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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
SUPPLEMENTAL COMMENTS ON NSAs VS. PILOT TESTS
(October 10, 2003)

The Office of Consumer Advocate (OCA) hereby submits supplemental comments on the proposed rules of practice governing Negotiated Service Agreements (NSAs). OCA did not present these comments initially, on September 29, 2003, because the issue addressed in the instant comments only became apparent yesterday as a result of OCA's reading of Commission Order No. 1385.[1] By Order No. 1385, the Commission dismissed a complaint by Walz Postal Solutions, a company engaged in the business of selling: "'privately printed' Special Service Forms for clients of the United States Postal Service."[2] Its primary product is "the WALZ Certified Mailers," 100 million of which have been sold since 1985.[3] The gravamen of Walz' complaint is that the Postal Service had offered a bulk electronic return service for Certified Mail, initially to only three vendors (explicitly excluding Walz), and later in a manner that fell outside

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[1] "Order Dismissing Complaint of Walz Postal Solutions," issued October 9, 2003. On Tuesday, October 14, 2003, OCA will file Reply Comments addressing issues raised in by other commenters in their initial comments.

[2] http://www.walzpostal.com/CompanyInfo.asp (Walz' "About Us" web page).

[3] Id.

the proposed classification for such a service to *retail* customers only (not bulk providers) in Docket No. R2001-1.[4]

The Commission stated that Walz had presented "valid allegations of procedural deficiencies in the Postal Service's development of Certified bulk electronic access as a *pilot test*, and as a standard offering."[5] After reviewing Walz' proffered evidence and arguments, and those made by the Postal Service in its Answer to Walz' Complaint,[6] the Commission exercised its discretion, declined to hold hearings, and dismissed the Complaint.[7] One of the Commission's chief concerns about the Postal Service's course of action had been that, up until Walz had filed its complaint, "the Postal Service was not providing adequate notice to mailers of the availability of bulk electronic access."[8] This was remedied by the Postal Service's publication of rules, in the *Postal Bulletin*, that set forth the parameters of bulk electronic access.[9]

OCA understands the Commission's reasons for not proceeding on the Complaint, but finds that a statement made in Order No. 1385 has implications for the instant rulemaking proceeding and has produced potential confusion. The Order, at 19, provides that:

> [M]ailers . . . must realize that there is no individual right to participate in a Postal Service test. Short duration tests may limit participation to a limited

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4 "Complaint on Bulk Access (Batch Processing) of Delivery Confirmation Information for Certified Mail," filed April 29, 2003.

5 Order No. 1385 at 2. (Emphasis added).

6 "Answer of the United States Postal Service," filed May 29, 2003.

7 Order No. 1385 at 2.

8 Id. at 7.

9 Id. at 7, n. 9.

number of participants, or limit participation to specific geographic areas without violating the requirements of the Act.

The Commission's description of activities that may be conducted without a recommended decision by the Commission and those that are subject to NSA proceedings seem to be subject to considerable overlap. The definition that the Commission proposes for an NSA contains the following key characteristics:[10]

- a written contract
- a defined period of time
- an arrangement between the Postal Service and a mailer
- customer specific rates or fees, or postal services

Of these four key criteria, pilot tests, as described by the Commission in the statements reproduced from the Walz case, seem to meet all but one, i.e., a written contract. In Order No. 1385, the Commission determined that a Postal Service decision to provide a new form of Certified Mail service, consisting of bulk electronic return information to three mailers – Pitney Bowes, US Certified Letters LLC, and Out Source Solutions, explicitly excluding Walz, was in harmony with the requirements of the Postal Reorganization Act, apparently because only three mailers were involved (a "limited number of participants") and the pilot test was of "short duration" – either 8/9 months by the Postal Service's reckoning or 19/20 months by the Commission's.[11] Without

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[10] Proposed NSA rule §3001.5(r) provides: "*Negotiated Service Agreement* means a written contract, to be in effect for a defined period of time, between the Postal Service and a mailer, that provides for customer-specific rates or fees and/or postal services in accordance with the terms and conditions of the contract."

[11] The beginning date for the pilot test is not seriously in dispute – it is in the September-November 2001 time frame. Order No. 1385 at 1, n. 2. The Postal Service informed Walz that the pilot test ended on June 30, 2002, upon the implementation of new classification language in Docket No. R2001-1 that was recommended by the Commission and adopted by the Governors of the Postal Service. Thus, the Postal Service would likely take the position that the pilot test was conducted for a period of 8 months. *See* July 2, 2002, letter from John Dorsey, Manager, Special Services, USPS, to Peter Casserly, President, Walz Postal Solutions, attached to the Walz complaint. The Commission, however, views May 29, 2003, as the critical date when "mailers in general could have been aware that bulk electronic access was available." Order No. 1385 at 7, n. 9.

question, for the first 8/9 months, the Postal Service offered a new type of postal service that did not fall within the description of Certified Mail contained within the pre-R2001-1 Domestic Mail Classification Schedule (DMCS). After June 30, 2002, following a formal request under 39 U.S.C. §3623, the Postal Service began to offer a newly defined Certified Mail service – one that "upon request" would provide "electronic confirmation that an article was delivered or that a delivery attempt was made."[12] However, the Commission's position is that the Postal Service behaved in a discriminatory manner and was not in compliance with the requirements of the Postal Reorganization Act (PRA) until the bulk electronic access rules were published in the *Postal Bulletin*.

As OCA is best able to determine, offering electronic return service to the three mailers – Pitney Bowes, US Certified Letters, and Outsource Solutions – was an NSA-style arrangement for a defined period of time (8 months if one uses the Postal Service's time frame) between the Postal Service and three mailers. The otherwise unavailable variant of Certified Mail was a "customer specific . . . postal service" as defined in proposed NSA rule §3001.5(r). It is unclear to OCA whether the Postal Service entered into a contractual arrangement with the three mailers or not. If a contract (or contract-like) written document had been entered into, then OCA wonders whether the Commission would take the position that the Postal Service was obligated to request a recommended decision from the Commission as it had in the Capital One proceeding. In the future, would the Postal Service be required under the PRA to submit a request under 39 U.S.C. §3623 before entering into such an arrangement?

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[12] DMCS §941.11, PRC Op. R2001-1, Appendix Two at 74.

Another question puzzling OCA is whether the Postal Service has the freedom to characterize a customer-specific arrangement to provide postal services (or variations of postal services) outside of the DMCS as not subject to the Commission's proposed rules for NSAs by either avoiding entering into a formal contract or characterizing its written arrangement as something other than a contract.

Finally, if the Postal Service does not violate the PRA by entering into such arrangements, is the PRA violated by excluding mailers willing and able to participate who are "competitors of the parties" to the arrangement as provided in proposed NSA rule §3001.193(f)(1)?

OCA believes that commenters in the instant rulemaking and members of the public would benefit from having the Commission indicate in its proposed NSA rules under what circumstances it is necessary to file a request for a proposed customer-specific arrangement that is subject to the Commission's jurisdiction under 39 U.S.C. §§3622 and 3623.

Respectfully submitted,

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