

BEFORE THE
POSTAL RATE COMMISSION

RULES APPLICABLE TO BASELINE
AND FUNCTIONALLY EQUIVALENT
NEGOTIATED SERVICE AGREEMENTS

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: DOCKET NO. RM2003-5
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REPLY COMMENTS OF UNITED PARCEL SERVICE
(October 14, 2003)

Pursuant to Commission Order No. 1383 (August 27, 2003), United Parcel Service (“UPS”) submits these comments in reply to certain contentions made in the initial comments filed by other parties in this proceeding.

BACKGROUND

Whether or not one agrees with the proposition that Negotiated Service Agreements (“NSAs”) are consistent with the Postal Reorganization Act, the Commission has done a yeoman’s job in formulating an initial set of rules intended to “balance the development of an adequate record against the burdens on the participants” to an NSA proceeding. Order No. 1383 at 3. The Postal Service apparently agrees. In its initial comments, the Postal Service has largely endorsed the proposed rules; its “comments and suggestions . . . are, in the broader scheme of things, relatively modest.” Initial Comments of the United States Postal Service (September 30, 2003) (“Postal Service Comments”) at 28.

Rather, it is large mailers and their trade associations which express concern that the Commission may apply the proposed rules in a way that will result in a “bureaucratic stranglehold.” Comments of Capital One Services, Inc. (September 29, 2003) at 9. Unlike the modest changes proposed by the Postal Service, those proposed by the mailers would effectively replace the Commission’s congressionally-mandated role as the primary authority in postal ratemaking, National Ass’n of Greeting Card Publishers v. United States Postal Service, 462 U.S. 810, 821, 822 (1983), with a “contracting process” under which postal rates would be established not on the basis of the statutory criteria, but on the basis of “the bargain the parties have reached.” Comments of Discover Financial Services, Inc. (September 30, 2003) (“Discover’s Comments”) at 2. For example, the suggestion that the parties to a proposed NSA could avoid providing information specified in the proposed rules merely by certifying that such information is “not needed,” Comments of Pitney Bowes Inc. (September 29, 2003) (“Pitney Bowes Comments”) at 5, would effectively eliminate the Commission as a meaningful participant in the ratemaking process.¹

In short, the mailers’ proposed changes are antithetical to the statutory scheme. As one commenter has correctly observed, the Commission “must operate under the Postal Reorganization Act as the law stands at present, and not as it may be changed in the future,” whether along the lines proposed by the President’s Commission or not. Valpak Direct Marketing Systems, Inc., and Valpak Dealers’ Association, Inc.

1. This suggestion highlights the inherent danger of allowing NSAs at all: NSAs tend to turn postal ratemaking into a “contracting process” rather than the reasoned decisionmaking process by an independent expert body mandated by Congress.

Comments on Proposed NSA Rules Pursuant to Commission Order No. 1383
(September 29, 2003) at 3.

DISCUSSION

1. Mailer-Specific Costs

The large mailers urge the Commission to abandon any attempt to obtain mailer-specific costs and other information. They do not contend that such information is not relevant. Indeed, it would be incongruous to argue that mailer-specific information is not relevant to a mailer-specific agreement with mailer-specific rates. Instead, these parties argue that the rule in question could be read as creating an inappropriate presumption that mailer-specific data is required to be included in an NSA, Pitney Bowes Comments at 4, or that the proposed rule requires “an enormous amount of data.” Comments of The Direct Marketing Association, Inc., et al. (September 29, 2003) (“DMA et al. Comments”) at 6.

While the Postal Service takes the position that “determination of mailer-specific costs in all but the most extraordinary circumstances would be nigh impossible,” Postal Service Comments at 13, it does not advocate elimination of the proposed rule because “the proposed language of [the rule] would provide it with the necessary latitude to structure its financial analyses, and allow it to avoid routine requests for waivers.” Id. at 15. Since the Postal Service believes this aspect of the rules is acceptable, so too should the Commission, since it is the Postal Service which must comply with this provision.

The attempt to obtain mailer-specific information to support mailer-specific rates should not be abandoned before it is even tried -- gathering mailer-specific information

is the cost of offering mailer-specific rates. The absence of mailer-specific data draws into question the very concept of NSAs.

2. Competitive Impact

A number of mailers also contend that the proposed rule requiring an estimate of the impact of an NSA on competitors of the parties to the NSA should be abandoned as “highly burdensome.” Comments of First Data Corporation (September 29, 2003) at 3. Again, the Postal Service does not propose elimination of this rule, although it expresses concern about “how the rule is interpreted and applied” and suggests a revision that would require an “analysis” rather than an “estimate” of the impact of a proposed NSA on competitors. Postal Service Comments at 17, 18, 19.

As the Postal Service acknowledges, the statute itself requires that the Commission take into account the impact of postal rates on competition. Postal Service Comments at 18 n.5. The Commission must do so whether or not particular competitors complain or present evidence about the impact of specific postal rates on them. When it adopted the statute, Congress required far more than that changes in postal rates “improve [the Postal Service’s] financial position.” DMA, et al. Comments at 6. A proposal to reduce the Commission’s role to determining that overall contribution to the Postal Service would improve reads out of the statute the factors set forth in Section 3622, including Section 3622(b)(4) regarding impact on competition. The mailers’ proposal should be rejected.

3. Multi-Year Financial Analyses

Certain mailers question the requirement in the proposed rules that “the effect of the NSA on volumes, costs, and revenues be estimated for the life of the NSA, not just

a Test Year.” DMA et al. Comments at 7. See also, e.g., Comments of Capital One Services, Inc. at 2. They suggest that such estimates “could [not] be projected for a three year period.” Id. at 3. The Postal Service notes that the fact that rates established in an omnibus rate case will likely be in effect beyond the test year “has generally not triggered serious proposals to extend rate case financial analyses beyond the test year.” Postal Service Comments at 6.

There are a number of significant relevant differences between omnibus rate cases and proceedings to evaluate a negotiated rate agreement of known duration. While rates established in an omnibus case generally remain in effect beyond the test year, neither the Commission nor the parties -- not even the Postal Service -- have much of a basis for guessing exactly how long those rates will actually remain in effect. On the other hand, in the case of an NSA it is known with certainty how long the negotiated rates will remain in effect. It would be strange not to recognize that fact and do the best possible job of determining the effect of rates of known duration for the time they are known to be in effect. Indeed, the Postal Service almost certainly will have considered its estimate of such effects in deciding whether to agree to a one, two, or three year term for an NSA.

It is also likely that the first year of a multi-year NSA will begin earlier than an omnibus rate case test year actually begins. In omnibus rate cases, the Commission permits the Postal Service to use a test year “beginning not more than 24 months [i.e., two years] subsequent to the filing date of the formal request.” 39 C.F.R.

§ 3001.54(f)(2).² Since NSA cases are likely to be concluded more promptly than omnibus rate cases, and since negotiated rates for one mailer will likely be implemented more quickly than wide-scale rate changes for all mailers, the estimates required by the proposed rules are likely to be for years not as far in the future as in omnibus rate cases. This makes the NSA rates less speculative than these parties suggest.

Moreover, the Commission's rules allow the use of multi-year test periods "of up to 5 fiscal years" when the Postal Service requests "the establishment of a new postal service, with attendant rates." 39 C.F.R. § 3001.181(a). An NSA is really a proposal for a new service, restricted to one mailer only, with mailer-specific rates. Thus, Section 181(a) of the Commission's Rules negates the expressed concern that estimating the effects of an NSA over the one, two, or potentially three years of the NSA would require estimates that are too speculative.³

To its credit, the Postal Service recognizes that "an estimate which merely shows a multi-year NSA providing favorable financial results in the first year cannot necessarily be assumed to be proof of comparable favorable results over the entire duration of the agreement." Postal Service Comments at 7. As a result, it "agrees that everyone should be reviewing the potential financial impact for the duration of the agreement." *Id.* at 10. It suggests a different approach for doing so than the approach set forth in the Commission's proposed rules. We prefer the Commission's more optimistic and

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2. As a result, the Postal Service has on occasion implemented omnibus rate changes before the beginning of the test year.
 3. The concern that estimates over the full period of a three year NSA are too speculative suggests that perhaps three years is too long a term for an NSA, and that NSAs should be limited in duration to one or two years, at most.

ambitious approach, at least unless and until actual experience (rather than timidity and speculation) show that the proposed rule is impractical.

CONCLUSION

United Parcel Service seriously questions the wisdom of establishing postal rates on the basis of a “contracting process,” where all that counts is that “the bargain that the parties have struck reflects their view of the best deal they believe they could have made.” Discover’s Comments at 5. The Postal Reorganization Act is concerned with much more than that; its concern is the public interest. Admonitions that “the Commission has no business inserting itself into the sanctity of the bargaining process and post-judging the balance that the contracting parties have drawn between the benefits and risks of” the deal they have negotiated (id. at n.3) reflect a fundamental misunderstanding of the Postal Reorganization Act, and a call for the Commission to abandon its statutory role. That is why UPS endorses the suggestion of the National Newspaper Association that “The Postal Service should be required to prove that a niche classification case would not be an equally reasonable approach” before approving an NSA. Comments of the National Newspaper Association on Proposed Negotiated Service Agreement Rules (September 29, 2003) at 4. Proposals to apply the existing rules for experimental services, for example, or to reduce a case for a contested “functionally equivalent” NSA to as little as 90 days (Discover’s Comments at 3-4), go in the wrong direction; an NSA is not a proposal for an experiment.

Assuming NSAs are both legally permitted and otherwise appropriate under the statute, the Commission’s initial proposed rules represent a good start toward at least minimizing to some extent the danger of a ratemaking approach that “by [its] nature

ha[s] features that are discriminatory, and ha[s] the potential to cause harm to the marketplace.” Order No. 1383 at 5 (footnote omitted). The calls to water down those rules even before they have been tried should be rejected.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused the foregoing document to be served in accordance with Section 12 of the Rules of Practice.

John E. McKeever

Dated: October 13, 2003.

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