

PRESIDING OFFICER'S
RULING NO. MC2004-4/2

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Rate and Service Changes To Implement
Functionally Equivalent Negotiated Service
Agreement With Discover Financial Services, Inc.

Docket No. MC2004-4

PRESIDING OFFICER'S RULING
IN REGARD TO LIMITATION OF ISSUES

(Issued August 11, 2004)

The Postal Service filed a proposal to limit the issues open for litigation in this proceeding.¹ The Proposal essentially requests limiting the issues to those specified in rule 196(a)(6). Rule 196(a)(6) specifies three issues deemed always relevant to any request predicated on a functionally equivalent Negotiated Service Agreement:

- (i) The financial impact of the Negotiated Service Agreement on the Postal Service over the duration of the agreement;
- (ii) The fairness and equity of the Negotiated Service Agreement in regard to other users of the mail; and
- (iii) The fairness and equity of the Negotiated Service Agreement in regard to the competitors of the parties to the Negotiated Service Agreement.

Rule 196(a)(6). The Postal Service further states that it is relying on specific Docket No. MC2002-2 testimony, and submits that issues previously decided in that docket should not be open for relitigation.²

¹ United States Postal Service Proposal for Limitation of Issues, June 21, 2004 (Proposal).

² The Postal Service's Proposal contains a partial list of issues that it contends were decided in Docket No. MC2002-2. See Proposal at 2.

The Commission's rules contemplate hearing arguments on requests to limit issues at the time of the prehearing conference. Rule 196(c) states, in part, "Participants shall be prepared at the prehearing conference to address whether or not it is appropriate to proceed under § 3001.196, and to identify any issue(s) that would indicate the need to schedule a hearing." The Commission further urged participants to file supporting written arguments in advance of the prehearing conference to identify issues that would indicate the need for a hearing, and if necessary to object to the Postal Service's proposal for limiting issues.³

During the prehearing conference, the Commission entertained arguments in regard to the limitation of issues from the Postal Service, Discover, and Valpak. The Postal Service provided a synopsis of its original proposal for limitation of issues. In its role as settlement coordinator, the Postal Service reported agreement among settlement conference participants that consideration of the financial cap is related to the financial effects of the Negotiated Service Agreement, and thus would be open to litigation.⁴ It also indicated that progress was being made on a number of issues, which hopefully would result in expediting this case. Additional time was requested for participants to further explore issues in order to decide whether or not to request a hearing. Therefore, action on limiting issues was deferred to allow participants time to narrow issues and to report on any open issues.

Discover argued that the issue of recommending a niche classification in place of the Negotiated Service Agreement should be precluded from litigation. Contrary to Discover's position, Valpak argued that the question of recommending a niche classification should not be barred from litigation. It contends that the Postal Service mischaracterizes the Commission's discussion in regard to whether or not a Negotiated Service Agreement is preferred over a niche classification. Valpak concluded by requesting additional time to submit comments in writing.⁵

³ PRC Order No. 1410 at 8.

⁴ Tr. 1/10.

⁵ The Presiding Officer established deadlines of July 29, 2004 for comments, and August 5, 2004 for reply comments. Tr. 1/23.

A second settlement conference was held on July 21, 2004.⁶ The settlement coordinator reported that OCA intends to file testimony in regard to the “competitive cap.” OCA also expressed concern in regard to the differences between Capital One and Discover on their use of Standard Mail versus First-Class Mail for solicitations, as well as the differences in their use of the electronic address correction information after it is received. Valpak indicated that it has concerns with the same issues.

The OCA filed detailed comments stating that it did not oppose the Postal Service’s proposal to limit issues.⁷ The detailed comments also suggest that the evidentiary record should be more fully developed on several issues.⁸ Most issues focus on the differences between Discover and Capital One and their respective mail. For example, the Discover agreement grants discounts to volume that would have been mailed even in the absence of discounts, whereas the projected Capital One volumes were below the threshold for discounts. The Discover agreement calculates the stop-loss cap using a different methodology than used in the Capital One decision. OCA notes that Capital One and Discover have different mailing practices, such as ownership of mailing lists, and ability to update that might influence costs. OCA also notes that Capital One’s mail was incurring physical return costs prior to its agreement, whereas Discover’s Standard Mail is not incurring these same costs. Finally, OCA intends to explore whether new costs incurred by moving Discover’s mail from Standard to First-Class, such as new forwarding costs, outweigh the estimated additional contribution.

Valpak filed similarly detailed comments expressing its views as to the issues in this docket.⁹ Valpak identifies as issues the calculation of costs of electronic Undeliverable as Addressed (UAA) mail for the new First-Class volumes, the treatment

⁶ Report of Settlement Coordinator, July 22, 2004.

⁷ Office of the Consumer Advocate Request for a Hearing in Docket No. MC2004-4, July 23, 2003; Office of the Consumer Advocate Answer to Postal Service Motion to Limit Issues, July 29, 2004.

⁸ OCA characterizes this process as involving evidentiary hearings, although it also indicates it may not need the opportunity to orally cross-examine proponent witnesses.

⁹ Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Restated Request for Hearing, Preliminary Statement of Issues, and Submission of Proposed Hearing Schedule, July 23, 2004; Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Comments on the United States Postal Service’s Proposal for Limitation of Issues, July 29, 2004.

of the cost of free forwarding and free Address Correction Service (ACS) for forwarded mail, and the possibility of a reduction in contribution due to the migration of the mail from Standard to First-Class. Valpak also is concerned with the impact of Capital One maintaining its own solicitations lists versus Discover's use of rented lists as it relates to the value of obtaining UAA electronic return information. Valpak notes that the Capital One agreement involves new First-Class Mail volume, whereas Discover's agreement involves a migration of Standard Mail to First-Class Mail. Thus, Valpak has concerns in regard to Discover's before and after comparison of contribution. Finally, Valpak questions whether the proposed stop-loss provision satisfies the principles outlined in Docket No. MC2002-2.

Valpak also has identified two issues that go beyond the parameters of the Postal Service's request. Valpak is interested in the relationship between the Discover Negotiated Service Agreement and addressing a system-wide fix to the UAA pricing problem. It does not propose to present evidence on this issue in this docket, other than what has already been obtained through discovery. Valpak would like the opportunity to discuss this issue on brief. Valpak also expressed interest in the possibility of offering the Negotiated Service Agreement as a niche classification, although it does not intend to present evidence on this issue in this docket.

Discover urges the Commission to take a "very strict approach to limiting issues, limiting discovery, and limiting hearings."¹⁰ It expresses concern over the costs of participating in functionally equivalent agreements.

In reply comments, American Bankers Association contends that dockets involving functionally equivalent Negotiated Service Agreements should keep the issues narrow to limit the time, effort, and resources required by the proceeding.¹¹ Valpak states that it has no real opposition to the Postal Service's proposal to limit issues

¹⁰ Discover Financial Services, Inc. (DFS) Comments on the Requests for a Hearing of OCA and Valpak and on the Subject of the Limitation of Issues, July 29, 2004, at 2.

¹¹ American Bankers Association Reply Comments on Limitation of Issues and Response to Request for Hearing, August 5, 2004.

because it has chosen not to pursue issues outside of the issues in the proposal.¹² Discover urges the Commission to not allow proceedings to be cluttered by irrelevant issues. It contends that the issue should be whether there is any reasonable risk that the Postal Service will lose money under the terms of the agreement, assuming that there is no showing of harm to other mailers or competitors.¹³ Reply comments also were filed by J.P. Morgan Chase, OCA, and the Postal Service.¹⁴

Participants have requested that the Commission defer ruling on the need for oral cross-examination until after August 17, 2004. Any participant requesting oral cross-examination of a witness shall indicate this to the Commission by August 20, 2004.

Analysis. OCA and Valpak have provided extremely helpful reviews of the issues present in this docket. The majority of the issues involve the impact of similarities and differences between Capital One and its mail and Discover and its mail as they relate to the financial aspects of the Postal Service's request. OCA and Valpak also focus on the calculation of the stop-loss provision. These issues fall within the ambit of issues that the Commission has stated will always be under consideration in any request predicated on a Negotiated Service Agreement, rule 196(a)(6).

Valpak requested the opportunity to address two other issues in briefs: consideration of a niche classification, and the issue of a system-wide fix to the UAA pricing problem. Such discussion will help the Commission deal with future requests for functionally equivalent Negotiated Service Agreements. However, such discussions

¹² Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments on Limitation of Issues, August 5, 2004.

¹³ Reply Comments of Discover Financial Services, Inc. (DFS) on Limitation of Issues, August 5, 2004.

¹⁴ Reply Comments of J.P. Morgan Chase and Co. on Limitation of Issues and Request for Hearing, August 5, 2004; Office of the Consumer Advocate Reply to Discover Financial Services, Inc. Comments on Limitation of Issues, August 5, 2004; United States Postal Service Response to Comments on its Proposal for Limitation of Issues, August 5, 2004; Notice of United States Postal Service of Filing Errata to United States Postal Service Response to Comments on Limitation of Issues (Errata), August 6, 2004.

shall not form the basis of the Commission's recommended decision on this Negotiated Service Agreement.

It is ordered:

1. Any participant requesting oral cross-examination of a witness shall indicate this to the Commission by August 20, 2004.
2. The issues open for litigation in this docket shall be limited to those issues specified in rule 196(a)(6), consistent with the body of this ruling.

George Omas
Presiding Officer