

UNITED STATES OF AMERICA
Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Rules Applicable to Baseline
And Functionally Equivalent
Negotiated Service Agreements

Docket No. RM2003-5

OFFICE OF THE CONSUMER ADVOCATE
COMMENTS
(September 29, 2003)

The Office of Consumer Advocate (OCA) hereby submits comments on the proposed rules of practice governing Negotiated Service Agreements (NSAs). For the most part the OCA concurs with the thrust of the proposed rules. However, due to the high degree of financial uncertainty experienced in the first NSA case, the OCA proposes that certain filing requirements be more rigorous.

General Observations

OCA's suggested amendments to the Commission's proposed rules are based on comments offered by the OCA in Docket No. MC2002-2 (herein "OCA Comments").¹ In that proceeding, the OCA identified a number of issues that were contentious or problematic concerning the NSA for Capital One Services, Inc., (herein Capital One).

¹ Docket No. MC2002-2, Office of the Consumer Advocate Comments Concerning Procedures for Future NSAs, April 3, 2003.

The OCA Comments further suggested principles and filing requirements to guide the development of Commission rules applicable to future NSA proceedings.

The OCA Comments stated a preference for broader classifications versus NSAs, improved understanding of the financial and market effects of future NSAs, and data collection plans. OCA argued that the use of NSAs should constitute a last resort as compared to traditional classification approaches. OCA Comments at 15. OCA stated that “*the* defining characteristic of a legitimate NSA is the uniqueness of the business relationship between a mailer and the Postal Service.” *Id.* In the absence of a unique business relationship, there is no need to resort to an NSA, as traditional classification approaches can be used to address characteristics exhibited by more than one mailer. This policy preference for classifications that offer broader participation found support with the Commission. PRC Op. MC2002-2, para. 3037.

With regard to financial effects, OCA posited that the *sine qua non* for any future NSA is that it makes a material additional contribution to the institutional costs of the Postal Service. OCA Comments at 3. The importance of a positive financial contribution was similarly recognized by the Postal Service in its proposed regulations for comparable NSAs, which required that there be an “[o]verall positive financial impact . . . [and] to ensure a positive contribution.”² To achieve this result, OCA suggested that the Postal Service be required to identify separately any bundled mail service elements of a future NSA, and explain precisely why it is advantageous to the Postal Service to bundle such elements. OCA Comments at 16. Moreover, OCA argued that with the filing of a request for any future NSA, the Postal Service should be required to estimate the amount of additional contribution, and demonstrate that each

major service element is individually making a material additional contribution to institutional costs. *Id.* at 4-5, 16. This last requirement would preclude contribution neutral NSAs (or elements thereof), as contemplated by the Postal Service.³ These filing requirements were prompted by the experience in the Capital One case, where additional contribution was derived from three major service elements: new mail volume prompted by volume discounts, cost reductions associated with electronic notices in lieu of physical returns, and cost reductions from Capital One's avoided mail forwarding. However, an estimate of the cost reductions from avoided mail forwarding was not presented at the time of the filing of the Postal Service's request; nor were reliable estimates provided during the proceeding. Moreover, the "additional contribution" from new mail volume was actually negative.⁴

The OCA Comments proposed that the Postal Service be required to "show an objective connection between the discounts and size of incremental volume blocks, and how they will stimulate volume all along the mailer's demand curve." OCA Comments at 8. In the Capital One proceeding, the Postal Service made no attempt to analyze objectively the declining block rate structure.⁵ The Postal Service did not have the information necessary to conduct such an analysis. Rather, the declining block rate structure was simply the outcome of negotiations that both the Postal Service and Capital One believed to be mutually advantageous.⁶ OCA explained that with respect to the Capital One NSA, the Postal Service had effectively proposed second-degree

² Docket No. MC2002-2, Stipulation and Agreement, Attachment D, March 31, 2003, at 5.

³ *Id.*, Tr. 3/508.

⁴ *Id.*, Tr. 2/309.

⁵ *Id.*, Tr. 4/723.

⁶ *Id.*, USPS-T-2 at 5.

price discrimination. However, the existence of the declining block rate schedule for Capital One suggested that the Postal Service was attempting a more complicated model of first-degree price discrimination. To use effectively a declining block rate schedule would require extensive knowledge of Capital One's demand—something that was not available. As a result, the more deeply discounted rates in the declining block rate schedule were not specific to Capital One's demand, and would likely have no effect on Capital One's decision to enter even greater additional volumes at the margin. OCA Comments at 6. Capital One's entire estimated additional test year volume induced by the declining block rate schedule was eligible for only one optional price, i.e., the first discounted rate.

In its Comments, the OCA suggested that the Commission require the Postal Service "to include mechanisms in [future NSAs] that place an absolute cap on its possible losses." OCA Comments at 18. In the Capital One proceeding, OCA witness Callow proposed one mechanism that effectively hedged the risk of financial loss to the Postal Service.⁷ The Commission recommended an absolute cap that limited the total amount of discounts payable to Capital One over the three-year period of the NSA. The cap was equal to the Postal Service's net cost saving from Capital One's acceptance of electronic notices. PRC Op. MC2002-2, para. 5061. The need to hedge financial risk in future NSAs follows from the high level of uncertainty associated with forecasts of individual mailer behavior. Forecasting an individual mailer's demand for mail services is inherently difficult, as many factors other than price affect such a mailer's demand. The resulting uncertainty about estimates of future demand

⁷ Id., Tr. 7/1375-77.

increases the possibility that the Postal Service will pay discounts for mail volumes it would have received anyway, i.e., the free-rider effect identified by OCA witness Smith.⁸ In the Capital One NSA, the Postal Service linked Capital One's access to volume-based discounts to changes in Capital One's operations that reduced costs to the Postal Service. However, not all future NSAs may have such features—they may consist solely of volume-based discounts—or such features may be insufficient to ensure profitability.

OCA suggested adoption of a Commission rule “that equates the test period for an NSA case to the length of time the NSA will be in effect.” OCA Comments at 18. OCA observed that the concept of a test period equal to one year is “unsuitable” when the test period used is not typical of the conditions expected over the life of an NSA. *Id.* In the case of the Capital One NSA, the Postal Service's provision of free electronic notices was designed to improve Capital One's address lists, thereby generating fewer returns and forwards and reducing Postal Service costs during the three year period of the NSA. Future NSAs may exhibit similar features that should be explicitly modeled over the life of the NSA.

OCA also proposed that “the Commission should require a more rigorous analysis of market structure and behavior, both for NSA participants and their competitors.” OCA Comments at 10. Witness Panzar identified the possibility that a single-firm NSA, given the oligopolistic nature of some postal markets, might cause total revenues to the Postal Service to decline. That is, an NSA for a leading firm in an oligopolistic market might prompt other firms to exit the market, causing a reduction in mail volume. However, other outcomes are possible. An NSA might result in an

⁸ *Id.* at 1241.

increase in total revenues to the Postal Service as firms compete through increased mail advertising. The actual outcome is unknown, and depends on an analysis and understanding of the market structure for the postal services in question.

The OCA argued that a comprehensive data collection plan should accompany future requests for any NSA. OCA Comments at 11. More specifically, OCA argued that future data collection plans should produce data to show whether the estimated cost reductions have been realized through changes in Postal Service operations. Id. at 14.

The Commission's proposed rules take account of many of the OCA's previously expressed concerns, for which the OCA is grateful. Nevertheless, the OCA believes the proposed rules can be improved.

Suggested Amendments

The OCA suggests amending the last sentence of proposed § 3001.190(a) to read as follows:

The requirements and procedures specified in these sections apply exclusively to requests predicated on Negotiated Service Agreements. Except where specifically noted, this subpart does not supersede any other rules applicable to Postal Service requests for recommendation of changes in rates or mail classifications.

The change is purely stylistic. No change in meaning is intended.

The OCA suggests adding to the policy statement in § 3001.190(b) as follows:

In administering this subpart, it shall be the policy of the Commission to recommend Negotiated Service Agreements each of whose elements are consistent with statutory criteria, unambiguously benefit the Postal Service, and do not cause unreasonable harm to the marketplace. It shall be the policy of the Commission to require declining-block rates to be supported by a company-specific demand analysis justifying each volume threshold and corresponding rate. Except in extraordinary circumstances and for good

cause shown, the Commission shall not recommend Negotiated Service Agreements of more than three years duration; however, this limitation is not intended to bar the Postal Service from requesting

These suggestions implement the OCA's desire to ensure that a proposed NSA, in whole and in part, materially improves the financial condition of the Postal Service. The necessity of OCA's amendment to the proposed rule is supported by both theoretical and practical considerations. In Docket No. MC2002-2, the testimony of Commission witness Panzar discussed the appeal of optional tariffs to both economists and regulators.⁹ He observed that the volume-based declining block rates in the Capital One NSA were a form of optional tariffs. However, witness Panzar cautioned that "there are some crucial, largely implicit assumptions" that make possible the beneficial results of optional tariffs.¹⁰

According to witness Panzar, "the automatic presumption of the desirability of optional tariffs relies heavily on the assumption that the vendor is a profit seeker."¹¹ Under this assumption, the vendor can be expected to make an additional profit whenever there is an optional tariff offering. Even where the vendor is subject to a break-even constraint, any additional profits can be used to lower the vendor's overall rate structure, thereby benefiting customers not party to the optional tariff offering.¹² Witness Panzar warned, however, that an optional tariff offering may cause a reduction in the vendor's profits, and the existence of the break-even constraint will necessitate an increase in the overall rate structure to the detriment of customers not party to the

⁹ Id., Tr. 8/1578-79.

¹⁰ Id. at 1579.

¹¹ Id. at 1581.

¹² Id. at 1580.

optional tariff offering.¹³ While the assumption of a profit-maximizing firm provides a measure of assurance that an optional tariff offering will generate profits for the vendor, there is no such assurance for a breakeven enterprise like the Postal Service.

The implications of this assumption for the Postal Service with respect to future NSAs that consist solely of optional tariff offerings, i.e., declining block rates, is obvious. As the Postal Service is not a profit-maximizing firm, there can be no assurance that declining block rates will prove beneficial to the Postal Service, or to other mailers not party to future NSAs. Because of these concerns, declining block rates will be of dubious benefit. The best Commission strategy is a requirement for an in-depth Postal Service analysis showing that each element of a future NSA will make a material additional contribution to institutional costs. This is an especially important requirement where the future NSAs feature only declining block rates.

The requirement to demonstrate that future NSAs make a material additional contribution to institutional costs is also compelling where the NSA consists of declining block rates and changes in a co-proponent's mailing practices that reduce costs to the Postal Service. The Capital One NSA consisted of both features: access to declining block rates in exchange for free electronic address correction notices rather than physical returns that were more costly for the Postal Service to provide. By linking these two features, the Postal Service attempted to minimize the risk of financial loss so as to ensure that the NSA would be profitable. However, concerns about the declining block rates for Capital One were significant because the declining block rates did not make an additional contribution to institutional costs. In future NSAs, even where the

¹³ Id. at 1580-81.

mailer undertakes measures to reduce Postal Service costs, the Postal Service should prove that the declining block rate feature will prove beneficial to the Postal Service.

There are also practical considerations that argue for a material additional contribution to institutional costs in future NSAs. Estimated cost reductions accompanying future NSAs will exhibit a degree of uncertainty. This uncertainty arises both from the use of statistical sampling and new cost and volume estimation methods, and from the need to forecast costs and volumes for a future time period. Assuming cost and volume estimates and methods are perfectly sound, there is considerable question as to whether the Postal Service can realize savings in its operations equal to its estimated cost reductions. It is for this reason the OCA proposed in its data collection plan that the Postal Service develop estimates of the “cost savings to the Postal Service of providing electronic notifications in terms of facilities closed (if any), craft positions eliminated, and other labor cost savings, etc.”¹⁴

OCA’s suggested revisions are designed to address these theoretical and practical concerns to ensure that future NSAs make a material additional contribution to institutional costs. But there is a statutory consideration that warrants a material additional contribution from future NSAs. Section 3623(b)(7) of Title 39 provides that “simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail” is one of the factors to be given weight by the Commission. NSAs, which constitute customized classifications for individual mailers, clearly violate this policy. The Commission acknowledged this undesirable facet of an NSA classification in its opinion in Docket No. MC2002-2.¹⁵ The

¹⁴ Id., Tr. 7/1369.

¹⁵ Paras. 8044 – 45.

Commission explained that the additional complexity of a “single, limited term NSA” had to be weighed against “potential efficiency benefits . . . estimated at tens of millions of dollars.”¹⁶ It is OCA’s position that the duty to weigh complexity against benefit should be reflected in the NSA rules. This is warranted, in large part, because of the administrative costs involved in negotiating and litigating NSAs. The Commission, the Postal Service, OCA, and other litigants have devoted, and will devote, considerable resources to the litigation of NSA proceedings. These costs are incremental to the individual NSAs. If such costs are not explicitly estimated, then they must be covered by the additional contribution of the NSA to institutional costs.

The OCA suggests amending proposed § 3001.193(a)(1) as follows:

- (1) Each formal request filed under §§ 3001.195-98 shall include such information and data and such statements of reasons and bases as are necessary and appropriate fully to inform the Commission and the parties of the nature, scope, significance, and impact of the proposed changes or adjustments in rates, fees, and/or the mail classification schedule associated with the Negotiated Service Agreement, and to show that the changes or adjustments are in accordance with the public interest, the policies of this subpart, and the policies and the applicable criteria of the Act. Each formal request shall include the information specified in paragraphs (b) through (k) of this section. If the required information is set forth in the Postal Service’s prepared direct evidence, it shall be deemed to be part of the formal request without restatement.

The changes to the first sentence are stylistic. The changes to the second sentence are intended to make clear that the information identified in § 3001.193 is mandatory. NSAs are extraordinary arrangements requiring extraordinary justification. As the Commission has noted with respect to data collection plans, the information requested in the proposed

¹⁶ Id., paras. 8045 – 46.

rules is information the Postal Service would collect anyway as part of good business practice.

The OCA suggests deleting proposed §§ 3001.193(a)(2), (3), and (4). Paragraph (a)(2) becomes unnecessary if § 3001.193(a)(1) is amended to make clear that the filing of the information identified in § 3001.193 is mandatory. Paragraph (a)(3) is redundant of § 3001.22, the general rule on waivers. Paragraph (a)(4) is unnecessary if paragraphs (a)(2) and (a)(3) are deleted.

Proposed § 193(a)(4) is modeled after Minor Classification rule § 3001.69a(b). OCA struggled with this rule in Docket No. MC2003-1. In all frankness, it is not clear what the Commission hopes to avoid with the prohibitions of § 193(a)(4). Order No. 1368, “Order on Application of Rules for Minor Classification Changes,” issued April 14, 2003, at 5, made clear that:

Although the Commission is responsible for insuring that there is a sufficiently complete record to provide due process, it is not responsible for assuring that the Postal Service sustains its burden of proof.

Thus, the Commission acknowledged that grant of a Rule 69a(b)-style waiver does not obviate a participant’s right under the Administrative Procedure Act to contend on brief that the proponent has not met its burden of proof. Furthermore, Order No. 1368, at 7-8, also provided that, although the Commission granted waiver of certain filing requirements, OCA would be permitted to contend that the request be rejected on the grounds that necessary data had not been filed with the Request.

Proposed subpart 193(a)(4) is not likely to promote expedition since litigants are explicitly permitted to contend that “the absence of the information should form a basis for rejection of the request” based upon a demonstration of unreasonability or

compelling and exceptional circumstances that bear on the merits of the proposal. Inasmuch as the Commission provides for additional opportunities to litigate the impact of waivers, OCA is uncertain about what litigation activities are barred by § 193(a)(4) and, therefore, what purpose the rule serves.

OCA has looked for guidance to the rulemaking proceeding, Docket No. RM95-4, in which the Commission proposed and adopted the same language for minor classification proceedings.¹⁷ Unfortunately, there was no discussion of what the Commission wished to achieve by the adoption of the subpart. OCA has been unable to determine on its own the purport of the provision. In OCA's view, it is preferable to invoke § 3001.22 that already provides for motions for waiver of any subpart of Part 3001.

OCA notes that subparts §§ 3001.54(r) and 64(h)(3) also provide for waivers when a requested change is "minor" or does not significantly change rates, fees, or cost-revenue relationships. It is significant that even their "minor" character does not trigger the burden-shifting included in Rule 69a(b). They trigger no restrictions on the ability of a participant to contend that the absence of waived data warrants rejection of a Postal Service request.

In any event, the condition of insignificance or minor character is not a requirement for NSAs (nor is OCA suggesting that such a requirement be imposed). NSAs have the potential to be broad in scope or impact since the proposed Commission rules do not restrict them in any way. Given that some NSAs may not be

¹⁷ Order No. 1084, "Notice and Order Concerning Proposed Rules of Practice," issued October 13, 1995; and Order No. 1110, "Order Adopting Final Rules," issued May 7, 1996.

“minor,” OCA submits that the burden shifting that is imposed in a minor classification case is not appropriate for NSA proceedings.

In the event that the Commission chooses to impose additional burdens on non-proponents in NSA proceedings, then OCA asks that the Commission modify the proposed rules as follows. The OCA believes a clarification is needed in proposed § 193(a)(4) (OCA's proposed revised paragraph (3)). As proposed by the Commission, (a)(4) precludes argument related to the absence of information otherwise required to be filed, but for which waiver has been granted, unless a party makes the demonstration specified in proposed rule (a)(4)(i) and (ii).

The rule should be clarified so that parties can be assured that they are not required, at the time when the Postal Service first requests waiver, to reserve their rights to later make such a demonstration, but rather that parties may raise contentions at a later time when better able to demonstrate that the Postal Service was "clearly unreasonable" in its request for waiver or that the absence of information bears upon the merits of the proposal. This clarification is significant as it will assure parties of their opportunity during hearings or on brief to explore the reasons for the lack of data. And it will preclude claims that information is irrelevant to the proceeding merely because the filing requirements relating to the subject matter have been waived.

The rule is also ambiguous as to when a demonstration by a party may be permitted. The ambiguity in the rule as to the appropriate time for a demonstration to permit a party to contend the absence of information should be a matter at issue caused OCA concern in the recent CMM minor classification case.¹⁸ In that case, a

¹⁸ Customized Market Mail Classification Changes, Docket No. MC2003-1.

Postal Service motion involved the waiver sections of Rule 69a, the rule from which the proposed rules in subsection (a)(4) here are drawn. When the Postal Service requested waiver of various filing requirements, the OCA was concerned that, unless the OCA raised the issue that the missing data was necessary to support the merits of the case at the time of answering the request for waiver, the OCA would later be precluded from making that fundamental contention in preparing its case or brief to the Commission. The rule currently is ambiguous in that it does not state clearly that the required demonstration does not need to be made (or the right to make that demonstration reserved) at the time of the waiver request. OCA was concerned that if OCA did not attempt to make the demonstration required at the time it answered the Postal Service's motion for waiver, OCA would be precluded from making the demonstration at a later time.¹⁹ OCA therefore proposes the phrase "made later in the proceeding" should be added after the first "contention" in paragraph (a)(4) of Rule 193 (section (a)(3) as proposed to be revised). If § 3001.193(a)(2) or (3) is not deleted, the OCA suggests that proposed § 3001.193(a)(4) be amended as follows:

Grant of a waiver under (a)(2) will be grounds for excluding from the proceeding a contention made later in the proceeding that the absence of the information should form a basis for rejection of the request, unless the party desiring to make such contention:

* * * * *

This subsection does not affect the burden of proof to be met by proponents of the Negotiated Service Agreement.

¹⁹ In that proceeding, in response to the Postal Service request for waiver of certain filing requirements, OCA presented its arguments that the data was necessary to a final determination on the merits of the case. The Commission order did not indicate whether it was necessary for the OCA to preserve the issue in its response to the waiver. The Commission order granted waiver and resolved the matter for that case by noting the "issue is not yet ripe. This is an issue that must be addressed by the Commission after reviewing the full evidence and argument that all participants may wish to offer on this subject." "Order on Application of Rules for Minor Classification Changes," April 4, 2003 at 8.

The necessary burden of proof is a function of the statutory requirements that cannot be waived by the Commission. To the extent the necessary showing is a burden imposed by Commission policy, the Commission should not modify its policies regarding the burden of proof merely by granting a waiver of a filing requirement at the onset of a proceeding. The waiver of a filing requirement is obtained for practical reasons at the beginning of a proceeding to permit the proceeding to continue. The Commission should make clear it does not intend to modify the underlying showing necessary for approval merely by the ministerial function of waiving a filing requirement. The Commission should reserve for the end of the proceeding the determination as to whether the burden of proof has been met, regardless of the filing requirement waivers granted at the time of filing the request.

The OCA suggests amending proposed § 3001.193(e)(3) to include a specific reference to the workpaper rules. As amended the rule would read as follows:

be prepared in sufficient detail to allow independent replication, including citation to all referenced material as described in § 3001.193(h)(4)

This would make clear that the citation requirements for the financial analysis are as stringent as the requirements for workpapers.

The OCA suggests amending proposed §§ 3001.193(e)(4) and (5) to make them symmetrical. This would involve adding the word “actual” to paragraph (e)(4) and including in (e)(5) the requirement from (e)(4) for information for each year the NSA is to be in effect. As amended the paragraphs would read as follows:

- (4) include an analysis, which sets forth the actual and estimated mailer-specific costs, volumes, and revenues of the Postal Service for each year the Negotiated Service Agreement is to be in effect assuming the then effective postal rates and fees absent the implementation of the Negotiated Service Agreement;

- (5) include an analysis, which sets forth actual and estimated mailer-specific costs, volumes, and revenues of the Postal Service for each year that the Negotiated Service Agreement is to be in effect assuming the then effective postal rates and fees and implementation of the Negotiated Service Agreement;

The OCA suggests amending proposed § 3001.193(e)(6) to require an analysis rather than a discussion of the effects of an NSA on contribution. The OCA also suggests adding the following language as a new § 3001.193(e)(9):

- (9) demonstrate that the impact of the Negotiated Service Agreement on the net present value of the Postal Service is significant and positive.

This requirement would ensure that the time value of money is accounted for in estimating the effect of an NSA on Postal Service finances. Finally, the OCA suggests amending the last sentence of § 3001.193(e) to require an analysis rather than a discussion of the suitability of proxies for mailer-specific costs and elasticities.

The OCA suggests adding a sentence to proposed § 3001.193(g). The amendment would make clear that a proposed data collection plan was subject to change by the Commission. As amended, § 3001.193(g) would read as follows:

(g) *Data collection plan.* Every formal request shall include a proposal for a data collection plan, which shall include a comparison of the analysis presented in § 3001.193(e)(5) with the actual results ascertained from implementation of the Negotiated Service Agreement. The proposed data collection plan will be subject to amendment by the Commission in its recommended decision. The results shall be reported to the Commission on an annual or more frequent basis.

The OCA suggests amending proposed § 3001.196(a)(6)(i) as follows:

the financial impact of the Negotiated Service Agreement on the Postal Service as set forth in § 3001.193(e);

This would make clear that the financial consequences of mailer-specific differences from a baseline NSA would have to be presented at the same level of detail as for a baseline NSA. If one considers the Capital One NSA as an example of a baseline NSA, no other future NSA partner will have the same return rate, forwarding rate, demand curve, or declining block rate schedule as Capital One. It follows that the rigor of financial analysis for “functionally equivalent” NSAs should be no less than was the case for Capital One.

OCA’s suggested amendments are shown in legislative format in the Appendix to these comments.

Respectfully submitted,

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Subpart L – Rules Applicable to Negotiated Service Agreements

§ 3001.190 Applicability.

(a) The rules in this subpart govern requests of the Postal Service for recommended decisions pursuant to § 3622 or § 3623 that are based on Negotiated Service Agreements. The Rules of General Applicability in subpart A of this part are also applicable to proceedings on requests subject to this subpart. The requirements and procedures specified in these sections apply exclusively to requests predicated on Negotiated Service Agreements, ~~and~~ except where specifically noted, this subpart does not supersede any other rules applicable to Postal Service requests for recommendation of changes in rates or mail classifications.

(b) In administering this subpart, it shall be the policy of the Commission to recommend Negotiated Service Agreements that each of whose elements are consistent with statutory criteria, ~~and unambiguously~~ benefit the Postal Service, ~~without and do not~~ cause ing unreasonable harm to the marketplace. It shall be the policy of the Commission to require declining-block rates to be supported by a company-specific demand analysis justifying each volume threshold and corresponding rate. Except in extraordinary circumstances and for good cause shown, the Commission shall not recommend Negotiated Service Agreements of more than three years duration; however, this limitation is not intended to bar the Postal Service from requesting:

- (1) the renewal of the terms and conditions of a previously recommended Negotiated Service Agreement, see, § 3001.197; or
- (2) recommendation of a Negotiated Service Agreement that is functionally equivalent to a previously recommended Negotiated Service Agreement, see, § 3001.196.

§ 3001.191 Filing of Formal Requests.

(a) Whenever the Postal Service proposes to establish or change rates or fees and/or the mail classification schedule based on a Negotiated Service Agreement, the Postal Service shall file with the Commission a formal request for a recommended decision. The request shall clearly state whether it is a request for a recommended decision pursuant to:

- (1) the review of a baseline Negotiated Service Agreement, see, § 3001.195;
- (2) the review of a Negotiated Service Agreement that is functionally equivalent to a previously recommended Negotiated Service Agreement, see, § 3001.196;

- (3) the renewal of the terms and conditions of a previously recommended Negotiated Service Agreement, see, § 3001.197; or
- (4) the modification of the terms and conditions of a previously recommended Negotiated Service Agreement, see, § 3001.198.

Such request shall be filed in accordance with the requirements of §§ 3001.9 to 3001.12. Within 5 days after the Postal Service has filed a formal request for a recommended decision in accordance with this subsection, the Secretary shall lodge a notice thereof with the Director of the Office of Federal Register for publication in the Federal Register.

(b) The Postal Service shall clearly identify all parties to the Negotiated Service Agreement. Identification by the Postal Service shall serve as Notice of Intervention for such parties. Parties to the Negotiated Service Agreement are to be considered co-proponents, procedurally and substantively, during the Commission's review of the proposed Negotiated Service Agreement.

§ 3001.192 Filing of Prepared Direct Evidence.

(a) Simultaneously with the filing of the formal request for a recommended decision under this subpart, the Postal Service and its co-proponents shall file all of the prepared

direct evidence upon which they propose to rely in the proceeding on the record before the Commission to establish that the proposed Negotiated Service Agreement is in the public interest and is in accordance with the policies and the applicable criteria of the Act. Such prepared direct evidence shall be in the form of prepared written testimony and documentary exhibits, which shall be filed in accordance with § 3001.31.

(b) Direct evidence may be filed in support of the Negotiated Service Agreement prepared by, or for, any party to the Negotiated Service Agreement. Direct evidence in support of the Negotiated Service Agreement prepared by, or for, any party to the Negotiated Service Agreement shall not be accepted without prior Postal Service review. The Postal Service shall affirm that the Postal Service has reviewed such testimony and that such testimony may be relied upon in presentation of the Postal Service's direct case.

§ 3001.193 Contents of Formal Requests.

(a) General requirements.

- (1) Each formal request filed under ~~this subpart~~ §§ 3001.195-98 shall include such information and data and such statements of reasons and bases as are necessary and appropriate fully to inform the Commission and the parties of the nature, scope, significance, and impact of the proposed changes or adjustments in rates, fees, and/or the mail classification

schedule associated with the Negotiated Service Agreement, and to show that the changes or adjustments ~~are~~ are in the public interest and in accordance with the public interest, the policies of this subpart, and the policies and the applicable criteria of the Act. ~~To the extent information is available or can be made available without undue burden,~~ e Each formal request shall include the information specified in paragraphs (b) through (k) of this section. If the required information is set forth in the Postal Service's prepared direct evidence, it shall be deemed to be part of the formal request without restatement.

~~(2) If any information required by paragraphs (b) through (k) of this section is not available and cannot be made available without undue burden, the request shall include a request for waiver of that requirement supported by a statement explaining 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 actions which would be needed to make each such item of information available, together with an estimate of the time and expense required therefor;~~

~~(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 sufficiently reliable estimates are available to mitigate the need for such information, and if so, the specifics of such estimates.~~

(23) If the Postal Service believes that any of the data or other information required to be filed under § 3001.193 should not be required in light of the character of the request, it shall move for a waiver of that requirement, stating with particularity the reasons why the character of the request and its circumstances justify a waiver of the requirement.

(34) Grant of a waiver under (a)(2) ~~or (a)(3)~~ will be grounds for excluding from the proceeding a contention made prior to the close of the evidentiary record that the absence of the information should form a basis for rejection of the request, unless the party desiring to make such contention:

- (i) demonstrates 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 in accordance with § 3001.193; or
- (ii) demonstrates other compelling and exceptional circumstances requiring that the absence of the information in question be treated as bearing on the merits of the proposal.

This subsection does not affect the burden of proof to be met by proponents of the Negotiated Service Agreement.

- (45) The provisions of paragraphs (a)(2) ~~and (a)(3)~~ of this section for the Postal Service to seek a waiver ~~include in its formal request of~~ certain ~~alternative information in lieu of that~~ requirements specified ~~in by~~ paragraphs (b) through (k) of this section ~~are is~~ not in derogation of the Commission's and the presiding officer's authority, pursuant to §§ 3001.23 through 3001.28, respecting the provision of information at a time following receipt of the formal request.
- (56) The Commission may request information in addition to that required by paragraphs (b) through (k) of this section.

(b) *Negotiated Service Agreement.* Every formal request shall include a copy of the Negotiated Service Agreement.

(c) *Rates and standards information.* Every formal request shall include a description of the proposed rates, fees, and/or classification changes, including proposed changes, in legislative format, to the text of the Domestic Mail Classification Schedule and any associated rate schedule.

(d) *Description of agreement.* Every formal request shall include a statement describing and explaining the operative components of the Negotiated Service Agreement. The statement shall include the reasons and bases for including the components in the Negotiated Service Agreement.

(e) *Financial analysis.* Every formal request shall include an analysis of the effects of the Negotiated Service Agreement on Postal Service volumes, costs and revenues.

The analysis shall:

- (1) be performed over the duration of the agreement, and for each individual year that the agreement is in effect;
- (2) provide such detail that the analysis of each component of a Negotiated Service Agreement can be independently reviewed;

- (3) be prepared in sufficient detail to allow independent replication, including citation to all referenced material as described in § 3001.193(h)(4);
- (4) include an analysis, which sets forth the actual and estimated mailer-specific costs, volumes, and revenues of the Postal Service for each year that the Negotiated Service Agreement is to be in effect assuming the then effective postal rates and fees absent the implementation of the Negotiated Service Agreement;
- (5) include an analysis, which sets forth actual and estimated mailer-specific costs, volumes, and revenues of the Postal Service for each year that the Negotiated Service Agreement is to be in effect assuming the then effective postal rates and fees and ~~which result from~~ implementation of the Negotiated Service Agreement;
- (6) include an analysis ~~discussion~~ of the effects of the Negotiated Service Agreement on contribution to the Postal Service (including consideration of the effect on contribution from mailers whom are not parties to the agreement);
- (7) utilize mailer-specific costs, and provide the basis used to determine such costs, including a discussion of material variances between mailer-specific costs and system-wide average costs; and

~~(8)~~ ~~(8)~~—utilize mailer-specific volumes and elasticity factors, and provide the bases used to determine such volumes and elasticity factors; and

(9) demonstrate that the impact of the Negotiated Service Agreement on the net present value of the Postal Service is significant and positive.

If mailer-specific costs or elasticity factors are not available, the bases of the costs or elasticity factors that are proposed shall be provided, including an analysis discussion of the suitability of the proposed costs or elasticity factors as a proxy for mailer-specific costs or elasticity factors.

(f) *Impact analysis.* Every formal request shall include an estimate of the impact over the duration of the Negotiated Service Agreement on:

- (1) competitors of the parties to the Negotiated Service Agreement other than the Postal Service;
- (2) competitors of the Postal Service; and
- (3) mail users.

The Postal Service shall include a copy of any completed special studies that were used to make such estimates. If special studies have not been performed, the Postal Service shall state this fact and explain the alternate bases of its estimates.

(g) *Data collection plan.* Every formal request shall include a proposal for a data collection plan, which shall include a comparison of the analysis presented in § 3001.193(e)(5) with the actual results ascertained from implementation of the Negotiated Service Agreement. The proposed data collection plan will be subject to amendment by the Commission in its recommended decision. The results shall be reported to the Commission on an annual or more frequent basis.

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§ 3001.196

(a) * * *

(6) * * *

(i) the financial impact of the Negotiated Service Agreement on the Postal Service over the duration of the agreement;