

PRESIDING OFFICER'S
RULING NO. MC2004-3/2

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

Rate and Service Changes To Implement
Functionally Equivalent Negotiated Service
Agreement With Bank One Corporation

Docket No. MC2004-3

PRESIDING OFFICER'S RULING
IN REGARD TO LIMITATION OF ISSUES

(Issued August 13, 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, Bank One, and Valpak. The Postal Service provided a synopsis of its original proposal for limitation of issues. It also stated that the issues of a financial cap and the merger with J.P. Morgan Chase could be addressed. In its role as settlement coordinator, the Postal Service reported further 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.

Bank One argued that the issue of recommending a niche classification in place of the Negotiated Service Agreement should be precluded from litigation. Valpak generally objected to the Postal Service's proposal to preclude issues.⁵ The Presiding Officer directed Valpak to submit specific comments in writing.⁶

³ PRC Order No. 1409 at 8.

⁴ Tr. 1/12.

⁵ Tr. 1/15.

⁶ Tr. 1/17. The Presiding Officer established deadlines of July 29, 2004 for comments, and August 5, 2004 for reply comments. POR No. MC2004-3/1, July 23, 2004.

A second settlement conference was held on July 21, 2004.⁷ 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 Bank One 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.⁸ The detailed comments also suggest that the evidentiary record should be more fully developed on several issues.⁹ Most issues focus on the differences between Bank One and Capital One and their respective mail. For example, the Bank One 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 Bank One agreement does not include a stop-loss cap. OCA proposes to address whether a cap can be calculated similar to the cap calculated in the Capital One decision. OCA asserts that no information exists on the J.P. Morgan Chase merger to allow a re-evaluation of the financial impact analysis. Unlike the Capital One agreement, the Bank One agreement involves mailing flats in addition to letters. OCA also notes that Capital One’s mail was incurring physical return costs prior to its agreement, whereas Bank One’s Standard Mail is not incurring these same costs. Finally, OCA intends to explore whether new costs incurred by moving Bank One’s mail from Standard to First-Class, such as new forwarding costs, outweigh the estimated additional contribution.

⁷ Report of Settlement Coordinator, July 22, 2004.

⁸ Office of the Consumer Advocate Request for a Hearing in Docket No. MC2004-3, July 23, 2003; Office of the Consumer Advocate Answer to Postal Service Motion to Limit Issues, July 29, 2004.

⁹ OCA characterizes this process as involving evidentiary hearings, although it also indicates it may not need the opportunity to orally cross-examine proponent witnesses.

Valpak filed similarly detailed comments expressing its views as to the issues in this docket.¹⁰ Valpak identifies as issues the calculation of costs of electronic Undeliverable as Addressed (UAA) mail for the new First-Class volumes, the treatment 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 Bank One'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 Bank One's agreement involves a migration of Standard Mail to First-Class Mail. Thus, Valpak has concerns in regard to Bank One's before and after comparison of contribution. Finally, Valpak questions whether the absence of a 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 Bank One 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.

Bank One filed an extensive review of the issues raised by OCA and Valpak.¹¹ It argues that the issues raised by OCA and Valpak do not merit a hearing, with the possible exception of issues related to its merger with J.P. Morgan Chase. It asserts

¹⁰ Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Restated Request for Hearing and Preliminary Statement of Issues, 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.

¹¹ Bank One Corporation Comments on Limitation of Issues and Response to Requests for Hearing, refiled August 5, 2004.

that any decision in regard to a hearing on the merger issue should be deferred until August 17, 2004.

In reply comments, Valpak states that it has no real opposition to the Postal Service's proposal to limit issues because it has chosen not to pursue issues outside of the issues in the proposal.¹² The Association for Postal Commerce contends that the issues to be litigated should be carefully limited, and re-arguing of issues should be avoided. It also argues that intervenors have failed to identify any genuine issue of material fact relating to the stop-loss cap.¹³ American Bankers Association provides further comment on the Bank One and J.P. Morgan Chase merger, and the absence of a cap on total discounts.¹⁴ OCA provides an extensive reply to the Bank One comments filed on July 30, 2004.¹⁵ Reply comments also were filed by Discover, National Postal Policy Council, Bank One, and the Postal Service.¹⁶

Bank One filed additional comments to address the reply comments of OCA and Valpak.¹⁷ Bank One concludes that the Commission should deny the requests of OCA and Valpak for a hearing on any issues other than those related to the J.P. Morgan Chase merger.

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

¹³ Reply Comments of the Association for Postal Commerce in Regard to the Limitation of Issues, August 5, 2004.

¹⁴ American Bankers Association Reply Comments on Limitation of Issues and Response to Request for Hearing, August 5, 2004.

¹⁵ Office of the Consumer Advocate Reply to Bank One Corporation Comments on Limitation of Issues, August 5, 2004.

¹⁶ Reply Comments of Discover Financial Services, Inc. (DFS) on Limitation of Issues and Requests for a Hearing, August 5, 2004; Reply Comments of National Postal Policy Council on Limitation of Issues and Requests for Hearing, August 5, 2004; Reply Comments of Bank One Corporation on Limitation of Issues and Requests for Hearing, 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.

¹⁷ Response of Bank One Corporation to August 5 Reply Comments of OCA and Valpak, August 10, 2004. Bank One also filed Motion of Bank One Corporation for Leave to file Response to August 5 Reply Comments of OCA and Valpak, August 10, 2004. This motion is granted.

Analysis. OCA, Valpak, and Bank One 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 Bank One 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. The financial effects of the J.P. Morgan Chase merger also might be relevant to any decision. 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 shall not form the basis of the Commission's recommended decision on this Negotiated Service Agreement.

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.

It is ordered:

1. Any participant requesting oral cross-examination of a witness shall indicate this to the Commission by August 20, 2004.
2. Motion of Bank One Corporation for Leave to File Response to August 5 Reply Comments of OCA and Valpak, August 10, 2004, is granted.
3. 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