

ORDER NO. 1443

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

Before Commissioners:

George Omas, Chairman;
Tony Hammond, Vice Chairman;
Dana B. Covington, Sr.; Ruth Y. Goldway;
and Dawn A. Tisdale

Rate and Service Changes to
Implement Functionally Equivalent
Negotiated Service Agreement with
Bank One Corporation

Docket No. MC2004-3

ORDER ESTABLISHING PROCEDURAL
FRAMEWORK FOR RECONSIDERATION

(Issued August 23, 2005)

The Commission recommended that the Postal Service proceed with a Negotiated Service Agreement with Bank One Corporation.¹ The Commission found that the agreement suggested by the parties was in most respects consistent with postal policy; however, it determined that it was necessary to add a “stop-loss cap” to the agreement to provide a reasonable measure of protection for mailers not party to the agreement.

The Governors accepted the Commission’s recommendation and the agreement became effective April 1, 2005.² At the same time, the Governors’ Decision announced the Postal Service would seek reconsideration of the Commission finding that a stop-loss cap was necessary. If the Commission again recommends the application of a

¹ Opinion and Recommended Decision Approving Negotiated Service Agreement, Docket No. MC2004-3, December 17, 2004 (Commission’s Opinion).

² Decision of the Governors of the United States Postal Service on the Opinion and Recommended Decision of the Postal Rate Commission Approving Negotiated Service Agreement with Bank One Corporation, Docket No. MC2004-3, February 16, 2005 (Governors’ Decision).

stop-loss cap based on the record already compiled, the Governors request clarification and further explanation of the Commission's Opinion in regard to the potential for uncapped Negotiated Service Agreements styled on the Bank One agreement as originally proposed. They also request further Commission explanations on two related topics: the applicable evidentiary standard that must be met to substantiate a volume-based discount provision without the application of a stop-loss cap, and the role of settlement in uncontested cases.

The Commission understands and supports this groundbreaking Governors' initiative. In addition to seeking reconsideration, the Governors are attempting to surmount the institutional limitations imposed by the strictly limited responsibilities of the Governors and the Commission, and to foster meaningful dialogue for the purpose of achieving a healthy and effective national postal system. Some of the issues the Governors raise are not directly within the ambit of reconsideration, but these issues are obviously important to the present and future success of proceedings under current law. The Commission agrees that additional dialogue and clarification in these areas can only be beneficial, and it intends to review these issues carefully and provide responses.

Postal Service Procedural Motion. On March 7, 2005, the Postal Service filed a motion resubmitting the case to the Commission for reconsideration, suggesting procedures to guide the reconsideration, and requesting that it be allowed until April 15, 2005, to file a memorandum in support of reconsideration further elaborating on areas of concern to the Governors.³ This request was approved.⁴ On April 14, 2005, the Postal Service sought additional time, until May 13, 2005, to provide its memorandum.⁵ The Postal Service cited the duties associated with the preparation and filing of an omnibus postal rate case, and the need "to consult with entities outside the Postal

³ United States Postal Service Motion for Leave to File Memorandum on Reconsideration and for Proposed Procedures, March 7, 2005 (Postal Service Motion).

⁴ Notice of Request for Reconsideration and Order Establishing Procedures, PRC Order No. 1433, March 16, 2005.

⁵ United States Postal Service Motion for Extension of Time in Which to File Memorandum on Reconsideration, April 14, 2005.

Service, including external experts and existing and future NSA partners” as reasons for the delay. This request also was granted.⁶ On May 16, 2005, the Postal Service filed its memorandum on reconsideration.⁷ The Memorandum was accompanied by a technical appendix and the sworn supporting statements of three individuals.⁸

The Postal Service Motion suggests a possible procedural path to address the issues presented by the Governors. The first step, which has been approved by the Commission and completed by the Postal Service, is for the Postal Service to file a Memorandum further explaining the issues. After the filing of its Memorandum, the Postal Service proposes that intervenors, including past and prospective Negotiated Service Agreement partners and the OCA, be allowed to comment on the Postal Service’s views. The Postal Service argues that this would allow Negotiated Service Agreement stakeholders to address suitable evidentiary standards in light of their own capabilities and concerns. The Postal Service suggests that the Commission next would address the Postal Service’s and other participants’ comments and proposals, and also would propose an approach to overcome the Commission’s concerns that led to imposing a stop-loss cap in this case. Participants then would be allowed to comment on the Commission’s views, including views on the appropriate standard of evidence necessary to support uncapped declining block rates. Finally, the Commission would issue a recommended decision including further explanations and guidance for future cases.

Separate Treatment of Reconsideration and Advisory Issues. The issues raised by the Governors and the Postal Service involve a complex mix of issues related to the instant docket and to guidance on novel issues applicable to future requests. Extra-record material has been filed with the Memorandum, which has not been subject to examination. To assure these issues are comprehensively considered, this material

⁶ Presiding Officer’s Ruling Granting Extension of Time, P.O. Ruling MC2004-3/8, April 15, 2005.

⁷ United States Postal Service Memorandum on Reconsideration, May 16, 2005 (Memorandum). The Memorandum was accompanied by Motion for Leave to File out of Time the United States Postal Service’s Memorandum on Reconsideration, May 16, 2005. This motion is granted.

⁸ The Memorandum and one of the statements were revised on May 18, 2005.

would have to be made part of the evidentiary record. Other participants and the Commission would probably want to develop the record further, either through discovery or by filing additional evidence relevant to these issues.

The issues presented for consideration potentially have direct impact on numerous persons that are not participants in the instant docket. Thoroughly reviewing these issues, while providing the required prompt reconsideration of the Bank One Negotiated Service Agreement, would be further compromised by the time constraints and resource commitments imposed by the ongoing omnibus rate case. Just as the Postal Service required an extended period to formulate views, other potentially affected individuals and groups will need significant time to evaluate the Postal Service material and prepare responsive presentations.

The Commission concludes that the development of guidance to assist mailers and the Postal Service in the development of volume-based discounts that do not include a stop-loss cap involve novel issues that have yet to be considered. The Postal Service's procedural proposal is not the best means for adequately accommodating the complexities addressed above. Therefore, consideration of the issues directly related to reconsideration will be separated from the theoretical issues that are advisory in nature in order to protect the rights of current participants, and those that may wish to participate in regard to the broader issues. The basis of this decision is further explained below.

The Commission will immediately undertake reconsideration of its Bank One Opinion, with a focus on its decision to recommend the addition of a stop-loss cap to the Bank One Negotiated Service Agreement. The reconsideration will be based on the existing Bank One record. The first step in reconsideration is for the Commission to entertain comments based on the existing record from interested participants which address issues relevant to the reconsideration. Because the Memorandum submitted by the Postal Service, including the attached material, covers a range of issues that go beyond that necessary for the reconsideration, the Postal Service is encouraged to provide further comments if it desires to narrow its focus and further address issues

specific to reconsideration. The Postal Service and interested participants should file initial comments by September 16, 2005. Reply comments will also be entertained, and should be filed by September 30, 2005.⁹

The Governors also request that the Commission discuss the role of settlement in uncontested Negotiated Service Agreement cases. The issues presented by settlement in the Bank One case prompted the Commissioners to issue a concurring opinion to reassure the postal community of their unanimous support for the Postal Service's Negotiated Service Agreement initiatives. Because this had an important influence on the Commission's recommendation, the Commission will include consideration of the role of settlement in this Order.

The Commission will also promptly issue a notice of rulemaking to initiate a separate rulemaking docket to consider the third issue raised by the Governors, the applicable evidentiary standard that must be met to substantiate a volume-based discount provision without the application of a stop-loss cap. A separate rulemaking docket will allow thorough consideration of this important issue by all interested persons, including present and potential Negotiated Service Agreement partners.

The Postal Service proposes a two-part standard for evaluating declining block rate proposals.

When evaluating a declining block rate proposal, the standard to apply is whether:

- (1) The forecasts are reliable and reflect an appropriate tolerance for error in light of industry practice, sound regulatory principles, and the requirements of the Postal Reorganization Act; and
- (2) The Postal Service has demonstrated that risks in the NSA are reasonably constrained by (a) identifying factors that could impact mail volumes; (b) using contract terms to minimize risks, and (c) showing that any residual risk is offset by the potential benefits.

Memorandum at 18. The Commission will utilize this proposal as the basis of the rulemaking. The notice of rulemaking will solicit comments in regard to the benefits of

⁹ These periods are longer than might otherwise be necessary in recognition of rate case demands on the resources of all participants.

incorporating this proposal into the Commission's rules, the appropriateness of the specific proposal, and suggestions for alternatives. Comments also will be solicited to better develop an understanding of how the proposed language is to be interpreted, and any suggestions for improvements.

Further Explanation Why Separate Treatment is Appropriate

Nature of the Postal Service's Supplemental Material. The Postal Service has attached three sworn declarations and an appendix to its Memorandum (supplemental material). The Commission considers this material to be a good start toward developing a record for evaluating the issues on which the Governors seek guidance. When the rulemaking docket is opened, this material will be included in the record of that docket.

The Commission has performed an initial review of the supplemental material for the purpose of discerning the nature of the material, its status as potential evidence, and its possible applicability. The Appendix consists of a theoretical discussion of certain characteristics of declining block rates. Mr. Plunkett's declaration is characterized as a discussion of how the Postal Service negotiated declining block rate discounts and thresholds, evaluated Bank One's before- and after-rates volume forecasts, included contract terms to minimize the risk of declining block rates, and evaluated the risks and rewards associated with the Bank One Negotiated Service Agreement. Mr. Matthews' declaration discusses risks and risk management in the negotiation environment, and thoughts on these considerations in regard to the Bank One Negotiated Service Agreement. Mr. Hadaway's declaration offers anecdotal evidence in support of the Postal Service's proposal for establishing a standard for uncapped Negotiated Service Agreement discounts.

The Commission finds the supplemental material to be general in nature. The material is designed to support the Postal Service's overall position on uncapped agreements, but it does not argue, based on specific record citations or new quantitative evaluation related to the existing record, that the Commission came to an incorrect conclusion in the Bank One case. The conclusions presented are essentially

qualitative. If the evidentiary record before the Commission had been developed with the new factual and theoretical information now proffered by the Postal Service, the Commission might well have had more confidence in the Bank One volume estimates.

Mr. Plunkett's declaration is notable. It indicates real progress in the Postal Service's procedures to ascertain the mailing characteristics of its Negotiated Service Agreement partners. There appears to be a significant improvement over the level of analysis presented in the Capital One docket, the case considering the first proposed Negotiated Service Agreement. In the Capital One case, Mr. Plunkett was asked if the Postal Service independently estimated Capital One's volume estimates. He began his response by stating: "The Postal Service did not develop a parallel estimate of Capital One's mail volume using distinct data sources or methodologies." Docket No. MC2002-2, Tr. 4/762, 765-6. This introductory statement cemented the Commission's belief that more needed to be done.

Presentation of an analysis based on Mr. Plunkett's review procedures outlined in his declaration potentially could improve the confidence level of partner supplied estimates, and could facilitate the Commission's future consideration of Negotiated Service Agreements. However, the benefits of a review only can be judged by the thoroughness in which the review is carried out. Mr. Plunkett's declaration does not provide the Commission with any means of evaluating this thoroughness in the case of Bank One.¹⁰

The supplemental material has not been offered as evidence in this docket. However, the Commission finds that it has the characteristics of testimony that would have to be entered into the record if it were to be considered in the Commission's reconsideration. To be made part of the record, the record would have to be reopened, the material entered into evidence, the opportunity for adversarial examination provided, and the record re-closed. There also is the possibility that this material could require a

¹⁰ Furthermore, in describing what analysis the Postal Service had undertaken to estimate the reasonableness of the mailer supplied forecasts in the Bank One case, witness Plunkett asserts that the Postal Service did not develop a parallel estimate of Bank One's mail volume using distinct data sources or methodologies. Docket No. MC2004-3, Tr. 2/424.

response through rebuttal testimony. Effectively, a request to include this material into the record would amount to a request for the Bank One docket to be reopened for further litigation.

Typically, the Commission will reopen a record in a fully concluded and litigated docket only for the purpose of administrative corrections, or to make non-substantive changes. In extraordinary circumstances, the Commission could reopen a record if there is an acceptable demonstration of why material could not have been initially presented during the course of the proceeding, and why it should be considered late in the proceeding. The Commission also might reopen the record if the material was directly on point and there would be an injustice if the record were not reopened. There has been no showing that this material could not have been entered during the litigation of this docket, and the material has been produced well after the Commission has issued its Opinion. Furthermore, review of the material reveals that it is predominately general in nature, and there is not a showing that any injustice would occur if this material were not admitted into evidence at this point.

Finally, applicability of the Postal Service's supplemental material appears more directed at the broader issue of uncapped volume-based discounts. It will be more efficient for the Commission and interested parties, including the Postal Service, to analyze general precepts applicable to "pure" volume discounts outside of the limited factual record made in Docket No. MC2004-3, which evaluated a functionally equivalent Negotiated Service Agreement that relies on cost savings to the Postal Service resulting from foregoing the return of undeliverable First-Class Mail.

Notwithstanding the pending request for reconsideration, the Governors concluded that the Bank One Negotiated Service Agreement warrants implementation because of the potential benefits that should accrue to the Postal Service, Bank One, and the mailing community as a whole. The Commission expects that the agreement has been providing these benefits since its implementation on April 1, 2005, and should continue to be beneficial regardless of the guidance issued by the Commission on uncapped volume-based discounts.

Making the Bank One agreement the focal point in providing general guidance on uncapped volume-based discounts appears likely to place an inequitable burden on Bank One. In developing guidance, Bank One could be required to provide information that may or may not ever be relevant to the guidance that is finally adopted. This also could unnecessarily require Bank One to provide information that it otherwise would be reluctant to provide when there is no assurance that the result will be of benefit. There is no indication of whether Bank One is willing to accept this burden. It appears a more judicious use of Bank One's and the Postal Service's resources to have them first assist in the development of the general guidance to be provided by the Commission, and then evaluate whether or not it is appropriate or beneficial to apply this guidance to the Bank One Negotiated Service Agreement. If it appears advantageous, the Postal Service can request a modification of the agreement on an expedited schedule. The Commission has issued rules for this purpose, which are intended to streamline requests to consider modifications to ongoing Negotiated Service Agreements.

Adequacy of Notice. It is extremely important that adequate notice be given before the Commission considers potential rules applicable to groundbreaking issues. The benefits of addressing the Governors' concerns in a new, distinct docket rather than as part of a reconsideration of a functionally equivalent Negotiated Service Agreement are heightened because a request for a functionally equivalent Negotiated Service Agreement is meant to send a clear signal that no new major issues are present in the request. Potential participants may therefore forego intervention, secure in the knowledge that all major issues can be assumed to have been resolved in the baseline case.

The Commission has promulgated distinct procedural rules to be employed in the review of Postal Service Requests for new baseline Negotiated Service Agreements, and subsequent similar functionally equivalent Negotiated Service Agreements. Additionally, there are separate rules applicable to requests to renew and amend or modify existing agreements. The distinctions among the filing categories is important because of the clear signal that each category is intended to send, and the effect that

each category has in regard to the rights of potential intervenors. In the context of this docket, the distinction between a new baseline proposal and a functionally equivalent filing is relevant and weighs on the procedure to be employed to reconsider the request submitted by the Postal Service.

Requests predicated on any style of Negotiated Service Agreement may be filed under the rule for a new baseline agreement. This rule is designed for comprehensive review of agreements that include elements of first impression before the Commission, although it also may be employed where no new issues are present. The clear signal that potential intervenors receive from a filing under this rule is that the request might include new issues that previously have not been considered. Thus, potential intervenors are on notice that new precedent might be established. The Postal Service did not file its Bank One request under this rule.¹¹

Requests predicated on Negotiated Service Agreements that are “equivalent” to previously recommended baseline Negotiated Service Agreements may be filed under the rule for functionally equivalent agreements. A two-part literal and substantive test is outlined in the rulemaking pertaining to the rule applicable to functionally equivalent agreements, which has been employed in every functionally equivalent case thus far. See PRC Order No. 1391. The Commission accommodates variances in terms and conditions between the baseline and the subsequent functionally equivalent agreements.¹² However, the clear signal that potential intervenors should receive from a filing under this rule is that a functionally equivalent request does not contain issues of first impression. This signal has important notice and due process implications.

The primary purposes of the functionally equivalent rule are to reduce procedural burdens and expedite the proceeding relative to a de novo review of a new or unique baseline agreement. Expedition is accomplished by allowing the co-proponents of the

¹¹ Although the Commission considers the Capital One Negotiated Service Agreement as a baseline agreement, the rule for filing as a new baseline agreement was promulgated after the conclusion of the Capital One docket.

¹² As the differences increase, the applicability of the functionally equivalent rule becomes more questionable.

request to rely on the record and associated findings and conclusions from recently concluded dockets (primarily the baseline docket) to support the functionally equivalent request without having to re-litigate recently settled issues.

The temptation to request consideration of a new, groundbreaking Negotiated Service Agreement under the rule for a functional equivalent agreement predominately for the purpose of expedition must be avoided. The signal that a request does not contain major issues of first impression must be believable. Otherwise, potential intervenors may not intervene, and could allege inadequate notice if new issues are present.¹³

An integral element of the Capital One, and all subsequent agreements, has been an electronic address correction cost savings element. Over \$13 million of the estimated \$15 million benefit to the Postal Service was projected to result from cost savings.¹⁴

In the Capital One case, the Commission found it necessary to protect mailers not party to the agreement from potential harm resulting from questionable volume estimates. In that case, the Commission recommended a stop-loss cap tying the potential level of cost savings to the maximum level of volume discounts. A stop-loss cap is not a necessary protective mechanism for recommendation of a Negotiated Service Agreement. However, if the risk that the stop-loss cap is meant to address is present, a stop-loss cap or an equivalent alternative mechanism would be required to obtain a positive recommendation. The Commission finds that a proposal for a savings-based agreement, such as at the Capital One agreement, is fundamentally different from a proposal for a “pure” volume-based agreement.

A significant focus of both the Governors’ Decision and the Postal Service’s Memorandum is the need for Commission guidance on the acceptability of volume-

¹³ Expecting every party that might be affected by some sort of Negotiated Service Agreement to intervene in every case is expensive and wasteful. The Commission is trying to develop rules to simplify and expedite its processes.

¹⁴ \$13,094,00 cost savings compared with \$1,846,000 added contribution. Docket No. MC2002-2, USPS-T-3, Attachment B.

based discount agreements that do not rely on a cost-savings element. The Commission interprets this as a request to address the potential for agreements that may not even include a cost-savings element. This style of agreement would be fundamentally different from the Capital One agreement and would have to be considered as a new baseline agreement. The rule for functionally equivalent requests would not be applicable. An associated issue will be whether the risks inherent in a pure volume-based discount can be ameliorated satisfactorily through mechanisms other than a stop-loss cap.

Consideration of an uncapped volume-based discount request is outside the scope of agreements proffered as functionally equivalent to the Capital One baseline. Such an agreement might be feasible for mail in any class, and it is probable that persons that have not intervened in the Bank One case might have significant interest in an uncapped volume-based discount element. This potential notice issue is further reason that consideration of guidance for the Governors on these issues should be considered separately.

Ongoing Omnibus Rate Case. Most participants, the co-proponents, OCA, and the Commission, are significantly involved with the pending omnibus rate case. This places many resource and time constraints on everyone and certainly influences the fairness of requiring the consideration of a theoretical issue as important as volume-based discounts in the context of considering the relatively limited issues directly associated with the reconsideration.

The time constraints of the omnibus rate case already have delayed reconsideration of this case. Three months elapsed between the Governors' Decision and the filing of the Postal Service Memorandum due to the pressing needs of the omnibus rate case on Postal Service personnel.

Separation of the theoretical issues from those directly related to the Bank One agreement will divide the work load. It will allow reconsideration issues to be placed on a faster track, and enable all interested parties to thoughtfully address the theoretical issues.

Modified Stipulation and Agreement. The Postal Service proffered new material after most participants agreed to a Modified Stipulation and Agreement filed on October 5, 2004. Paragraph 10 of that agreement specifies the limited circumstances in which future pleadings may be filed. This effectively ended the signatories' adversarial role in this case. The Commission is concerned that the participants that signed the Modified Stipulation and Agreement may be inhibited from fully litigating all issues presented upon reconsideration within the context of the instant docket. Separating the uncapped volume-based discount issue from the reconsideration allows all participants to fully address all issues without regard to their status or obligations as signatories.

Discussion of Risk. The Commission recommended a stop-loss cap to bring the risks associated with potentially inaccurate volume projections to within an acceptable range. If these risks materialize, mailers not party to the agreement could be subject to harm. The Commission cannot eliminate all risks from Negotiated Service Agreements, and the Commission does not expect that Negotiated Service Agreements will be risk-free. However, if an unreasonably significant risk is identified that could cause harm to the Postal Service and/or its customers, the Commission would be remiss if it did not condition its recommendation on the addition of an applicable risk control device.

In the Bank One case, the Commission only took specific action to address one risk — potentially inaccurate volume projections. Many other risks are present within the Bank One agreement, for example: the risks associated with the implementation of PARS; misestimations of forwarding and return rates; changes in Bank One's business plans; mergers, acquisitions and portfolio changes; and myriad exogenous factors related to the nation's economy, among others. In some areas, the Commission commented on the effectiveness of the risk reduction provisions already included in the agreement, but did not find that the agreement warranted change. For example, the effectiveness of the trigger mechanism described in the Modified Stipulation and Agreement was questioned, and the end result of the J.P. Morgan Chase merger is still an unknown even with the included mergers and acquisition clauses.

The Commission considers the analysis of risk as an important consideration in recommending Negotiated Service Agreements. This consideration is magnified where monopoly products are involved. If a specific risk that would jeopardize a favorable recommendation cannot be eliminated, it must at least be quantified and controlled. The stop-loss cap fulfills this role in addressing an identified specific risk.

The Commission will entertain comments on this issue as part of the reconsideration.

The Impact of Proposed Settlements on Commission Decisions

The Governors request that the Commission provide comments on the role of settlement in uncontested Negotiated Service Agreement cases. The Governors seek clarification “whether, as a policy matter, [the Commission] disfavors settlements in functionally equivalent NSAs.” If so, the Governors ask the Commission to reconsider such a policy. Governors’ Decision at 9.

The Commission has a longstanding policy favoring the settlement of important issues through negotiations among participants, independent of Commission action. The settlement process allows participants to formulate proposals that represent a consensus as to the optimum approach to resolve contested issues. The settlement proposals that are generated facilitate the Commission’s independent decision making process by informing the Commission of approaches to resolving contested issues that have been thoroughly considered and have the support of the participants agreeing to the settlement.

The settlement of contested issues facilitates the Commission’s review of Postal Service requests because of its inherent efficiency and cost effectiveness. If settlement resolves all factual issues, whole portions of the hearing process may be eliminated. Settlements may obviate the need for rebuttal and surrebuttal testimony and the related discovery process, providing a substantial cost benefit to the participants. This also will preserve the Commission’s resources and allow the Commission to make decisions in a

more timely fashion as the procedural schedule will not have to accommodate the eliminated tasks.

The negotiation process can be beneficial even where the settlement of specific issues is not anticipated. Early in a case, participants may utilize the negotiation process to flesh out each participant's positions on important issues. The information gained can be used to limit the issues that must be brought before the Commission. If the absence of contested issues is discovered, the case can be brought to a rapid conclusion saving everybody the time and expense of litigation.

The Commission is proactive in facilitating the negotiation process, with a goal of encouraging participants to settle issues on their own. The Commission believes that participants have been particularly successful in negotiating the resolution of potential discovery disputes. The Commission also consistently approves requests to appoint settlement coordinators and hold formal settlement conferences, and it facilitates formal settlement conferences by making Commission facilities and equipment available for use by the participants.

The Commission policy favoring settlement is consistent with that of courts in other areas of the law. Case law is replete with examples of the courts favoring settlements in many different contexts. For instance, in *D.H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971) the court states: "Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits." In *Pfizer Inc. v. W. Lord*, 456 F.2d 532, 543 (8th Cir. 1972) the court stated: "The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto."

Statutory policy also favors the independent settlement of issues. The Administrative Procedure Act (APA), 5 USCA § 554(c) directs agencies to provide opportunities for settlement.

The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the

public interest permit; and (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

The Commission follows this direction in its rules: “Any participant in a proceeding may submit offers of settlement or proposals of adjustment at any time and may request a conference between the participants to consider such offers or proposals.” 39 U.S.C. § 3001.29.

The Commission has authorized settlement negotiations and assigned the Postal Service to be settlement coordinator when functionally equivalent Negotiated Service Agreements have been proposed. The Commission believes in the benefits of participants resolving issues on their own. In no instance has the Commission hampered the negotiation process, or discouraged attempts at settlement.

The Commission has commented on one instance where it is not helpful to file a Stipulation and Agreement at the conclusion of the settlement negotiation process. This is where the Stipulation and Agreement does not resolve any issues, but merely is used as a procedural mechanism to signal the Commission that no issues exist so that the Commission can proceed to making its recommendation. The filing of a Stipulation and Agreement in this instance may prolong the procedural schedule. In such circumstances, a simple notice that the participants have no disputes may be preferable.

Filing a request under the functionally equivalent Negotiated Service Agreement rules signals the Commission and prospective participants that in important respects, the new request is similar to the baseline case. The rules governing functionally equivalent Negotiated Service Agreement requests are designed to allow a decision to be issued on an expedited basis. If no issues, or potential issues, are brought to the Commission’s attention by the time of the prehearing conference, the Commission will proceed directly to developing its recommendation.¹⁵ If there are areas of dispute, a

¹⁵ The option to file briefs can be discussed at this time if necessary.

Stipulation and Agreement may resolve some or all of those issues to the satisfaction of participants, and facilitate the Commission's decision.

The Commission seriously considers all settlement proposals when making its recommendation to the Governors. When a settlement proposal is presented to the Commission, it is considered as a proposal on the merits. The Commission strives to preserve the intent of the proposals and the suggestions of the participants, and only make adjustments where necessary. If a settlement proposal is deficient only in some limited way, the Commission's preference is to accept the proposal with adjustments to remedy the deficiencies.

Notwithstanding Commission policy to favor the participants' settlement of contested issues, two absolute requirements must be met before a settlement can be accepted. First, a settlement must be consistent with applicable statutory requirements, and second, a settlement must be consistent with the evidentiary record.

Courts demand that in the administrative setting, settlements must adhere to statutory requirements. For example, in *Continental Oil Company v. Federal Power Commission*, 373 F.2d 96, 100 (10th Cir. 1967) the court explains: "But settlement agreements are encouraged for the very purpose of setting rights, providing for stability in the exercise of those rights, and, unless such agreements run afoul of the Natural Gas Act or the public good, should be interpreted to accomplish the clear and stated purpose contained therein." Similarly, in *United States v. Fort James Operating Company*, 313 F.Supp.2d 902, 906 (D.Wis. 2004) the court explains: "It is well settled that in reviewing a CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act] consent decree, a district court must satisfy itself that the settlement is reasonable, fair, and consistent with the statutory purposes of CERCLA."

The requirement that settlements reflect the record flows from the requirement that Commission recommendations be based on the record. See 5 U.S.C. § 556. The Governors recognize the Commission's responsibility to assure compliance with the Act, and to base its recommendations on the record.

We fully appreciate that the Commission is not bound by such settlement agreements, but that it must independently recommend changes based on the record and its own interpretation of statutory and other requirements.

Governors' Decision at 16.

At the same time, in regard to the Bank One case, the Governors believe the Commission should have been persuaded by the collective judgment of the signatories to the Modified Stipulation and Agreement. Ibid.

The Commission agrees with the Governors that the level of support a settlement proposal receives is an important factor for the Commission to weigh; however, Commission responsibilities are prescribed by law and the number of signatories to an agreement does not surmount either a violation of statute or inconsistency with the evidentiary record. The Commission has to review every settlement proposal on its own merits.

The Commission considered the proposed stipulation presented in the Bank One case as a most positive development that assisted the Commission in recommending approval of a Negotiated Service Agreement.¹⁶ The Stipulation and Agreement included a trigger mechanism developed by the signatories to protect the Postal Service and other ratepayers from the risk of receiving less contribution from First-Class mailpieces sent at a discount than would have been received if the same mailpieces had been sent as Standard Mail, based upon errors in estimating forwarding, return, and ACS return rates. This was a unique risk identified and addressed solely by the participants in this case. The Stipulation and Agreement further proposed modifications to the data collection plan, and requested that the Commission not impose a stop-loss cap, as it had done in the baseline case.

The Commission incorporated the proposed trigger mechanism and the modifications to the data collection plan into its recommendation, but it could not adopt

¹⁶ There actually were two stipulations and agreements presented to the Commission. The Commission treated the first stipulation and agreement as superseded by the second because both stipulations and agreements dealt with the same issues, and the second stipulation and agreement was unopposed thus demonstrating broader support.

the request to forego the addition of a stop-loss cap.¹⁷ The incorporation of the trigger mechanism and the modifications to the data collection plan resolved two issues important to the signatories to the Stipulation and Agreement based on their preferences. The Commission found these additions to the initial request appropriate.

As discussed in the December 17, 2004 opinion, the Commission concluded that without the addition of the stop-loss cap, the Bank One agreement would not be in compliance with the requirements of the Act.¹⁸ This finding was consistent with Commission precedent. Thus, despite the suggestion of the signatories, a stop-loss cap was included in order to permit a favorable recommendation.¹⁹

Even where a proposed Stipulation and Agreement purports to resolve all issues, the Commission may be required to address issues not considered by the participants. The Commission also recommended additional modifications to the data collection plan and the Domestic Mail Classification Schedule (DMCS) that were not addressed in the Stipulation and Agreement. The data collection plan was modified to conform with the Commission's Negotiated Service Agreement rules, and to provide the data necessary to implement the proposed trigger mechanism. The DMCS was modified to conform with Commission practice as well as to require a stop-loss cap.

The Commission views the development of mutually beneficial Negotiated Service Agreements as evolving successfully. New proposals have included increasingly effective provisions to limit risk and account for unforeseen circumstances. The Bank One negotiation process, including the Stipulation and Agreement, is an excellent example of this progress. The participants identified and addressed a risk issue important to their acceptance of the request. The participants did not need to answer discovery requests or file rebuttal testimony in what could have been a highly contested case. The Postal Service did not need to file surrebuttal testimony. These

¹⁷ A stop-loss cap protects against risks associated with the loss of revenue from discounts on mail that would have been sent without the agreement, a distinctly different risk than addressed by the proposed trigger mechanism.

¹⁸ Commission's Opinion at paras. 6014-15, 6037 and 6066-67.

¹⁹ This issue will be the focus of the reconsideration requested by the Governors, and the Commission will re-evaluate the record after soliciting additional comments from participants.

circumstances allowed the Commission to expedite its recommendation. Finally, the development of the direct case provided a record which was adequate upon which to base a *favorable* recommendation. In future cases, the Commission will continue its support of participants independently negotiating solutions to issues that arise in regard to Postal Service requests.

It is ordered:

1. Motion for Leave to File Out of Time the United States Postal Service's Memorandum on Reconsideration, May 16, 2005, is granted.
2. Comments in regard to the reconsideration of the Docket No. MC2004-3 Opinion and Recommended Decision Approving Negotiated Service Agreement based on the record developed in that docket shall be filed no later than September 16, 2005. Reply comments shall be filed no later than September 30, 2005.

By the Commission
(SEAL)

Steven W. Williams
Secretary