

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

Rules Applicable to Baseline
And Functionality Equivalent
Negotiated Service Agreements

Docket No. RM2003-5

COMMENTS OF
THE DIRECT MARKETING ASSOCIATION, INC.
MAGAZINE PUBLISHERS OF AMERICA, INC.
MAIL ORDER ASSOCIATION OF AMERICA
NATIONAL POSTAL POLICY COUNCIL
PARCEL SHIPPERS ASSOCIATION
(SEPTEMBER 29, 2003)

The Direct Marketing Association, Inc. (DMA), Magazine Publishers of America, Inc. (MPA), Mail Order Association of America (MOAA), National Postal Policy Council (NPPC), and Parcel Shippers Association (PSA) strongly support the use of Negotiated Service Agreements and some of us joined in urging the Postal Rate Commission to recommend the request for a Negotiated Service Agreement in Docket No. MC2002-2, *Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One*.¹ We agree with the Postal Service Governors that NSAs “are important tools that provide flexibility at the margin, as we transform the Postal Service into an organization with new means to be more responsive to the needs of its customers and the new demands of today’s economy.”² The President’s Commission on the United States Postal Service also strongly endorsed Negotiated Service Agreements:

¹ See e.g., Docket No. MC2002-2, Brief of Alliance of Nonprofit Mailers, Direct Marketing Association Inc., Magazine Publishers of America, Inc., Parcel Shippers Association.

² Decision of the Governors on Docket No. MC2002-2 at 21.

The Postal Service should be given greater flexibility to enter into negotiated service agreements for noncompetitive products. Specifically, the Postal Service should be allowed to enter into agreements based on general criteria established by the new Postal Regulatory Board. The Postal Regulatory Board would conduct expedited, after-the-fact reviews of such agreements when a written complaint is filed.

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

PRC Order No. 1383 (August 27, 2003) is the first step in fulfilling the Rate Commission's commitment to initiate a series of rulemakings to facilitate consideration of Postal Service requests based on Negotiated Service Agreements. It is a welcome first step and the Commission should be commended for taking it. As discussed below, however, it is a modest step and if the rules proposed in Order No. 1383 were in effect today, we are concerned that requests based on Negotiated Service Agreements would be few, if any. If the proposed rules are adopted without substantial change, we expect our members would be reluctant to pursue requests for Negotiated Service Agreements in the face of the uncertainties and burdensome information and data requirements discussed below. Certainly, the information and data accepted in *Capital One* would not be sufficient under the proposed rules to warrant Commission approval absent a multitude of waivers particularly with respect to various aspects of "mailer-specific" information. Under the proposed rules, the multitude of waivers required, the uncertainty as to whether they will be obtained, the uncertainty as to the duration of the litigation involved, and the risk of disclosure of proprietary information are deterrents to entering NSA negotiations. Would Capital One have undertaken the task faced with the information and data requirements contemplated by these rules?

In Docket MC2002-2 the Commission for the first time recognized the value of and recommended a Postal Service request predicated on a Negotiated Service Agreement.

NSAs are a way to add flexibility to postal ratemaking. They provide the Postal Service with the ability to take advantage of special situations to

improve its profitability by developing innovative rate designs to meet the need of diverse, individual customers. The Commission finds that it is appropriate for the Postal Service to explore opportunities for improving efficiency and expanding its markets through economically beneficial rate programs.

PRC Op. MC2002-2, para. 1003.

In that opinion, the Commission confirmed a previously expressed opinion that NSAs may be legally permissible if they adhere to three broad principles:

1. An NSA must be reviewed in a public proceeding as required by the Postal Reorganization Act. Public Law 91-375, 84 Stat. 719, 39 U.S.C. §§ 101 et seq. (the Act).
2. The agreed upon rate and service changes will work to the mutual benefit of mail users and the postal system as a whole.
3. The rate and service changes must be made available on the same terms to other potential users willing to meet the same conditions of service.

PRC Op. MC2002-2, para. 2006; see *also* Report to Congress: Authority of the United States Postal Service to Introduce New Products and Services and to Enter Into Rate and Service Agreements With Individual Customers or Groups of Customers, February 11, 2002.

These proposed rules must be tested against these three broad principles. We believe the proposed rules not only satisfy the three principles, they go beyond what is required to meet these principles and impose unnecessary burdens upon the Postal Service and parties to future Negotiated Service Agreements. We believe these burdens are so great, and the effort and transaction costs to meet them so substantial, that private sector partners will be very reluctant to pursue NSAs. In these comments, we suggest changes to the proposed rules for baseline Negotiated Service Agreements to address these concerns.

Summary of Comments

We believe the Commission is correct in establishing rules specifically tailored to address Postal Service requests for NSAs. Many of the features in the

proposed rules will facilitate future consideration of NSA requests. However, the data and information to support an NSA request required by the proposed rules will impose transaction costs such that potential NSA partners, particularly small and medium size mailers, will be deterred from even exploring the possibility of a Negotiated Service Agreement. While NSA-specific rules are desirable, the context in which NSA requests are considered generally should be analogous to the context in which requests for experimental classifications are considered under Commission Rules 67-67d (39 C.F.R. 3001.67-67d). To promote expedition, the procedural schedule for adoption of a recommended decision should allow for the issuance of a recommended decision not more than 150 days from the date of the filing of the request. cf. Rule 67d. Baseline NSAs should be limited in duration.³ An NSA request should include a data collection plan sufficient to enable the Commission to compare actual experience under the NSA with the experience anticipated in the initial request. Proposed Rule 193(g); cf. Rule 67c. If the Postal Service believes that the data otherwise required to support the NSA request is unavailable, it is sufficient that the Postal Service explain that unavailability as required by Rule 64(a)(2) (subject to an appropriate demonstration by a party that it is “clearly unreasonable” for the Postal Service to request the NSA without having first secured the information). cf. Rule 67b.

Finally, a difficult, perhaps impossible, “impact analysis” that will deter parties from seeking NSAs must be mitigated.

The Commission is correct in establishing rules specifically tailored to address Postal Service requests for NSAs

In *Capital One*, faced with the first-ever request for a Negotiated Service Agreement, the Commission was required to determine the procedures that would apply in that docket. The Postal Service suggested that the Commission’s rules governing experimental classifications should apply. 39 C.F.R. 3001.67-67d. The Presiding Officer, however, determined the experimental rules were not

³ All experiments, with the exception of Mailing Online, have been recommended for a duration of two years or less. PRC Op. MC2002-2, para. 4014. MPA endorses the “strong preference” for a three-year limit for NSAs in proposed Rule 190(b). See Order No. 1383 at 5.

appropriate. *Capital One*, the Postal Service's first request for an NSA, "was too complex to allow the streamlined and expedited consideration provided under the experimental rules." PRC Op. MC2002-2, para. 2016.⁴ In its opinion, the Commission discussed at length why its existing rules governing experimental classifications were not appropriate for consideration of requests for NSAs. PRC Op. MC2002-2, chapter IV.

We agree that NSA-specific rules are desirable for consideration of future NSAs and that application of the *existing* rules for experimental classifications is not appropriate for NSAs. As discussed below, however, we believe NSA requests are similar to requests for experimental classifications, and NSA-specific rules would benefit from incorporation of many of the concepts embodied in the provisions of the existing experimental rules.

Many of the features in the proposed rules will facilitate future consideration of NSA requests

The proposed rules address several procedural issues that arose in *Capital One* in a manner that should expedite consideration of future requests for NSAs. Proposed Rule 191(b) requires the Postal Service to identify all parties to the Negotiated Service Agreement, and provides that identification serves as an automatic notice of intervention of those identified. Identified parties are considered "co-proponents" of the request. Proposed Rule 192(a) requires the co-filing of a co-proponent's direct evidence simultaneously with the filing of the Postal Service's request for a Negotiated Service Agreement. Proposed Rule 192(b) requires the Postal Service to review and affirm that any evidence filed by a co-proponent can be relied on in concert with the Postal Service's request. We

⁴ In his ruling the Presiding Officer states:

The extreme novelty of the NSA-based proposal militates against limiting or foreshortening exploration of the issues that may entail. The magnitude of the proposed changes is narrow in scope, but somewhat uncertain in financial impact. Generating and gathering data during the proposed experiment appears feasible, but may involve difficulties in disaggregating *Capital One's* volumes of First-Class Mail. Finally, the proposed duration of the changes are at the outer limit of recently-approved experiments, and its length would tend to amplify the uncertainty regarding the potential impact of the proposed discounts. P.O. Ruling MC2002-2/3 at 5.

support each of these proposed rules, which should reduce motion practice and facilitate expedition of consideration of the request.

The data and information required to support an NSA request should not impose transaction costs such that potential NSA partners, particularly small and medium size mailers, are deterred from even exploring the possibility of a Negotiated Service Agreement

We have previously stressed that “requirements for future NSAs . . . could be so burdensome or commercially unrealistic as to deter parties from entering into discussion concerning future NSAs.” Docket No. MC2002-2, Reply Brief of Alliance of Nonprofit Mailers, Direct Marketing Association Inc., Magazine Publishers of America, Inc., Parcel Shippers Association at 5. We believe the data and information requirements contemplated by the proposed rules are so burdensome and broad that, if promulgated, they would deter most from seeking NSAs and substantially increase the costs of obtaining NSAs to those who might be willing to go forward.

The proposed rules are burdensome from both a procedural and a substantive perspective. From a procedural perspective, the rules require the proponents of the NSA to provide an enormous amount of data. While the rules allow the Commission to grant waivers if specific data elements are unavailable or it is too burdensome to provide them, given that different data will be important in different agreements, the waivers will require a significant amount of motion practice (or incredibly high transaction costs) in almost every case. And they will inject an element of uncertainty into the process that will deter participation.

A procedural alternative would be to simply specify what the Postal Service must prove – that the NSA improves USPS financial position. The Postal Service should be required to provide sufficient data to prove this point. It should have to provide a detailed discussion of why the data is sufficient for this task. For example, if an NSA is not a volume-based deal, why is it necessary to estimate elasticity? And if the payment mechanism is directly related to the cost saving (for example, if a printer offered to make up five digit pallets and for doing

so received a share of what it saved the Postal Service), why is a volume estimate necessary?

The proposed rules are also burdensome from a substantive perspective. Proposed Rule 193 lists the contents of formal requests. Subsection (e) outlines the requisite financial analysis. Troublesome provisions require that: the effect of the NSA on volumes, costs, and revenues be estimated for the life of the NSA, not just a Test Year (e)(1); the analysis use mailer-specific costs (e)(4); the analysis needs to include a discussion of the effect of the NSA on contribution “including consideration of the effect on contribution from mailers who are not parties to the agreement” (e)(6); the analysis provide the basis for the mailer-specific costs (e)(7); and the analysis use mailer specific volume and elasticity (e)(8).

Based on the experience in *Capital One*, each of these could be an insurmountable problem. In *Capital One*, the Postal Service did not have mailer-specific cost data. Capital One, not the Postal Service, had to develop mailer-specific volume estimates and concerns were expressed regarding their accuracy. It simply is very difficult to develop accurate point estimates of before and after rates volume for specific mailers and to defend these estimates without disclosing a significant amount of proprietary information. If it is hard to develop mailer-specific volume estimates, developing mailer-specific elasticity estimates is even harder. And does Proposed Rule 193(e)(6) contemplate anything other than a calculation of the savings that are not passed through to the mailer?

The NSA-specific rules generally should be analogous to the rules governing requests for experimental classifications

In *Capital One* the Commission rejected the application of its rules for experimental classifications to NSA requests. That was appropriate in that case and we agree that NSA-specific rules are desirable. We also believe, however, that rules governing requests for Negotiated Service Agreements that are analogous to those providing for consideration of experimental classifications will permit the Commission to meet its “absolute obligation to assure that any rates

and classifications it recommends are consistent with the policies of the Act, and that the Negotiated Service Agreement is subject to prior Commission review, will benefit mail users and the postal system as a whole, and will be available to similarly situated mailers.” PRC Op. MC2002-2 para. 8009, 3003. We recommend the proposed rules incorporate the following procedural and substantive aspects of the Commission’s experimental rules.

A. To promote expedition, the procedural schedule for adoption of a recommended decision should allow for the issuance of a recommended decision not more than 150 days from the date of the filing of the request.

Consideration of the *Capital One* request for a Negotiated Service Agreement extended 257 days from its filing on September 19, 2002, through approval by the Postal Service Governors on June 3, 2003.⁵ This time does not include the nine months required for Capital One and the Postal Service to negotiate the terms of the original NSA request. Docket No. MC2002-2, Tr. 9/1826 (Shippee). While this length of time may have been necessary to thoroughly consider the novel and unprecedented issues presented in *Capital One*, those issues have now been addressed. It is unrealistic to expect private parties to enter into contract negotiations, which may be lengthy, when the eventual outcome of those negotiations rests in the hands of a third party, and that party may take the better part of a year to reach a decision.

The Commission is experienced and comfortable with time limits for procedural consideration of Postal Service requests that are as complex and have as significant an impact as Negotiated Service Agreements. For example the size of the discount in the Capital One NSA (estimated to be \$6.7 million in the Test Year by the Postal Service) was less than half the size of the discounts (estimated to be \$14.1 million by the Postal Service) in the recently approved Experimental Parcel Return Services case. Docket No. MC2002-2, USPS-T-3 at 6 (Crum); Docket No. MC2003-2, Tr. 2/241 (Kiefer). Commission rules provide for completion of experimental classification requests in 150 days, minor classification requests in 90-120 days (depending on whether a hearing is

⁵ Commission consideration consumed 238 days from September 19, 2002, through May 15, 2003.

required), and provisional service requests in 90 days. See Rules 67d, 69c, and 174. A 150-day time limit for requests for baseline Negotiated Service Agreements is reasonable and should be included in the final rules.

B. Baseline NSAs should be limited in duration.

Proposed Rule 190(b) provides that “[e]xcept in extraordinary circumstances and for good cause shown, the Commission shall not recommend Negotiated Service Agreements of more than three years duration.” Order No. 1853 further expresses “the Commission’s strong preference that Negotiated Service Agreements be limited to three years or less.” *Id.* at 5. We agree that baseline Negotiated Service Agreements should be limited in duration, and believes the proposed three-year limitation is reasonable *and* consistent with consideration of requests for NSAs under procedures analogous to requests for experimental classifications.

C. A baseline NSA should include a data collection plan sufficient to enable the Commission to compare the actual experience under the NSA with the experience anticipated in the initial request.

Proposed Rule 193(g) requires every formal request for an NSA to include a proposal for a data collection plan. We support this proposed rule and note that it is consistent with procedures analogous to requests for experimental classifications. Consistent with the concerns expressed above about the over-emphasis on and likely unrealistic requirements for mailer-specific costs, volumes, and revenues, we anticipate that the data collection plan will include a comparison with the system-wide average costs, volumes, and revenues, or best estimates included in the financial analysis filed with the initial request.

D. If information or data otherwise required to support an NSA request is unavailable, it should be sufficient that the Postal Service explain that unavailability as required by Rule 64(a)(2).

The burdens of the information and data requirements of Proposed Rule 193(b) are discussed above. Frankly, as indicated in its introduction, we believe

the burden is so crushing as to make future use of these proposed rules a remote possibility for most. If more reasonable data and information requirements are proposed they should be coupled with a shifting of the presumption with regard to the need to produce data that is unavailable. This can be done by adopting the approach of existing Commission Rule 67b, relating to experimental classifications.

Rule 67b provides that if the Postal believes that data required to support an experimental request are unavailable, it shall explain that unavailability as required by Rule 64(a)(2). Rule 64(a)(2) requires the explanation to state with particularity:

- (i) The information which is not available or cannot be made available without undue burden;
- (ii) The reason or reasons that each such item of information is not available and cannot be made available without undue burden;
- (iii) The steps or action which would be needed to make each such item of information available, together with an estimate of the time and expense required therefore;
- (iv) Whether it is contemplated that each such item of information will be supplied in the future and, if so, at what time; and
- (v) Whether reliable estimates are available where such information cannot be furnished and, if so, the specifics of such estimates.

A satisfactory explanation, as opposed to the request for and subsequent granting of a waiver, is sufficient grounds for excluding from the proceeding a contention that the absence of the data should form the basis for a rejection of the request absent a showing by an opposing party consistent with that required by Proposed Rule 193(a)(4).⁶ The explanation required by Rule 67b is a less burdensome procedure than the various waivers that frequently will be required under Proposed Rule 193(a), but the Rule 67b approach still protects the rights of parties who wish to challenge the request for a Negotiated Service Agreement.

⁶ Proposed Rule 193(a)(4) requires a party challenging a waiver to demonstrate: (i) that, having regard to all the facts and circumstances of the case, it was clearly unreasonable for the Postal Service to propose the change in question without having first secured the information and submitted it; or (ii) other compelling and exceptional circumstances requiring that the absence of the information in question be treated as bearing on the merits of the proposal.

A difficult, perhaps impossible, “impact analysis” that will deter parties from seeking NSAs must be mitigated

Proposed Rule 193(f) specifies a required “impact analysis.” It says “[e]very formal request shall include an estimate of the impact over the duration of the Negotiated Service Agreement on:

- (1) competitors of the parties of the NSA other than the Postal Service;
- (2) competitors of the Postal Service; and
- (3) mail users.”

These provisions are also likely to be burdensome. In *Capital One*, witness Panzar noted that analyzing the impact on competitors of the mailer proponent is a very difficult task, noting that such “a study...would take [a noted economist] years, not weeks and months.” Docket No. MC2002-2, Tr. 8/1741 (Panzar). If he were commenting on these rules, he would probably point out that analyzing the impact on the Service’s competitors is also difficult.

The “impact analysis” requirement in Proposed Rule 193(f) is also vague, calling for “an estimate of the impact.” This is not a standard term in the economic literature. Would the Service need to provide an estimate of the change in concentration ratios induced by the NSA? Or estimate production costs for the NSA partner both before and after the term of the NSA and compare this to the production costs of competitors? Or something else?

Related to the “impact analysis” requirement, Proposed Rule 195 unnecessarily injects the Commission into the business operations of the private NSA party and the contractual relationship of the NSA parties. Proposed 195(a)(2) envisions a description of how the agreement will work operationally for the Postal Service and the mailer. But it should not be the Commission’s concern how the mailer’s operations work, and with respect to the Postal Service, it is only the Commission’s concern to the extent it allows the Commission to probe the validity of cost estimates.

Proposed Rule 195(a)(3) requires “[a] statement of the parties’ expectations regarding performance ...including the possibility of cancellation or

re-negotiation of the agreement, and the perceived potential for renewal of the agreement for an additional period.” These statements seem to have little relevance since only the contract is binding.

Conclusion

We commend the Commission for proposing NSA-specific rules to govern requests for future Negotiated Service Agreements. The proposed rules are a step in the right direction. However, unless substantially modified to reduce what we believe are unnecessary and overly burdensome information and data requirements, few, if any, parties will avail themselves of the “opportunity” presented by these rules to bring future NSAs to fruition.

Respectfully submitted,

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