deemed it sufficient to remind UPS that it “may request that the Commission grant access or terminate non-public status pursuant to” 39 U.S.C. § 504(g) and 39 C.F.R. §§ 3007.10 and .20. Order No. 2731 at 11.

III. CONCLUSION

The Postal Service submits that the above clarifications will aid the Commission in performing its review of the GeM Merchant Solution market test. In short, UPS has provided no valid reason for the Commission to block the market test or to treat the experimental product as market-dominant.

Respectfully submitted,

UNITED STATES POSTAL SERVICE
By its attorneys:

Anthony F. Alverno
Chief Counsel, Global Business &
Service Development

Kyle Coppin
Jacob Howley

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1135
(202) 268-2368; Fax -5402
Kyle.R.Coppin@usps.gov
April 28, 2016