

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

**Proposed Rules Applicable To
Baseline And Functionally
Equivalent Negotiated Service
Agreements**

Docket No. RM2003-5

Initial Comments Of Major Mailers Association

By Order No. 1383,¹ the Commission has proposed new procedural rules governing the submission and processing of Negotiated Service Agreements (NSA). In accordance with the procedural schedule adopted in the **NOPR**, Major Mailers Association (MMA) hereby submits its initial comments on the proposed NSA rules.

MMA is an association of quality First-Class Mailers, organized for the purpose of promoting fair and equitable postal rates, classifications, and rules. MMA has participated actively in all major rate and classification proceedings considered by the Commission over the past decade.

MMA members are among the largest mailers of “workshare” First-Class Mail that is presorted, prebarcoded and properly prepared.

General Comments

MMA strongly supports the wider use of NSAs. NSAs give the Postal Service and interested mailers a flexible mechanism for achieving greater efficiencies and adapting to rapidly changing technologies and market conditions. The postal system as a whole will benefit from implementation of properly structured NSAs.

MMA understands that, having just completed its first comprehensive NSA proceeding, the Commission may have trouble envisaging a time when submission and processing of NSAs will be routine. MMA, however, shares the vision of the President's Commission on the Postal Service that such private arrangements can be made

¹ Proposed Rules Applicable To Baseline And Functionally Equivalent Negotiated Service Agreements, Docket No. RM2003-5, Order No. 1383, issued August 27, 2003 (**NOPR**).

effective subject to after-the-fact review only if there is a written complaint.² The rules that the Commission adopts today should not thwart the evolution and development of NSA mechanisms that make sense for all concerned.

MMA applauds the Commission for taking the initiative in prescribing specific rules to govern the submission and processing of NSAs. All affected parties stand to benefit from adoption of procedural rules that streamline and add additional certainty to the process of obtaining NSAs.

MMA generally supports the overall procedural framework embodied in the proposed rules. Distinguishing between baseline NSAs and functionally equivalent NSAs makes good sense. Reducing the number and complexity of issues that need to be addressed will serve to expedite consideration of proposals for functionally equivalent NSAs. Permitting reliance upon record evidence from an already-concluded baseline NSA proceeding will save time and expense for the Postal Service, affected mailers, and the Commission when functionally equivalent NSAs are proposed.³

The Commission states that the intent of its proposed NSA rules is “to **facilitate** the consideration of baseline Negotiated Service Agreements and the extension of the terms and conditions of ongoing Negotiated Service Agreements to similarly situated mailers.” **NOPR** at 2 (emphasis added). MMA agrees. Baseline and functionally equivalent NSAs can become effective alternatives to omnibus rate and classification proceedings where one-size-fits-all rates and classifications are recommended, but only if the Commission adopts rules that encourage submission of innovative NSAs and simplify the procedures for review and recommendation of NSAs.

In the recently concluded Capital One NSA proceeding,⁴ the Commission faced many important issues of first impression. Having worked through those issues it is understandable that the Commission would look to **Capital One** to set clear guidelines

² *Embracing the Future; Making the Tough Choices to Preserve Universal Mail Service*, Report of the President's Commission on the United States Postal Service, issued July 31, 2003 at 174.

³ MMA also applauds the Commission's decision to treat mailers who participate in an NSA as co-proponents with the Postal Service “procedurally and substantively” (§ 3001.191 (b)). This decision will serve to increase procedural efficiency in many areas, thereby sparing the limited resources of all parties to NSA proceedings.

⁴ Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One, Docket No. MC2002-2, Opinion and Recommended Decision issued May 15, 2003 (**Capital One**).

and streamlined procedural rules for consideration of new baseline NSAs and functionally equivalent NSAs. At the same time, however, MMA does, and the Commission should, recognize that future NSAs will come in many forms that may or may not resemble the NSA approved in **Capital One**.

Despite the Commission's assurance that it intends to **facilitate** consideration of NSAs, several other statements and certain of the filing requirements suggest that the Commission looks upon NSA proposals, especially proposals for baseline NSAs, as inherently dangerous arrangements that must be subjected to higher standards and closer scrutiny than may be required or permitted by the Postal Reorganization Act (Act):

Negotiated Service Agreements by their nature have features that are discriminatory, and have the potential to cause harm to the marketplace. **NOPR** at 5 (footnote omitted);

[T]he Postal Service [must] provide an analysis of the effect of the Negotiated Service Agreement on contribution. This analysis should verify that the Postal Service will be no worse off as a result of the agreement. **NOPR** at 12; and

It is important that mailers not be made worse off due to the implementation of a Negotiated Service Agreement. **NOPR** at 13.

Only in discussing NSA **renewals** does the Commission sets forth what MMA believes should be the standards applicable to all NSAs:

There is no known reason that a Negotiated Service Agreement that is shown to benefit the Postal Service, meets the statutory requirements, and **does not cause any undue harm**, should not be allowed to be renewed indefinitely. **NOPR** at 6 (emphasis added).⁵

As with other rate and classification changes considered by the Commission, the criteria set forth in the Postal Reorganization Act should provide the litmus test for determining whether or not to recommend **all** NSAs. In this regard, the Act does not proscribe all discrimination or preference, only that which is undue or unreasonable. 39

⁵ These standards are essentially the same as those set forth in section 190 (b) of the proposed rule. See, **NOPR**, Attachment, p.2.

U.S.C. § 403 (c).⁶ In any event, the ability of similarly situated mailers to obtain NSAs under the less stringent rules governing functionally equivalent NSAs should vitiate any concerns about undue discrimination.

Accordingly, in prescribing rules to govern future NSAs, the Commission should be careful not to prescribe overly rigid and burdensome filing requirements or unreasonable evidentiary standards. Above all, the Commission must consider whether particular features of the rules under consideration may have the effect of stifling negotiation and submission of beneficial NSA proposals, exactly the opposite of what the Commission has stated is the intent of its proposed rules.

Specific Comments

1. Relationship Of NSAs To Omnibus Rate Proceedings

The Commission observes (**NOPR** at 5):

The methodology for incorporating the impact of Negotiated Service Agreements into an omnibus rate case has not been developed. Furthermore, the effect of an omnibus rate case on a Negotiated Service Agreement is not known.

It is not entirely clear to MMA what the Commission means by these remarks. However, out of an abundance of caution, MMA submits that, once approved, NSAs should not be subject to early termination as the result of actions taken in an omnibus rate proceeding.

As with other private contracts, certainty that an NSA will remain in effect for the term agreed to by the parties is crucial. As the Capital One case demonstrates, negotiating an NSA and going through the process of having it recommended by the Commission can be a time consuming and expensive proposition for the participating mailer(s) and the Postal Service. Even the remotest **possibility** that, having incurred substantial costs to obtain an NSA, a mailer might then spend as much or more

⁶ Similarly, the Act does not require that a particular action make individual mailers or competitors “no worse off.” Rates and classifications are required to be fair and equitable, no more nor less. See 39 U.S.C. §§ 3622 (c) (1) and 3623 (c) (1).

defending against early termination of its NSA in an omnibus rate proceeding would have a chilling effect on mailers' willingness to negotiate NSAs in the first place.⁷

The Commission has set 3 years as the maximum time that a baseline NSA can remain in effect. That term limitation combined with the Commission's initial review of an NSA proposal provides adequate assurance that the NSA will not unduly harm the public interest. Accordingly, the Commission should expressly disavow any intention to permit rehearing or reconsideration of individual NSAs in an omnibus proceeding.

2. Financial Analyses For Baseline NSAs

Section 3001.193 (e) of the rules proposed for baseline NSAs requires the filing of financial analyses that utilize "mailer-specific" costs, volumes, revenues and elasticity factors. MMA has several concerns about the requirements for mailer-specific information. First, the Commission needs to clarify that what it is talking about are costs incurred by the Postal Service for handling the specific mailer's mail. Costs incurred by the mailer to prepare the mail generally are irrelevant to setting, for example, appropriate discounts for mailer worksharing.

Second, the Commission should clarify that the Postal Service is not required to provide financial analyses using mailer-specific information or develop elasticity factors based on mailer-specific data unless such information actually is relevant and probative in determining whether the NSA can be recommended. Unfortunately, as the Commission has structured these requirements, there is a presumption that any formal NSA proposal that does not contain the information is deficient and subject to rejection. The fact that the Postal Service can seek a waiver of these and other filing requirements is not very helpful. Putting on proponents of all NSAs the costly burden of developing analyses and elasticity factors that may be of little or no use⁸ is a disservice

⁷ Of course, parties to an NSA are free to, **and should**, agree how rate and/or classification changes in an omnibus rate proceeding will affect the rates and terms set forth in their NSA.

⁸ For many mailers, postage represents a small part of the product or service they sell. In such situations, material changes in volume caused by mailer-specific price elasticities likely would be so remote as to make calculating a specific estimate of the firm's price elasticity a meaningless exercise. MMA submits that the Commission must apply common sense by balancing the need for price elasticity calculations against the likely usefulness and materiality of the resulting information. This same balancing of competing considerations should be applied to all data requirements proposed in the rule. Such a rule of reason argues strongly against rigid filing requirements like those contained in the **NOPR**.

to the Postal Service, mailers, and the NSA process. It would also run directly counter to the Commission's goal of facilitating NSAs.

Finally, the Commission must give mailers adequate assurances that they will not be required to disclose highly confidential business information in the course of an NSA proceeding. Transparency is a laudable goal. But the possibility that they may have to expose themselves to significant competitive harm will dissuade mailers from seeking NSAs.

3. Impact Analyses

Section 3001.193 (f) of the proposed rules for baseline NSAs requires analyses regarding the impact "over the duration of the Negotiated Service Agreement" on competitors of mailer participant(s), the Postal Service, and mail users. MMA submits that not only would such analyses be unreasonably burdensome and of questionable value, they are also unnecessary.

The basic structure of the rules, including the requirement that NSA agreements be filed and available on the Commission's web site, provision for special notice to certain potential parties, and providing a forum for intervenors to voice their concerns, make any requirement that proponents of an NSA develop such analyses wholly unnecessary. The Commission can and should anticipate that competitors of the mailer participant(s) and the Postal Service will intervene and make their positions known. Similarly, in NSA proceedings, the OCA represents the interests of the general public, which presumably would include "mail users."

For these reasons, Section 3001.193 (f) should be deleted.

CONCLUSION

For the foregoing reasons, the Commission should adopt reasonable rules that encourage the evolution and development of Negotiated Service Agreements.

Respectfully submitted,

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