

**BEFORE THE UNITED STATES
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001**

**PROPOSED RULES APPLICABLE TO
BASELINE AND FUNCTIONALLY
EQUIVALENT NEGOTIATED SERVICE
AGREEMENTS**

Docket No. RM2003-5

COMMENTS OF PITNEY BOWES INC.

Pitney Bowes Inc. appreciates the opportunity to provide these comments pursuant to Order 1383 concerning the Commission's proposed rules applicable to Postal Service proposals requesting Commission review of baseline and functionally equivalent negotiated service agreements. Pitney Bowes is a leader in integrated mail, messaging, and document management solutions, and a major manufacturer and distributor of dedicated postal meters and computer-based metering technology.

Pitney Bowes reiterates its support for the Commission's initiative to promote pricing flexibility through NSAs, and appreciates the Commission's efforts to continue the momentum begun by its recommended decision in the Capital One NSA case.¹ This rulemaking will further those efforts, however, only if the rules ultimately adopted streamline the approval process and encourage parties to enter into beneficial NSAs. Pitney Bowes believes that some provisions of the proposed rules would prove unduly burdensome in operation, and addresses those in these comments. Pitney Bowes also believes clarification is necessary to the proposed provisions addressing competition issues.

¹ Pitney Bowes intervened as a full participant in Docket No. MC2002-2, "Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One, Inc.," the first docket in which the Commission considered and recommended a Postal Service request based on a Negotiated Service Agreement ("NSA").

I. PITNEY BOWES SUPPORTS THE COMMISSION’S RECOGNITION OF THE BENEFITS OF PRICING FLEXIBILITY.

A. The proposed rules applicable to negotiated service agreements provide an opportunity for the Commission to further the pricing flexibility and private workshare arrangements possible through NSAs.

Pitney Bowes supports NSAs as an innovative approach in pricing flexibility that can increase a mailer’s overall contribution to the USPS. NSAs can also serve as a useful vehicle for advancing the Postal Service’s policy of encouraging efficient worksharing arrangements. The Postal Service and the Commission should continue to encourage the shifting of costs to private sector providers where it is efficient to do so – notably mailers and intermediaries who work on behalf of mailers to reduce their costs. To capture these potential benefits, and thus reduce the total combined cost of mail preparation and processing for all parties, the Postal Service should have all appropriate pricing tools at its disposal. Therefore, the Commission should adopt rules that facilitate and encourage the use of NSAs where such agreements would provide benefits to both the Postal Service and the mailer that is party to the agreement, while reducing overall system costs and thus benefiting the industry and the mailing public as a whole.

B. In establishing its procedural rules for future Postal Service proposals requesting NSAs, the Commission should give particular attention to avoiding burdensome rules that could unnecessarily discourage parties from seeking NSAs.

The Commission should take care not to adopt procedural rules that unreasonably deter possible participants (particularly small and mid-size mailers) and impair the viability of future NSAs by imposing unduly burdensome transactional costs. Pitney Bowes is mindful that the rules applicable to all NSAs must incorporate certain basic features to assure that every NSA proposal approved by the Commission evinces fidelity to the statutory criteria, benefits the Postal Service by increasing the mailer’s overall system contribution, and does not cause unreasonable

market dislocation. The Commission’s determination of what constitutes an “adequate record” for a particular NSA proposal should be informed by the unique circumstances and likely impact of the NSA proposal before it.

The Commission has acknowledged that its “rules must balance the development of an adequate record against the burdens on the participants” *See Order*, at 3. The mere fact that a given piece of information might be of potential interest or use in an NSA proceeding cannot, therefore, be the sole test of whether it is required to be provided under the rules. Indeed, because of the particularized and tailored nature of NSAs, few could reasonably be expected to have a material, system-wide effect. The likelihood that extensive information will be needed to protect the postal system thus appears slight.

On the other hand, the risk is quite high that parties that might otherwise be interested in pursuing an NSA will be discouraged from negotiating one and seeking its approval if the costs imposed by this process are overly burdensome. Therefore, the Commission should be mindful not to impose procedural requirements that will undercut its policy to support future NSAs as a vehicle to promote pricing flexibility and to enhance the value of the mail.

II. PITNEY BOWES IS CONCERNED THAT THE RULES AS PROPOSED WILL PROVE UNDULY BURDENSOME IN OPERATION.

Although the proposed rules are designed to facilitate consideration of NSAs, certain provisions may have the opposite effect by proving unduly burdensome in operation. The following comments identify specific provisions that we believe merit further clarification or revision, and suggest some alternative language for the Commission’s consideration.

Extensive Mailer-Specific Information Requirements

As proposed, 39 C.F.R. § 3001.193 (“Rule 193”) could be read as creating a presumption that extensive mailer-specific information, both actual and projected, will be required in each case, notwithstanding the fact that information and data regarding costs, volumes, elasticities, and revenues may not be important for every agreement. The Commission should expressly clarify that there is no such presumption.

The orientation of any such presumption is inappropriate where the relevance of the mailer-specific information will necessarily be determined on an agreement-specific basis. For example, mailer-specific volume and elasticity information will be of less significance in the context of a proposed agreement that, unlike the Capital One case, does not involve declining block rates or other volume-based rates. The rules also call for mailer-specific information without requiring a prior determination that there is any basis to conclude that mailer-specific data would differ from average data. Similarly, the proposed rules do not account for the materiality of the information sought or afford any opportunity for the NSA parties to make a showing that the system-wide effects to be measured by the information sought would be *de minimis*.

Moreover, part of the justification for the limited duration of NSAs is that they are “predicated on less than complete knowledge of the mailer-specific costs and characteristics.” *See Order*, at 5. This suggests a trade-off that would be undermined if the Commission were to nonetheless require extensive mailer-specific information in the NSA approval process. It also bears noting that the proposed rules would impose a requirement for extensive out-year mailer-specific information beyond what is required in the context of an omnibus rate case, notwithstanding the inherent limitations in scope and duration of NSAs. This potential

disconnect, coupled with the Commission’s recognition that the rules must “balance the development of an adequate record against the burdens on the participants and the Commission,” *see* Order, at 3, counsel against adopting rules establishing any kind of presumption that extensive mailer-specific information is required in all cases.

Pitney Bowes proposes that Rule 193 be revised to clarify that there is no presumption for extensive mailer-specific information in each NSA request. The rule should also include an express provision stating that data is not required where the NSA parties present a plausible explanation that the effects to be measured by the information would be *de minimis*.²

Waiver Provisions

The waiver provisions of Rule 193(a)(3) and Rule 193(a)(4) may further serve to dissuade mailers from pursuing NSAs. Without any meaningful ability to determine whether the waiver request will be granted, potential NSA participants would face potentially significant litigation costs and lack certainty as to how extensive the data and information requirements will be when negotiating and preparing an NSA. Moreover, since the waiver once obtained would be subject to further challenge under Rule 194(a)(4), NSA parties could have to litigate the same issue twice.

As an alternative, Rule 193(a)(3) could merely require a certification of the NSA parties that certain data or information requested in the rules is not needed in light of the nature of the proposed NSA. That certification would then control without the need for further waiver proceedings, unless a party seeking to challenge the failure to provide certain information makes a showing that such information is required under the provisions of either Rule 193(a)(4) or Rule

² *See, e.g.*, Opinion and Recommended Decision, Docket No. MC2003-1, at 11, 27 (recognizing that the absence of quantitative data on costs, volume, and revenue was not fatal where classification changes would not have a substantial effect on the volume, revenue, and cost estimates and relationships of mail, and where production of such data would be unduly burdensome).

194, and the Commission finds that such data or information should be provided. The Commission would retain its authority under Rule 193(a)(5)-(6) to require the provision of additional information in appropriate circumstances. Parties could then proceed to provide the information that they certified in good faith was appropriate to consider, and would be subject to providing further information only at the Commission's request or on a showing by a party to the proceeding that additional information was necessary.

Undue Burden / Availability Provisions

The notions of "undue burden" and "unavailability" in Rule 193(a)(1) and Rule 193(a)(2) should be clarified to state that information that may be physically "available," but that is unduly burdensome to produce, is not considered "available" for purposes of the rule.

Financial Analysis / Impact Analysis Requirements

The financial analysis requirements may impose duplicative and unduly burdensome demands and thus unreasonably deter potential NSA parties from proceeding. For example, it is not clear what distinction is intended between the mailer-specific information required under proposed Rules 193(e)(4)-(5) and the information required under Rules 193(e)(7)-(8), which are without an explanatory narrative in the proposed order. Nor is it clear how assessing the impact on "mail users" as a group under Rule 193(f)(3) differs from discussing the effects on overall system contribution under Rule 193(e)(6), suggesting that the requirement of Rule 193(f)(3) is superfluous.

Additionally, the requirement in Rule 193(f) that "every formal request shall include an estimate of the impact" of the proposal on competitors and mail users is not clearly defined. This requirement appears to suggest a numerical or quantifiable "estimate" that will very likely be extremely burdensome to provide, assuming such estimations could even be made accurately.

Accordingly, Rule 193(f) should be revised to require that parties “consider” rather than “estimate” these impacts. Additionally, following the example of the Capital One NSA, the proposed rules should be revised to reflect that extensive data or information on competitive effects is not necessary if competitors do not appear to oppose the NSA request.

Confidentiality Provisions

The proposed rules may not sufficiently protect the confidentiality of certain contract information. The Commission may be able to achieve its policy objectives, without mandating the disclosure of potentially sensitive or proprietary information and thus unreasonably deterring possible NSA participants from going forward, by providing an option to protect the confidentiality of contract information where necessary. Parties could, for example, disclose only the essential terms of the contract if there are specific provisions of the contract as a whole that would reveal proprietary business information. Disclosing the essential terms would facilitate transparency, permit similarly situated mailers an opportunity to seek similar NSA arrangements, and counter claims of discrimination and secret dealing without unnecessarily disclosing sensitive mailer information.

Baseline NSA Scheduling Requirements

As proposed, Rule 195 fails to include any time limit or goal for completing action on baseline NSAs (as opposed to functionally equivalent NSAs). While a specific schedule would likely be established in each case, the Commission can impose some certainty on the process by incorporating time limits on a recommended decision. Absent any meaningful time limits, potential participants may be unreasonably deterred from moving forward because of the ultimate lack of certainty in the process.

III. COMPETITION ISSUES

The proposed rules require an assessment of the competitive effects of the proposed NSA on both the competitors of the Postal Service and the competitors of the mailer-participant. Further, the proposed rules require an analysis of the effect of the proposed NSA on overall system contribution and an estimate of the impact of the agreement on “mail users as a group,” noting that “it is important that mailers not be made worse off due to the implementation of the agreement.” *See* Order, at 13. As stated above, it is unclear how the assessment of the impact on “mail users as a group” differs from the assessment of the effect on overall system contribution; if the Commission intends to draw a distinction between these requirements the rules should provide a clear explanation.

Pitney Bowes offers several observations on the treatment of competition issues under the proposed rules. First, as noted in the Capital One NSA decision, although the Commission may wish to consider the competitive effects of the proposed NSA, this consideration should not be dispositive. *See* Opinion and Recommended Decision, Docket No. MC2002-2, at 97 (quoting with approval Professor Panzar’s suggestion that NSA’s could be in the public interest even if competitors are damaged, although “their concerns are an important part of the evaluation process”). Second, the Commission should clarify that competition in the market as a whole is the key consideration, not the effects on individual competitors. To borrow the formulation employed in the context of antitrust law, the Commission’s focus should be on the “protection of competition, not competitors.” *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Third, adverse effects on competitors that result from recognizing and rewarding operational efficiencies should not be viewed as anticompetitive. That is to say, mailers that seek NSAs will

want to adapt them to any unique or important attributes of their business process (e.g., Capital One's use of First-Class Mail, as opposed to Standard Mail, for solicitation purposes). A well-tailored NSA should seek to leverage and enhance these attributes and, thus, help the mailer compete more effectively in the marketplace. This should be considered in favor of NSAs, not as a negative factor.

IV. CONCLUSION

Pitney Bowes appreciates the opportunity to provide these comments on the proposed rules. The rules can further the goals of promoting pricing flexibility and worksharing through NSAs, but only if they streamline the approval process and encourage parties to enter into beneficial NSAs. The Commission should also clarify that its consideration of the competitive effects of NSA proposals will focus on considerations of efficiency and competition in the market as a whole, rather than the protection of individual competitors.

Respectfully Submitted,

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