

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

RATE AND SERVICE CHANGES TO IMPLEMENT
BASELINE NEGOTIATED SERVICE AGREEMENT
WITH BANK OF AMERICA CORPORATION

Docket No. MC2007-1

**PARTIAL OBJECTION OF THE UNITED STATES POSTAL SERVICE
TO INTERROGATORIES OCA/USPS-T1-8, 9, AND 11(b)**
(March 2, 2007)

In accordance with Rules 25 and 26 of the Commission's Rules of Practice and Procedure, the United States Postal Service partially objects to interrogatories OCA/USPS-T1-8, 9, and 11(b), filed on February 20, 2007. The interrogatories, which are attached, seek the baseline values for (i) the read/accept rate for First-Class Mail, (ii) the read/accept rate for Standard Mail, and (iii) the UAA rate for Standard Mail, that were discussed during the negotiations between the Postal Service and Bank of America and rejected, and the reasons those baseline values were rejected.

The Postal Service does not object to interrogatories OCA/USPS-T1-8, 9, and 11(b) to the extent that such interrogatories seek information regarding the factual bases supporting the co-proponents' adoption of the baseline values set forth in this NSA. Accordingly, the Postal Service intends to respond to OCA/USPS-T1-8, 9, and 11(b) in part by providing information regarding the factual bases supporting the baseline values set forth in this NSA and the reasons why those baseline values are preferable to any available alternative values.

However, the Postal Service objects to OCA/USPS-T1-8, 9, and 11(b) to the extent that such interrogatories require the disclosure of information that does not relate to the factual bases supporting the baseline values chosen by the co-proponents on the grounds that such information is predecisional and therefore protected from disclosure by the deliberative process privilege. As the Presiding Officer noted in Docket No. R97-1, the deliberative process privilege safeguards predecisional deliberations, thereby encouraging intra-agency candor and enabling agency decision-makers to fully consider all relevant legal and policy issues without fear of “premature disclosure.” P.O. Ruling R97-1/60 at 3. Presiding Officer's Ruling No. R97-1/60 recognized that “[m]anifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.” Id. (quoting N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975) (citing Mapother v. Department of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993))). The protection afforded by the deliberative process privilege is broad, encompassing, among other things, information exchanged during a federal agency’s consultations with a state agency concerning a joint state-federal regulatory project and documents provided by an agency’s contractor employees. See Citizens for Pa.’s Future v. United States Dep’t of the Interior, 218 F.R.D. 441, 446-47 (M.D. Pa. 2003) (protecting documents exchanged between the Department of the Interior and the Pennsylvania Department of Environmental Protection pursuant to a joint regulatory mandate); see also Hertzberg v. Veneman, 273 F. Supp. 2d 67, 76 n. 2 (D.D.C. 2003) (holding that “witness statements from Forest Service contractor employees may be considered ‘inter-agency or intra-agency’ for the purpose of Exemption 5” (citing Department of the Interior v. Klamath Water Users Protective Ass'n., 532 U.S. 1, 10-11 (2001))).

The information responsive to interrogatories OCA/USPS-T1-8, 9, and 11(b) is predecisional because it concerns baseline values that the co-proponents to this NSA considered and rejected, and the co-proponents' reasons for rejecting such values, prior to their decision to adopt the baseline values set forth in this NSA. The disclosure of such information would harm the decision-making process within the Postal Service by discouraging negotiators and decisionmakers from candidly discussing the advantages and disadvantages of a variety of baselines values with potential NSA partners. Such disclosure would also chill the exchange of ideas between potential co-proponents of an NSA while allowing persons not party to the NSA to unfairly benefit from the fruits of the Postal Service's negotiations with Bank of America. The rationale for protecting information discussed during negotiations, i.e., to ensure the confidentiality of the information discussed, is similar to the rationale underlying the civil discovery privilege for documents exchanged between parties engaged in settlement negotiations. See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003) (stating that "for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination" and "[t]hey must be able to make hypothetical concessions, offer creative quid pro quos, and generally make statements that would otherwise belie their litigation efforts."). Moreover, the factual information sought by the OCA regarding the actual baseline values that were rejected during the negotiations is inextricably intertwined with the Postal Service's decision-making process regarding the terms of this NSA. The disclosure of such information would, in

effect, reveal the Postal Service's deliberative process because, upon disclosure, nonparties to the negotiations would know what baseline values the agency considered and rejected.

Additionally, to the extent that OCA/USPS-T1-8, 9, and 11(b) require the disclosure of information that does not relate to the factual bases supporting the baseline values chosen by the co-proponents, the responsive information is irrelevant to the instant proceeding because it is immaterial to the issue of whether the rate and classification elements of this NSA meet the standards of applicable law. In the Commission's Opinion and Recommended Decision in Docket No. MC2002-2, the Commission stated that, with regard to its role in evaluating the merits of NSAs, "[the Commission] is more likely to be that of appraiser of whether agreements with rate and classification elements it regards as less than optimal nonetheless pass muster under the Reorganization Act's standards." PRC Op., MC2002-2, at 39. In its Opinion, the Commission cited with approval a section of the reply brief of the American Postal Workers Union in Docket No. MC2002-2 which stated in part that "the Commission should not judge NSAs on whether they are well crafted - the negotiation process will sometimes prevent that - but on whether the NSA benefits the Postal Service such that postal customers benefit generally and no postal customer is disadvantaged." *Id.* The Postal Service submits that only the baseline values actually adopted by the co-proponents to this NSA, and the factual bases supporting their adoption, are relevant to the issues of whether this NSA meets the standards of applicable law and whether this NSA will benefit postal customers.

For the above stated reasons, the Postal Service respectfully objects to interrogatories OCA/USPS-T1-8, 9, and 11(b).

UNITED STATES POSTAL SERVICE

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OCA/USPS-T1-8. Please refer to your testimony at page 16, lines 9-14, concerning the First-Class Mail baseline value of 96.8 percent. Please identify any baseline values other than the read/accept rate of 96.8 percent that were discussed during negotiations and rejected, and the reasons therefore.

OCA/USPS-T1-9. Please refer to your testimony at page 21, lines 2-8, concerning the Standard Mail baseline value of 96.9 percent. Please identify any baseline values other than the read/accept rate of 96.9 percent that were discussed during negotiations and rejected, and the reasons therefore.

OCA/USPS-T1-11. Please refer to your testimony at page 22, lines 6-12.

- a. Please confirm that the weighted average UAA rate for Standard Mail Automation and ECR is 6.1 $((4,477.4 + 1,052.9) / (57,208.3 + 32,995.7))$ percent. If you do not confirm, please explain.
- b. Please confirm that the weighted average UAA rate of 6.1 percent for Standard Mail Automation and ECR was discussed during negotiations and rejected as an alternative to the system-wide average UAA rate of 6.4 percent. If you do not confirm, please explain. Also, please identify any baseline values other than the system-wide average UAA rate of 6.4 percent that were discussed during negotiations and rejected, and the reasons therefore.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

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