

ORDER NO. 3319

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

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

Docket No. MT2016-1

ORDER AUTHORIZING MARKET TEST OF
GLOBAL ECOMMERCE MARKETPLACE (GEM) MERCHANT

(Issued May 25, 2016)

I. INTRODUCTION

On March 16, 2016, the Postal Service filed notice of its intent to conduct a market test of an experimental product identified as Global eCommerce Marketplace (GeM) Merchant beginning on or after April 30, 2016.¹ For the reasons discussed below, the Commission finds that the proposed GeM Merchant market test is consistent with 39 U.S.C. § 3641 and authorizes the market test to proceed.

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, at 1, 6 (Notice).

II. SUMMARY OF THE PROPOSED MARKET TEST

The Postal Service proposes to introduce GeM Merchant, an end-to-end international shipping service. See Notice at 2, 5. The Postal Service states that GeM Merchant would be a novel eCommerce service for participating domestic online merchants and their international customers. *Id.* at 2. According to the Postal Service, GeM Merchant would allow participating domestic online merchants to offer their international customers the ability, at the time of purchase, to estimate and prepay duties and taxes that the foreign country's customs agency will assess when the item arrives in the foreign destination. *Id.* The Postal Service explains that the participating domestic merchant will receive the order and will prepare the item for domestic shipment to the GeM processing facility. *Id.* After the item arrives at the GeM processing facility, the Postal Service indicates that it or its supplier will inspect the item for verification and security, as well as prepare and arrange for the item's international shipment and delivery to the customer. *Id.*

During the 2-year market test period, the Postal Service intends to offer GeM Merchant to a limited number of domestic online merchants through negotiated service agreements (NSAs). *Id.* at 2, 6. The Postal Service requests that the Notice serve as an application for extension under 39 U.S.C. § 3641(d) for any NSAs that have terms that extend beyond the 2-year period of the market test. *Id.* at 6. The Postal Service represents the extension would be limited to satisfying existing contractual obligations and that it would not initiate any new agreements with merchants after the 2-year period of the market test. *Id.* at 6-7. Through the market test, the Postal Service plans to assess GeM Merchant's revenue potential, competitive price points, and potential for expansion. *Id.* at 2. If the market test is successful, the Postal Service states that it would seek permanent product status for GeM Merchant. *Id.* at 7.

III. PROCEDURAL HISTORY

A. The Notice and Initial Commission Action

The Postal Service's Notice asserts that the proposed GeM Merchant market test satisfies the statutory and regulatory requirements for market tests of experimental products. *Id.* at 3. The Notice's supporting documents include proposed changes to the Mail Classification Schedule, as well as redacted versions of the GeM Merchant model contract, GeM Merchant price ranges summary, and supporting financial workpapers. The Postal Service requests that unredacted versions of the GeM Merchant model contract, GeM Merchant price ranges summary, and related financial information remain under seal in an Application for Non-Public Treatment attached to the Notice. *Id.* Attachment 1.

On March 18, 2016, the Commission issued an order establishing the docket, appointing a Public Representative, and providing interested persons with an opportunity to comment.²

B. Additional Information Regarding the Proposed Market Test

The Public Representative requested that the Commission issue an information request to obtain sufficient information to evaluate the proposed market test.³ On March 30, 2016, Chairman's Information Request No. 1 was issued.⁴ On April 6, 2016, the Postal Service filed its responses to CHIR No. 1, with portions filed under seal.⁵ The responses provided additional information regarding the Postal Service's proposed

² Order No. 3162, Notice and Order Concerning Market Test of Experimental Product—Global eCommerce Marketplace (GeM) Non-Published Rates, March 18, 2016.

³ Public Representative Motion to Request Issuance of Information Request, March 29, 2016 (Motion to Issue Information Request).

⁴ Chairman's Information Request No. 1, March 30, 2016 (CHIR No. 1). To the extent CHIR No. 1 included questions proposed in the Motion to Issue Information Request, that motion is granted.

⁵ Response of the United States Postal Service to Chairman's Information Request No. 1, April 6, 2016 (Response to CHIR No. 1).

data collection plan, the operations test the Postal Service conducted, as well as the nature and scope of the proposed market test. See *generally* Response to CHIR No. 1. The Postal Service also identified four competitors providing a product similar to GeM Merchant: United Parcel Service, Inc. (UPS), Pitney Bowes Inc. (Pitney Bowes), FedEx Corporation (FedEx) and DHL International GmbH (DHL). Response to CHIR No. 1, question 1a.

C. Additional Information Regarding the Sealed Model Contract Provisions

On March 28, 2016, the Public Representative requested that the Commission unseal the GeM Merchant model contract.⁶ On April 4, 2016, the Postal Service opposed the Motion to Unseal.⁷

To clarify the Postal Service's Application for Non-Public Treatment contained in the Notice, on April 5, 2016, Chairman's Information Request No. 2 was issued, which directed the Postal Service to respond by April 11, 2016.⁸ To provide interested persons an opportunity to consider the responses to CHIR No. 2 in their comments, the Commission extended the comment deadline to April 15, 2016.⁹ On April 12, 2016, the Commission extended the comment deadline again, to 7 days after the Postal Service files its response to CHIR No. 2.¹⁰ The Postal Service responded to CHIR No. 2 on April 12, 2016.¹¹ The Postal Service filed an amended public version of the model

⁶ Public Representative Motion to Unseal Model Contract, March 28, 2016, at 1 (Motion to Unseal).

⁷ 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, at 2.

⁸ Chairman's Information Request No. 2, April 5, 2016 (CHIR No. 2).

⁹ Order No. 3212, Order Extending Comment Deadline, April 5, 2016.

¹⁰ Order No. 3236, Order Extending Comment Deadline, April 12, 2016.

¹¹ Response of the United States Postal Service to Chairman's Information Request No. 2, April 12, 2016 (Response to CHIR No. 2). The Commission grants the Postal Service's motion for late acceptance of the Response to CHIR No. 2. See United States Postal Service Motion for Late Acceptance of Response to Chairman's Information Request No. 2, April 14, 2016.

contract unsealing 14 provisions.¹² The Postal Service filed objections, under seal, to unsealing five provisions of the model contract. See Response to CHIR No. 2 at 4.

D. Comments

The Public Representative¹³ and UPS¹⁴ filed comments on April 19, 2016. The Postal Service filed reply comments on April 28, 2016.¹⁵

1. Public Representative Comments

Based on his review of the Postal Service's Notice and supporting documentation, the Public Representative states that the proposed GeM Merchant product would serve a niche parcel market and finds no evidence that the Postal Service has offered a similar product catering to this market within the past 2 years. PR Comments at 3. He asserts that more information is needed to comprehensively evaluate possible market disruptions. *Id.* He observes that presently there is significant competition for services similar to the proposed GeM Merchant product. *Id.* at 5. He concludes that there is presently no evidence that the Postal Service has market power. *Id.* He suggests that if the Postal Service proposes to seek permanent product status, a formal market power analysis may be necessary; however, he states that this analysis need not be performed at this time to authorize the market test to proceed. See *id.* at 5 n.5.

¹² See Response to CHIR No. 2, Attachment 1 (revised public version of the model contract); see also Notice of the United States Postal Service of Filing Erratum Concerning Response to Chairman's Information Request No. 2, April 14, 2016 (correcting the public version of the model contract to unseal paragraph 10.1).

¹³ Public Representative Comments, April 19, 2016 (PR Comments).

¹⁴ Comments of United Parcel Service on Postal Service Notice of Global eCommerce Marketplace Proposed Market Test, April 19, 2016 (UPS Comments).

¹⁵ United States Postal Service Response to the Comments of United Parcel Service, April 28, 2016 (Postal Service Reply Comments). The Commission grants the Postal Service's motion for leave to reply to the UPS Comments. See United States Postal Service Motion for Leave to Reply to Comments of United Parcel Service, April 28, 2016.

Stating that the Postal Service has not provided information to support the revenue estimates provided under seal, the Public Representative suggests that “the Commission [] remind the Postal Service of its statutory obligations” under 39 U.S.C. § 3641(e). *Id.* at 6.

The Public Representative opposes the Postal Service’s application for a limited extension of the market test duration as premature and suggests that an application closer to the expiration date would allow the Commission to make a better informed decision. *Id.* He expresses concern that potential modifications of the model contract, which may occur as the market test progresses, may cause the market test authorized in 2016 to differ from a potential market test occurring in 2018 or 2019. *See id.* Further, he suggests that restricting the duration to 2 years would limit potential misuse of the market test rules. *Id.* at 7.

The Public Representative supports the Postal Service’s proposed data reporting and disaggregation of costs, as described by the Postal Service under seal. *Id.* He also suggests the Postal Service break down data by the “specific GeM facility, shape and weight of the mailing, the destination country, and the level/type of service provided.” *Id.* He also recommends that the Commission require the Postal Service to file all GeM Merchant NSAs as they are signed. *Id.* (citing Notice at 8).

The Public Representative takes issue with the Postal Service’s decision to file parts of its model contract and CHIR responses under seal. *Id.* at 8. He observes that competitors’ offerings comparable to the proposed GeM Merchant product may be viewed online. *Id.* He asserts that referring to these online descriptions was necessary to understand the Postal Service’s proposed offering. *Id.* He characterizes the filings under seal as “excessive” and extending to “definitions of industry standard terms within its contracts.” *Id.* He suggests that the Commission consider establishing standards for what content may be filed under seal in proceedings involving international contracts. *Id.* He does not dispute redaction of customer-identifying information, specific contract prices, potential price ranges and costs, and certain technical details (such as custom

software designs or interfaces). *Id.* He asserts that it is unnecessary to redact product descriptions and general contract definitions, terms, and conditions. *Id.* at 8-9.

Finally, the Public Representative expresses concern that the excessive redactions may disadvantage potential mailers that may want to participate in the market test. *Id.* at 9. He suggests adding an item to the data collection report to identify all merchants expressing interest in the market test and the reasons for allowing or denying participation. *Id.* at 9 n.9.

2. UPS Comments

UPS describes the rapidly growing outbound international e-commerce shipping and delivery market and the integrated software products offered by UPS (i-Parcel), Pitney Bowes (Borderfree), FedEx (Crossborder) and DHL (iCart) that facilitate orders by international customers. UPS Comments at 1-2. UPS asserts that the proposed GeM Merchant product will compete directly with i-Parcel, Crossborder, Borderfree, and iCart. *Id.* at 2-3.

UPS asserts that introducing GeM Merchant would unfairly advantage the Postal Service. *Id.* at 4. Noting that the Postal Service is a Universal Postal Union (“UPU”)-designated operator, UPS states that the Postal Service has access to outbound UPU prices not available to other competitors. *Id.* at 4-5. Also, UPS asserts that the Postal Service is exempt from customs requirements applicable to private carriers and instead may complete simpler and less onerous customs declaration forms. *Id.* at 5. Further, UPS asserts that the Postal Service is exempt from security requirements applicable to private carriers, such as the requirement for private carriers to provide advance electronic information, and is exempt from liability for noncompliance with entry procedures. *Id.* at 6. As a result, UPS requests that the Commission reject the proposed market test and order the Postal Service to terminate any ongoing GeM Merchant operations test. *Id.* at 4.

Alternatively, if the Commission authorizes the proposed market test to proceed, UPS requests that GeM Merchant be classified as a market dominant product and that

all GeM Merchant information be made available to the public. *Id.* at 4, 10-11. UPS asserts GeM Merchant should be classified as market dominant because as the UPU-designated operator, the Postal Service will be able to access UPU prices and receive “special” customs treatment. *Id.* at 5, 11.

UPS requests that the Commission “require the Postal Service to provide all necessary information, including the entire model contract.” *Id.* at 3-4 n.3. UPS states that the Postal Service’s sealed filings make it difficult for members of the public to assess whether and how GeM Merchant affects their interest. *Id.* at 12.

3. Postal Service Reply Comments

The Postal Service asserts UPS’s argument that the Postal Service’s status as a UPU-designated operator will create market disruption during the GeM Merchant market test is flawed. Postal Service Reply Comments at 1. The Postal Service disputes UPS’s assumption that GeM Merchant will benefit substantially from the Postal Service’s UPU-designated operator status, clarifying that “private companies are expected to handle a significant portion of the volume of [GeM Merchant] product, and that volume will be sent through commercial customs channels just like a UPS shipment would.” *Id.* at 2.

Also, the Postal Service explains that the UPU system of rates and customs clearance procedures are used for 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, Priority Mail International, and numerous NSAs based on those products. *Id.* According to the Postal Service, “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.” *Id.*

Additionally, the Postal Service asserts that benefits arising from its UPU-designated operator status come with tradeoffs, including the universal service obligation, potentially slower customs clearance, and a fragmented supply chain. *Id.* at

3. The Postal Service also observes the lack of record evidence to validate UPS's concern that "rates set through the UPU system might be 'below market and often below cost.'" *Id.* (quoting UPS Comments at 5). The Postal Service replies that UPS's comments are speculative and premature because of the limited experimental nature of a market test. *Id.* at 4. The Postal Service acknowledges the Commission's authority to oversee a market test, including review of the Postal Service's data collection plan, Annual Compliance Report, and filings of individual NSAs. *Id.*

The Postal Service rebuts UPS's alternative request to classify GeM Merchant as a market dominant product as lacking legal justification. *Id.* at 5-6. The Postal Service states that if it seeks permanent product status for GeM Merchant, "it will file all required documentation prescribed by the Commission rules" and any interested party, including UPS, may request access to any non-public material. *Id.* at 7. The Postal Service emphasizes that UPS identified that GeM Merchant will "compete directly" with a number of existing private competitors and that "there is no plausible basis to conclude that the GeM Merchant Solution is anything but a competitive product." *Id.* at 6-7 (quoting UPS Comments at 3).

E. Additional Information Regarding the Proposed Market Test and the Existing Competitive Market

On April 29, 2016, to assist the Commission in determining whether GeM Merchant will provide an unfair and inappropriate competitive advantage under 39 U.S.C. § 3641(b)(2), the Commission issued Notice of Inquiry No. 1.¹⁶ The Commission requested that interested parties provide the annual revenues and annual volumes of products similar to GeM Merchant for the last 3 years. NOI No. 1, questions 1 and 2. The Commission also requested that interested parties provide estimates of the annual volume and revenue of the related market as a whole. *Id.* question 3. NOI No. 1 directed that responses should be filed by May 9, 2016, and that responses may be filed

¹⁶ Notice of Inquiry No. 1, April 29, 2016 (NOI No. 1).

under seal consistent with the Commission's rules. *Id.* at 2; see 39 C.F.R. part 3007. UPS¹⁷ and Pitney Bowes¹⁸ filed responses under seal to NOI No. 1.

Commission Information Request No. 1 was issued on April 29, 2016, and directed the Postal Service to respond by May 9, 2016.¹⁹ On May 9, 2016, the Postal Service filed its responses to CIR No. 1, with portions filed under seal.²⁰ The responses provided additional information concerning the Postal Service's evaluation of the current market for services similar to GeM Merchant, the estimated number of participants in the market test, the financial model underlying the Postal Service's revenue estimates, the role of the supplier in the operations and market test, and its justification for redacting certain contract provisions. See *generally* Response to CIR No. 1.

On May 11, 2016, UPS filed a motion requesting the issuance of four additional information requests, access to the non-public information filed by the Postal Service in this proceeding, and for the opportunity to file sur-reply comments.²¹ On May 12, 2016, the Postal Service filed an opposition to the Motion for Access.²² On May 16, 2016, UPS sought leave to reply to the Opposition to Motion for Access.²³ UPS asserts that the Motion for Access was timely, the Postal Service's failure to provide adequate information to the Commission in the Notice delayed this proceeding, the Postal Service has not demonstrated that prejudice will result, and the information sought will assist the

¹⁷ United Parcel Service's Response to Notice of Inquiry No. 1, May 9, 2016 (UPS Response to NOI No. 1).

¹⁸ Response of Pitney Bowes Inc. to Notice of Inquiry No. 1, May 12, 2016 (Pitney Bowes Response to NOI No. 1). The Commission granted Pitney Bowes's unopposed request for an extension of time to respond by May 13, 2016. See Order No. 3280, Order Extending Response Deadline, May 10, 2016.

¹⁹ Commission Information Request No. 1, April 29, 2016 (CIR No. 1).

²⁰ Response of the United States Postal Service to Commission Information Request No. 1, May 9, 2016 (Response to CIR No. 1).

²¹ United Parcel Service, Inc.'s Motion for Access, May 11, 2016 (Motion for Access).

²² United States Postal Service Answer in Opposition to Motion of United Parcel Service for Access to Non-Public Materials, May 12, 2016 (Opposition to Motion for Access).

²³ Motion of United Parcel Service, Inc. for Leave to File Reply in Further Support of Motion for Access, May 16, 2016. The Commission grants this request pursuant to its discretion to accept a reply to the opposition. See 39 C.F.R. §§ 3001.21(b), 3007.40(c), and 3007.50(c).

Commission's evaluation of market disruption.²⁴ On May 17, 2016, the Postal Service filed a response to the Motion for Access on behalf of Shopex LLC which included a letter written by Shopex LLC.²⁵

IV. COMMISSION ANALYSIS

Based on a review of the record, including all of the documentation filed publicly and under seal, the Commission concludes that the GeM Merchant market test satisfies 39 U.S.C. § 3641(b). Accordingly, the market test is authorized to proceed. Below the Commission discusses the applicable statutory and regulatory requirements and resolves access to non-public information and other issues that arose during the course of this proceeding.

A. Statutory and Regulatory Requirements Applicable to Market Tests

1. Requirements of 39 U.S.C. § 3641(b)

A proposed market test cannot proceed unless the experimental product satisfies three requirements: (1) “[t]he product is, 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;” (2) “[t]he 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;” and (3) “[t]he Postal Service identifies the product...as either market-dominant or competitive.” 39 U.S.C. § 3641(b).

²⁴ United Parcel Service, Inc.'s Reply in Support of Motion for Access, May 16, 2016 (UPS Reply).

²⁵ Response of Shopex LLC to United Parcel Service Inc.'s Motion for Access, May 17, 2016. This filing did not affect the Commission's disposition of UPS's Motion for Access. See *infra* Part IV.B.

a. Significantly Different Product

The Commission must determine if GeM Merchant is significantly different from all other Postal Service products offered within the past 2 fiscal years. *Id.* § 3641(b)(1); 39 C.F.R. § 3035.3(a)(1)(i). The Postal Service asserts that GeM Merchant is significantly different from all products offered within the past 2 years. Notice at 3-5. The Public Representative finds no evidence that the Postal Service has offered a service like GeM Merchant within the past 2 years. PR Comments at 3. GeM Merchant will allow international customers of participating domestic online merchants to prepay estimated duties and taxes that the foreign country's customs agency will assess when the shipment arrives in the foreign destination. Notice at 2. Because no product offered by the Postal Service within the last 2 fiscal years resembles GeM Merchant, the Commission finds that GeM Merchant satisfies 39 U.S.C. § 3641(b)(1) and 39 C.F.R. § 3035.3(a)(1)(i).

b. Market Disruption

The GeM Merchant market test may not proceed unless the Commission finds that the "introduction or continued offering" of GeM Merchant will not create market disruption, which is defined as "an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns."²⁶ "Introduction or continued offering" requires the Commission to evaluate market disruption both at the beginning of the market test and throughout the duration of the market test to ensure continued compliance with 39 U.S.C. § 3641(b)(2). Based on the record before it, the Commission finds no indication that the test introduction of GeM Merchant will cause market disruption.

The Commission uses a four-step framework for analyzing market disruption.²⁷

²⁶ 39 U.S.C. § 3641(b)(2). "Small business concern" is defined in 39 C.F.R. § 3001.5(v).

²⁷ Docket No. MT2014-1, Order Authorizing Customized Delivery Market Test, October 23, 2014, at 9-12 (Order No. 2224).

The first step of the market disruption analysis is to identify the relevant market for the GeM Merchant market test. For market tests, the Commission identifies the relevant market by examining the description of the experimental product and the geographic area(s) where the Postal Service intends to offer the experimental product during the market test duration. Order No. 2224 at 9. The proposed GeM Merchant product is an end-to-end international parcel service that is offered to participating domestic online retailers. Thus, the relevant market for the GeM Merchant experimental product is the end-to-end international parcel market with services offered to domestic online retailers.

The second step is to identify businesses offering similar products or services in that relevant market. *Id.* at 10. The Postal Service identified four end-to-end international parcel service providers offering products similar to GeM Merchant: Pitney Bowes (Borderfree), FedEx (Crossborder), UPS (i-Parcel), and DHL (iCart). Response to CHIR No. 1, question 1a. UPS concurs that GeM Merchant would compete directly with these four products. UPS Comments at 3.

The third step is to “evaluate whether the introduction or continued offering of the experimental product will create ‘an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer....’ with regard to the service providers identified in step 2.” Order No. 2224 at 10 (quoting 39 U.S.C. § 3641(b)(2)). Therefore, the Commission must determine whether GeM Merchant will provide an unfair or otherwise inappropriate competitive advantage with regard to other end-to-end international parcel service providers.

The Commission previously found that notices of market tests should include “[e]xamples of businesses that offer similar products or services” and “[t]he range of prices these businesses charge for similar products and services” at a minimum. Order No. 2224 at 13. To better assess possible market disruption, CHIR No. 1 requested that the Postal Service identify the competitors and provide information concerning the range of prices charged by competitors for products similar to GeM Merchant. CHIR No. 1, question 1. The Postal Service identified the competitors and responded that the

price ranges for the competitors may not be comparable to the Postal Service's price ranges because competitors' pricing models may not include the same cost components used by the Postal Service. Response to CHIR No. 1, question 1. The Postal Service also noted the lack of visibility into competitors' pricing, which "is generally not published, but instead a result of a negotiated agreement." *Id.* question 1b; see *also* Postal Service Reply Comments at 3-4.

In order to assess the current product market, the Commission considered the Postal Service's and its competitors' estimates of the market size. It also considered the Postal Service's and its competitors' investment in the market based on information that was publicly available. When UPS acquired i-Parcel in October 2014 for an undisclosed amount; it estimated the cross-border e-commerce market "will reach \$105 billion [in 2014] and by 2018 will exceed \$300 billion."²⁸ FedEx acquired Crossborder (formerly known as Bongo International, LLC) in December 2014 for \$42 million.²⁹ Pitney Bowes acquired Borderfree in May 2015 for \$395 million³⁰ and

²⁸ United Parcel Service, Inc., UPS Acquires International Cross-Border E Commerce Enabler i-parcel, October 7, 2014, *available at* <http://www.investors.ups.com/mobile.view?c=62900&v=203&d=1&id=1974769>.

²⁹ FedEx Corporation, Form 10-K for the Fiscal Year Ended May 31, 2015, July 14, 2015, at 105, *available at* <http://www.sec.gov/Archives/edgar/data/1048911/000119312515252494/d48165d10k.htm>.

³⁰ Josh Beckerman, Pitney Bowes Agrees to Buy Borderfree For \$395 Million, *The Wall St. J.* May 5, 2015, *available at* <http://www.wsj.com/articles/pitney-bowes-agrees-to-buy-borderfree-for-395-million-1430861146>.

reported \$63 million in revenue in 2015 resulting from Borderfree's operations.³¹ With such estimates and investment in the end-to-end international parcel service market, it appears that the market is already large and is expected to grow in future years. To better assess the current market and expected growth, the Commission requested information from the Postal Service and all interested parties concerning annual volumes and revenues of products similar to GeM Merchant for the last 3 years. CIR No. 1, question 1; NOI No. 1, questions 1-3. The responses filed under seal by the Postal Service, UPS, and Pitney Bowes confirm the Commission's preliminary assessment of the current market size and expected growth. See *generally* Response to CIR No. 1; UPS Response to NOI No. 1; Pitney Bowes Response to NOI No. 1.

Notably, the Postal Service has not requested an exemption to the \$10 million annual revenue limitation for the proposed GeM Merchant market test. Notice at 7; see 39 U.S.C. § 3641(e). Also, the Commission has evaluated the Postal Service's pricing plans and estimated revenue filed under seal. See Response to CIR No. 1, question 3. Because the market test's estimated revenues are small in comparison to information provided in response to NOI No.1 about the market as a whole, the Commission finds that GeM Merchant's test introduction is unlikely to create an unfair or inappropriate competitive advantage for the Postal Service or any participating merchant.

UPS asserts that by leveraging the rates, customs clearance, and security treatment that the Postal Service receives as a UPU-designated operator, GeM Merchant will "disrupt the 'very competitive' outbound international shipping market and will create an unfair and inappropriate competitive advantage for the Postal Service." UPS Comments at 4. However, the rates, customs clearance, and security issues

³¹ Pitney Bowes, Inc., Form 10-K for the Fiscal Year Ended December 31, 2015, February 22, 2016, at 55, available at <http://www.sec.gov/Archives/edgar/data/78814/000007881416000040/pbi2015123110k.htm>. Pitney Bowes also reported that revenues would have been \$47 million higher for 2015 if Pitney Bowes had acquired Borderfree before the start of Fiscal Year (FY) 2015. *Id.*

raised by UPS are not unique to the proposed GeM Merchant experimental product.³² The rates, customs clearance, and security procedures to which UPS objects apply to the Postal Service's outbound international shipping products and numerous NSAs based on those products. See Postal Service Reply Comments at 2. These products are classified as competitive. See *id.* The vibrancy of the competitive market for these outbound international parcels is undisputed. See *id.* at 2-3; UPS Comments at 1-4; PR Comments at 5. Moreover, for any GeM Merchant volume shipped by commercial carriers, UPS's concerns about rates, customs clearance, and security issues are largely mitigated. See Postal Service Reply Comments at 2; see *generally* Response to CIR No. 1. For these reasons, the Commission finds that the Postal Service adequately addressed the issues raised by UPS regarding potential market disruption related to the test's rates, customs clearance, and security.

The fourth step of the market disruption analysis involves examining the impact of the market test on "small business concerns" in the relevant market. Order No. 2224 at 11 (citing 39 C.F.R. § 3001.5(v)). No small business filed comments in opposition to the market test in this proceeding. The Postal Service states that it has "contracted with one of the only remaining small businesses that is offering the same end-to-end service."³³ The Postal Service asserts that other small businesses offer niche regional and freight-forwarding services, but these businesses serve a different market than the GeM Merchant market test. Notice at 5. In addition, the Postal Service asserts that these businesses do not typically contract with merchants and provide direct customer integration at the time of purchase. *Id.* The Commission accepts these assertions as reasonable.

Applying the framework discussed above, the Commission finds that the record contains no indication that the test introduction of GeM Merchant will "create an unfair or

³² All outbound international parcels are subject to rates designated by the UPU unless a bilateral agreement exists with the destination country. All outbound international parcels are subject to the customs and security requirements as set by the destination country.

³³ Notice at 5. At the Commission's request, the Postal Service identified this partner as Shopex LLC. Response to CHIR No. 1, question 3b.

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).

In accordance with section 3641(b)(2), while this market test is on-going, the Commission will evaluate whether the “continued offering” of the experimental product creates market disruption. As part of this evaluation, the Postal Service is directed to file quarterly reports about each GeM Merchant agreement and to notify the Commission when it enters into a NSA with a participating merchant. See *infra* part IV.A.2.b. In addition, under the Commission’s rules, the Postal Service must notify the Commission at least 10 days before implementing any material changes to the market test or the services offered under the market test. See 39 C.F.R. § 3035.6.

The statute contains additional safeguards. The Commission may limit the amount of revenues the Postal Service may obtain as necessary to prevent market disruption. 39 U.S.C. § 3641(e)(1); 39 C.F.R. § 3035.17. If necessary, the Commission may also cancel the market test or take other action that it deems appropriate. 39 U.S.C. § 3641(f); 39 C.F.R. § 3035.12.

Concerns about the pricing of GeM Merchant will also be addressed if and when the Postal Service requests to extend the market test or to make GeM Merchant a permanent product. See 39 C.F.R. §§ 3035.10-.11, .18; see *also infra* part IV.A.2.c. In evaluating any request for an extension or permanent product status, the Commission will rely on the data collected by the Postal Service in its quarterly reports. See 39 C.F.R. §§ 3035.11, .18, .20; see *also infra* part IV.A.2.b. This proceeding is limited to authorizing the introduction of GeM Merchant as an experimental product. The Commission reserves judgment on whether a future application from the Postal Service to make the GeM Merchant product permanent would satisfy the applicable requirements. See Pitney Bowes Response to NOI No. 1 at 1 n.2. If such an application is made, the Commission will evaluate the data collected during the market test to assess that application. At such time, the Commission will also issue a notice concerning that request and provide an opportunity for interested parties to comment. 39 C.F.R. § 3020.33.

c. Correct Classification

A proposed market test product must be characterized as market dominant or competitive. 39 U.S.C. § 3641(b)(3). Products shall be classified as market dominant if “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 risk of losing a significant level of business to other firms offering similar products.” *Id.* § 3642(b)(1). All other products shall be classified as competitive. *Id.*

The Postal Service categorizes GeM Merchant as a competitive product, stating that GeM Merchant would be part of the highly competitive package services market. Notice at 6. Asserting that GeM Merchant will access UPU prices, UPS requests that the Commission reclassify GeM Merchant as a market dominant product for transparency if the Commission authorizes the proposed GeM Merchant market test to proceed. UPS Comments at 10-11. The Public Representative notes that currently there is significant competition for services similar to GeM Merchant and finds no evidence that the Postal Service has market power. PR Comments at 5. In its comments, UPS acknowledges the “exceedingly competitive” and “very competitive” outbound international package delivery market. UPS Comments at 3-4.

The presence of several other end-to-end international parcel services described in part IV.A.1.b minimizes the likelihood that the Postal Service will be able to set prices for GeM Merchant substantially above costs, raise prices significantly, or decrease quality or output without risking loss of significant business to other end-to-end international parcel service providers. See 39 U.S.C. § 3642(b)(1). Accordingly, the Commission finds that the Postal Service has properly categorized GeM Merchant as a competitive product. See *id.* § 3641(b)(3).

2. Other Statutory and Regulatory Requirements

a. Revenues

Based on current projections, the Postal Service does not request an exemption from the \$10 million, as adjusted for inflation, annual revenue limitation at this time. Notice at 7; see 39 U.S.C. § 3641(e). No commenters asserted that the Postal Service would exceed the revenue limitation. The Commission evaluated the Postal Service's projected number of market test participants and the financial model underlying the Postal Service's revenue estimates filed under seal. See Response to CIR No. 1, questions 2 and 3. As a result of this review, the Commission accepts the Postal Service's general revenue projections as reasonable. If actual market test revenues approach the annual revenue limitation, the Postal Service may apply for consideration of an exemption before the annual limit is reached. See 39 U.S.C. § 3641(e)(2); 39 C.F.R. § 3035.16. The data collection plan will facilitate the Commission's ability to continually review the proposed GeM Merchant market test's compliance with the annual revenue limitation.

b. Reporting Requirements

Data collection plan and quarterly report. For each market test, the Postal Service must provide quarterly reports of volumes, costs, and revenues. See *id.* § 3035.20(a). Data collection reports must be filed within 40 days after the close of each fiscal quarter. See *id.* § 3035.20(d). Each GeM Merchant market test data collection report must be filed in Docket No. MT2016-1, with the first report due November 9, 2016.³⁴

The Commission may request additional information as appropriate. 39 C.F.R. § 3035.20(b). In order to facilitate the Commission's continued evaluation of the GeM

³⁴ See *id.* Because this market test is planned to take effect during the third quarter of FY 2016, the first report is due on November 9, 2016 and shall include the data collected from the effective date of this market test through the end of the fourth quarter of FY 2016. The first report shall contain disaggregated data for both the third quarter and the fourth quarter.

Merchant market test, the Commission directs the Postal Service's quarterly reports to disaggregate volumes, costs, and revenues based on:

- the specific GeM Merchant agreement,³⁵
- the package's weight and dimensions (cubic feet),
- the destination country group,
- the shipping method (expedited or deferred delivery), and
- the specific GeM facility used for processing.³⁶

Cost reporting shall also be disaggregated as described by the Postal Service under seal and identify whether the Postal Service or a supplier (and include the identity of the particular supplier) provided the underlying services. See Response to CHIR No. 1, question 2a; see also Response to CIR No. 1, question 5d.

Other required reporting. Within 10 days of the effective date of each new GeM Merchant agreement, the Commission directs the Postal Service to file a copy of each agreement along with the financial model inputs used to generate rates for each agreement in this docket. See Notice at 8; Postal Service Reply Comments at 7. The title of the notice of execution must include each GeM Merchant agreement's unique serial number identification, effective date, and expected or actual termination date.³⁷ If a GeM Merchant agreement is terminated early, the Postal Service must file a notice of termination in this docket within 30 days of the GeM Merchant agreement's termination.

The Commission declines the Public Representative's suggestion that it require the Postal Service to report all merchants expressing interest in the market test and the reasons for allowing or denying participation. Because a market test is a temporary

³⁵ To facilitate the Commission's ability to review this aspect of the data collection, the quarterly reports shall list the GeM Merchant agreements that are newly executed or terminated during the reporting period. This part of the report shall include a serial number unique to each contract, as well as each contract's effective date and expected termination date.

³⁶ See Response to CHIR No. 1, question 5c; see also Response to CIR No. 1, question 6.

³⁷ If multiple GeM Merchant market test agreements are filed simultaneously, the title of the notice must indicate the range of serial numbers being filed. The body of the notice must identify each agreement's unique serial number, effective date, and termination date.

experiment facilitating the Postal Service's evaluation of whether it should offer a new product on a permanent basis, and if so, assess the product's pricing and potential for expansion, the Postal Service has latitude to select market test participants. Moreover, because GeM Merchant is a competitive product, the marketplace itself acts as a check on the Postal Service's decisions; that is, the Postal Service would lose additional revenue to its competitors if it declined to work with a willing and qualified merchant.

c. Duration

The Postal Service represents that it intends to file a notice in this docket with a definitive start date for the market test once that date has been determined. Notice at 6 n.4. Before beginning the market test, the Postal Service shall notify the Commission of the effective date of the GeM Merchant market test by filing a notice in this docket. The GeM Merchant market test will expire 2 years from the effective date, unless the market test is extended or cancelled in accordance with 39 U.S.C. §§ 3641(d) and (f) and 39 C.F.R. §§ 3035.11-.12. The Postal Service's application for a limited extension to satisfy 1-year GeM Merchant NSAs executed during the second year of the market test is premature at this time. The Postal Service may apply for an extension when the request becomes timely. The Commission finds it will have the information necessary to evaluate such a request after the Postal Service files its third quarterly data collection report, due May 10, 2017. See *supra* part IV.A.2.b. If the Postal Service intends to execute any new GeM Merchant NSAs with merchants after the 2-year period of the market test, the Postal Service shall request an extension of the market test or permanent product status. See 39 U.S.C. § 3641(d); 39 C.F.R. §§ 3035.11 and .18.

B. Disposition of Motions of the Public Representative and UPS

1. GeM Merchant Model Contract Provisions Filed Under Seal

On March 28, 2016, the Public Representative requested that the Commission unseal the GeM Merchant model contract under 39 C.F.R. § 3007.31. Motion to Unseal

at 1. UPS also contests the Postal Service's sealing of this material. See Motion for Access; UPS Comments at 3-4, 11-12.

When sealing information from public view in its filings, the Postal Service must justify the redaction according to the Commission's rules, which balance the need for the redaction against the Postal Accountability and Enhancement Act's intent to increase transparency. See *generally* 39 C.F.R. part 3007. The Postal Service must submit an application for non-public treatment that meets the burden of persuasion to withhold the redacted materials from public view. *Id.* § 3007.21(b). That application must include a "specific and detailed statement" containing "[p]articular identification of the nature and extent of the commercial harm alleged and the likelihood of such harm."³⁸

The Postal Service also described that it redacted information in the model contract that "reveals the specific processes and practices that will be employed in the provision of the services under the market test." Notice, Attachment 1 at 3. The Application for Non-Public Treatment did not include a specific and detailed statement setting forth the nature and extent of the commercial harm alleged to result and the likelihood of such harm occurring from public disclosure of many redacted provisions of the model contract, including the recitals, standard definitions of commercial terms, termination clause, data sharing clause, and dispute resolution mechanism. See 39 C.F.R. § 3007.21(c)(4).

In its Response to CHIR No. 2, the Postal Service unsealed 14 contract provisions. See *supra* nn.11-12. To provide interested persons an opportunity to consider this newly available information, the Commission extended the comment period. See *supra* nn.9-10. In its Response to CIR No. 1, the Postal Service unsealed the model contract's termination clause and dispute resolution mechanism and

³⁸ *Id.* § 3007.21(c)(4). Information qualifies for non-public status only if the Postal Service asserts that the information meets certain statutory exemptions from disclosure. *Id.* § 3007.1(b) (citing 39 U.S.C. §§ 504(g), 3652(f), or 3654(f) as the statutory exemptions from public disclosure). The rule also exempts from disclosure any materials claimed by a third party with a proprietary interest to be protected under Federal Rule of Civil Procedure 26(c). *Id.*

supplemented its justification for sealing other model contract provisions relating to technical details of the GeM Merchant market test. Response to CIR No. 1, question 8.

Much of the information initially redacted by the Postal Service in the model contract did not qualify for non-public treatment under 39 C.F.R. part 3007. The recitals, standard definitions of commercial terms, termination clause, data sharing clause, and dispute resolution mechanism are routine contract provisions that the Postal Service does not redact in other filings before the Commission.³⁹ The Postal Service's excessive redactions in this proceeding hindered the public's ability to prepare comments and delayed the proceeding. See PR Comments at 8; UPS Comments at 12; see *also* UPS Reply at 3. Although the lack of transparency in the Notice was cured by the Postal Service's responses to CHIR No. 2 and CIR No. 1, in future proceedings, the Postal Service must properly justify its redactions in its Applications for Non-Public Treatment. Therefore, the Commission denies the Public Representative's Motion to Unseal and the portion of UPS's Motion for Access applicable to the GeM Merchant model contract.

2. UPS's Motion for Access

On May 11, 2016, UPS filed a motion requesting access to the information filed by the Postal Service under seal, the issuance of additional information requests, and an opportunity to file sur-reply comments. The Motion for Access is denied.

The Application for Non-Public Treatment identified the nature and extent of the commercial harm alleged to result and the likelihood of such harm occurring from disclosure of redacted customer-identifying information; Postal Service-specific costs,

³⁹ Other Postal Service requests for Commission approval of NSAs did not redact contract terms such as termination and dispute resolution provisions, which were unrelated to the customer-identifying information; Postal Service-specific costs, revenues, and volumes data; non-published rate information; and certain technical details. See, e.g., Docket Nos. MC2016-94 and CP2016-119, Request of the United States Postal Service to Add Competitive International Merchandise Return Service Agreements with Foreign Postal Operators 2 (IMRS-FPO 2) Product to the Competitive Products List and Notice of Filing IMRS-FPO 2 Model Agreement and Application for Non-Public Treatment of Materials Filed Under Seal, March 8, 2016, Attachment 5 at 3.

revenues, and volumes data; and non-published rate information.⁴⁰ UPS's request for access encompasses all non-public materials filed in this proceeding by the Postal Service.⁴¹ UPS asserts that it is entitled to the non-public materials to determine and quantify the potential market disruption caused by GeM Merchant's introduction. See Motion for Access at 2. The Postal Service objects to UPS's request, asserting that the request is untimely, unnecessary to the resolution of this docket, and prejudicial to the Postal Service. Opposition to Motion for Access at 1-3.

To resolve a request for access to non-public materials, the Commission must "balance the interests of the parties based on Federal Rule of Civil Procedure 26(c)." 39 C.F.R. §§ 3007.42 and .52. The Commission may deny a request for access that may annoy, oppress, or unduly burden a party.⁴² UPS has presented its views to the Commission and, balancing the interests of UPS and the Postal Service, the Commission has determined that no further information is required to authorize the GeM Merchant market test to proceed as a competitive product. See *supra* part IV.A.1.b. UPS had the opportunity to seek the relief requested in the Motion for Access before the comment deadline.⁴³ Indeed, UPS raised transparency concerns in its comments but requested the relief of having the Commission classify GeM Merchant as market dominant rather than seek access to non-public material. See UPS Comments at 4, 10-

⁴⁰ Notice, Attachment 1 at 3-4; see 39 C.F.R. § 3007.21(c)(4). The Public Representative did not dispute the Postal Service's sealing of this material. See PR Comments at 8.

⁴¹ Motion for Access at 1. This motion is based on 39 C.F.R. §§ 3001.21, 3007.40, and 3007.50. *Id.* The Commission's rules allow any person to file a motion requesting access to non-public materials relevant to compliance under 39 U.S.C. § 3653. See 39 C.F.R. § 3007.50(a). No section 3653 compliance proceeding relating to Docket No. MT2016-1 is pending; therefore, UPS's request is denied as premature to the extent that it is based on 39 C.F.R. § 3007.50. See, e.g., Docket Nos. MC2014-3 and CP2014-3, Order No. 2047, Order Denying Motion Requesting Access to Non-Public Materials, April 11, 2014.

⁴² See Fed. R. Civ. P. 26(c)(1) (a court may for good cause issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including requiring that confidential research or commercial information not be revealed).

⁴³ See Opposition to Motion for Access at 2. Although UPS states that an earlier motion seeking to unseal the Response to CIR No. 1 would have been premature and incomplete (see UPS Reply at 2), UPS did not seek access to the sealed documents supporting the Notice and the responses to CHIR Nos. 1 and 2 before the comment deadline.

12. Granting UPS's Motion for Access at this time would serve no purpose other than to delay this proceeding to explore collateral issues. See Opposition to Motion for Access at 3. Therefore, UPS's Motion for Access filed on May 11, 2016, relating to such materials is denied as untimely and unnecessary to resolve this proceeding.

Regarding the four additional questions proposed by UPS, the Commission finds responses to those questions are unnecessary to resolve this proceeding and therefore denies UPS's request. See Motion for Access at 4-5. The Postal Service has adequately addressed the issues raised by UPS regarding potential market disruption. See *supra* part IV.A.1.b. Moreover, UPS's proposed questions relate to collateral issues relating to Postal Service-specific cost information rather than whether GeM Merchant's introduction would create an unfair market disruption. In addition, the record contains information needed to conduct the Commission's four-step market disruption analysis, set forth in Order No. 2224. Because the record is complete, additional information is not needed to resolve this proceeding. Also, allowing parties to file sur-reply comments at this time would unduly delay the proceeding. Therefore, the Commission denies UPS's request to file sur-reply comments.

In conclusion, the Commission finds that the proposed GeM Merchant market test is consistent with 39 U.S.C. § 3641 and therefore authorizes the market test to proceed. Revisions to the competitive product list and the Mail Classification Schedule appear below the signature of this Order and are effective upon notification of the market test's effective date.

V. ORDERING PARAGRAPHS

It is ordered:

1. Based on the record before it, the Commission finds that the proposed GeM Merchant market test is consistent with 39 U.S.C. § 3641 and authorizes the market test to proceed.
2. The Postal Service shall file quarterly data collection reports in this docket 40 days after the close of each fiscal quarter that contain the information described in the body of this Order.
3. Within 10 days of the effective date of each new GeM Merchant agreement, the Postal Service must file with the Commission in this docket a copy of each agreement along with the financial model inputs used to generate rates for each agreement. The notice shall contain the information described in the body of this Order.
4. If a GeM Merchant agreement is terminated early, the Postal Service must file a notice of termination in this docket within 30 days of the GeM Merchant agreement's termination.
5. The GeM Merchant market test will expire 2 years from the effective date unless the market test is extended or cancelled as described in the body of this Order. If the Postal Service intends to execute any new GeM Merchant NSAs with merchants after the 2-year period of the market test, the Postal Service shall request an extension of the market test or permanent product status.
6. The Postal Service's application for a limited extension is premature at this time. The Postal Service may apply for an extension when the request becomes timely as described in the body of this Order.

7. Before beginning the market test, the Postal Service shall notify the Commission of the effective date of the GeM Merchant market test by filing a notice in this docket.
8. Revisions to the competitive product list and the Mail Classification Schedule appear below the signature of this Order and are effective upon notification of the market test's effective date.
9. The Secretary shall arrange for publication in the *Federal Register* of an updated product list reflecting the change made in this Order.

By the Commission.

Stacy L. Ruble
Secretary

CHANGE IN PRODUCT LIST

The following material represents changes to the product list codified in Appendix A to 39 C.F.R. part 3020, subpart A—Mail Classification Schedule. These changes reflect the Commission's order in Docket No. MT2016-1. The Commission used two main conventions when making changes to the product list. New text is underlined. Deleted text is struck through.

Part B—Competitive Products
2000 Competitive Product List

MARKET TESTS*

Global eCommerce Marketplace (GeM)

CHANGES TO THE MAIL CLASSIFICATION SCHEDULE

The following material represents a change to the Mail Classification Schedule. The Commission uses two main conventions when making changes to the Mail Classification Schedule. New text is underlined. Deleted text is struck through.

Part B—Competitive Products

2000 Competitive Product List

2001 Competitive Product Descriptions

2800 Market Tests

2804 Global eCommerce Marketplace (GeM)

Reference

Docket No. MT2016-1

PRC Order No. 3319, May 25, 2016

Expires

TBD
