Postal Rate Commission
Submitted 9/27/2005 1:49 pm
Filing ID: 46925
Accepted 9/27/2005

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

NOTICE OF INQUIRY NO. 1 REGARDING STATUS OF SETTLEMENT AGREEMENT

(Issued September 27, 2005)

A Modified Stipulation and Agreement (Agreement) was filed on October 5, 2004.[1] It was offered as a negotiated settlement of all issues in this docket. The Agreement was signed by a majority of the participants and was otherwise unopposed. The Commission incorporated select provisions of the Agreement into its Opinion and Recommended Decision Approving Negotiated Service Agreement, but the Agreement did not form the basis of its opinion and recommended decision.[2] The Governors accepted the Commission's recommendation and the Negotiated Service Agreement became effective April 1, 2005.[3] At the same time, the Governors' Decision announced

[1] The Commission considered an earlier filed Stipulation and Agreement filed on September 15, 2004, as superseded by the Modified Stipulation and Agreement filed on October 5, 2004, and thus moot.

[2] Opinion and Recommended Decision Approving Negotiated Service Agreement, December 17, 2004.

[3] 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).

the Postal Service would seek reconsideration on the Commission's finding that a stop-loss cap was necessary, among other requests for clarification and further explanation.

The Governors also requested that the Commission comment on the applicable evidentiary standard that must be met to substantiate a volume-based discount provision without the application of a stop-loss cap, the role of settlement in uncontested cases, and the level of risk associated with Negotiated Service Agreements. Although these issues are related to the Bank One reconsideration, their significance extends beyond the limited nature of the Bank One reconsideration.

On March 7, 2005, the Postal Service filed United States Postal Service Motion for Leave to File Memorandum on Reconsideration and for Proposed Procedures. The procedures proposed by the Postal Service recognized the significance that reconsideration may have upon future Negotiated Service Agreement cases, and anticipated the need to solicit comments from interested parties. The Postal Service filed its memorandum in support of reconsideration on May 16, 2005.[4] The Memorandum included an Appendix, and the sworn declarations of Michael K. Plunkett, John P. Matthews, and Samuel C. Hadaway, Ph.D. These materials addressed standards for evaluating agreements such as the Bank One Negotiated Service Agreement generally, for the purpose of developing guidance on the showing needed to support future proposed agreements.

Initially, the Governors expressed an expectation that the evidentiary record would not have to be reopened for the Commission to reconsider the issues posed by the Governors. However, the Postal Service noted that the Commission could conclude that the Commission should not rely on the material contained in its Memorandum unless it is incorporated as evidence and subject to adversarial testing. The Postal Service now represents that the Office of the Board of Governors would not object to reopening the record for that limited purpose.[5]

---

[4] United States Postal Service Memorandum on Reconsideration, May 16, 2005; United States Postal Service Revised Memorandum on Reconsideration, May 18, 2005; Revised Declaration of Michael K. Plunkett, May 18, 2005 (Memorandum).

[5] Memorandum at 9-10.

The Commission established a procedural framework to address the complex mix of issues raised by the Governors and the Postal Service. See Order No. 1443, issued August 23, 2005. The Commission had to consider several factors when establishing this procedure. The Memorandum contains extra-record material which has not been subject to adversarial review.[6] This material has the characteristics of testimony, and would have to be entered into the record if it were to be considered in the Commission's reconsideration. Many of the participants have signed a settlement agreement. These participants may be inhibited from actively considering any new material presented to the Commission, either directly related to the reconsideration or on any novel issues. The novel issues may be of interest to numerous persons who are not participants in the instant docket. This raises due process and adequacy of notice concerns if issues that reach beyond the Bank One reconsideration are considered.

To address these issues, and others, the Commission adopted an approach to consider the issues related to reconsideration of the Bank One decision separately from the novel issues applicable to future requests. The Commission established comment and reply comment periods for interested participants to address issues relevant to reconsideration based on the existing record.[7] The Commission further stated that it would address the novel uncapped volume-based discount issues in a future rulemaking.

On September 14, 2005, J.P. Morgan Chase & Co. (Chase) filed a petition to reopen the record.[8] Chase argues that it has been denied due process, and unless it has a timely opportunity to supplement the record, a profound injustice will result. It proposes to supplement the record by entering data on actual Chase, heritage-Chase, and heritage-Bank One mail volumes, the material contained in the Postal Service

---

[6] The Commission's preliminary review found the supplemental material to be general in nature. It appeared more directed at the broader issue of uncapped volume-based discounts. Order No. 1443 at 6-7, 8.

[7] The filing of initial and reply comments has been stayed until consideration is given to the J.P. Morgan Chase & Co. to Reopen Record, September 14, 2005 (Petition). P.O. Ruling No. MC2004-3/9.

[8] Bank One Corporation, the original party in this case, merged with J.P. Morgan Chase & Co. on July 1, 2004. The merged entity now refers to itself as J.P. Morgan Chase & Co.

Memorandum, and any further testimony offered by the proponents of the agreement.[9] Reopening the record opens the possibility of discovery on the new material and how it influences the existing record, and to rebuttal testimony.

Chase asserts that "[b]ecause all of the active participants in the case signed the Stipulation, as a practical matter the only entity likely to seek discovery of the supplemental testimony is the Commission itself."[10] The Commission previously discussed a concern "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."[11] Chase contends that [i]n fact, the signatories to the Stipulation *should be* inhibited." It argues: "Chase and the USPS are not proposing to alter the terms of their proposal, and thus are entitled to expect the other settling parties to honor their agreement."[12]

In light of the foregoing events, the Commission is seeking comments as to the status of the settlement agreement, and further background information necessary to evaluate the Chase petition to reopen the record. Parties are invited to comment on the following questions. Questions 1 through 4 are directed to Chase and the Postal Service. Questions 5 through 9 may be of interest to all participants, and to interested persons who have not intervened in the Bank One case.

---

[9] Chase provides varying descriptions of the proposed supplemental materials to be entered into the record. In the Petition, page 18, Chase proposes the supplemental testimony of Michael Plunkett dated May 16, 2005, and data on actual Chase mail volumes. In the Petition, page 19, Chase adds: "and any further testimony offered by the NSA proponents[.]" In the Petition, pages 20-21, Chase discusses actual data on the effect on the 2004 Chase/Bank One merger, evidence on heritage-Chase volumes both pre-merger and immediately post-merger, and historical heritage-Bank One volumes. In the Petition, page 32, Chase cites the supplemental material submitted by the Postal Service on May 16, 2005, and supplemental data from Chase on the recent actual volumes of heritage-Chase and heritage-Bank One mail.

[10] Petition at 24.

[11] PRC Order No. 1443 at 13.

[12] Petition at 25.

1. Chase proposes to sponsor new Chase, heritage-Chase, and heritage-Bank One volume estimates to be entered into the record. Please fully describe the proposed new volume data to be provided, including applicable time frames, and levels of disaggregation. Does Chase contemplate sponsoring additional testimony, for example testimony to explain the volume data? Because this information will be used to supplement the co-proponents' direct case, rule 192(b) requires the Postal Service to affirm that it has reviewed such testimony (and supplemental volume data) and that such testimony may be relied upon in presentation of the Postal Service's direct case. What is the status of the Postal Service's review?

2. A timeline demonstrating when this volume information for the Chase, heritage-Bank One, and heritage-Chase entities became available is necessary to analyze due process arguments made by Chase. Please provide a timeline that sets forth dates for the following events: (1) the first public notice of the intent to merge Bank One and J.P. Morgan Chase & Co.; (2) the final regulatory approval of the proposed merger (which hindered disclosure of information as referred to by Chase);[13] (3) consummation of the merger; (4) removal of legal impediments hindering disclosure of information as referred to by Chase;[14] (5) actual availability of volume information that could be disclosed (this may require multiple dates for various information, or provision of preliminary versus final information, etc.); (6) knowledge that the Postal Service would independently evaluate Bank One and/or Chase volume estimates; (7) Chase knowledge of the existence of the Plunkett declaration; and (8) any other dates that might be important for the Commission to consider.

---

[13] Id. at 5-6.

[14] Id. at 21.

3. Chase has indicated that it desires to reopen the record to incorporate various materials that are under the control of the Postal Service. Chase first refers only to the Plunkett declaration, and then it refers to the supplemental material submitted by the Postal Service on May 16, 2005. Does the Postal Service intend to sponsor any of this material as testimony? Does the Postal Service intend on sponsoring any further testimony; for example, an analysis of the new Chase volume data?

4. Chase is proposing to provide new volume data. At the same time the Commission is being asked to reevaluate the necessity of a stop-loss cap. To reevaluate the necessity for a stop-loss cap in light of new volume data, it is necessary to have current information on any adjustments to the volume thresholds that have been made or that are planned, but yet to be implemented. For this question, "Chase" refers to Chase, heritage-Bank One, and heritage-Chase.

   a. Please provide a copy of all documentation specifying the estimated volume allocation by quarter, as referenced in the Negotiated Service Agreement contract paragraph III.E, provided to the Postal Service by Chase. At what levels by quarter (provide applicable dates) has the Postal Service set volume thresholds in response to this information?

   b. Has the Postal Service made, or does it possess information indicating that it will need to make, an annual threshold adjustment as referenced in the Negotiated Service Agreement contract paragraph III.F. If applicable, please provide the proposed or adjusted threshold levels, the proposed or actual implementation dates, and all supporting volume figures and calculations used to determine the proposed or adjusted threshold levels.

c. Has Chase notified the Postal Service of a merger, acquisition, or purchase of portfolio triggering the requirements of Negotiated Service Agreement contract paragraph IV.A? If applicable, please provide all Chase notices demonstrating compliance with the requirements of Negotiated Service Agreement contract paragraph IV.A.2. If applicable, please provide the proposed or adjusted threshold levels, the proposed or actual implementation dates, and all supporting volume figures and calculations used to determine the proposed or adjusted threshold levels.

d. Has Chase notified the Postal Service of a merger or acquisition triggering the requirements of Negotiated Service Agreement contract paragraph IV.B? If applicable, please provide all Chase notices demonstrating compliance with the requirements of Negotiated Service Agreement contract paragraph IV.B.1. If applicable, please provide the proposed or adjusted threshold levels, the proposed or actual implementation dates, the proposed or actual integration dates, and all supporting volume figures and calculations used to determine the proposed or adjusted threshold levels.

e. Has Chase notified the Postal Service of a loss or sale of a portfolio triggering the requirements of Negotiated Service Agreement contract paragraph IV.C? If applicable, please provide all Chase notices demonstrating compliance with the requirements of Negotiated Service Agreement contract paragraph IV.C.2. Please provide the proposed or adjusted threshold levels, the proposed or actual implementation dates, and all supporting volume figures and calculations used to determine the proposed or adjusted threshold levels, if applicable.

5. The Postal Service filed its Memorandum and the attached material with an intent to formulate guidance for Bank One and future Negotiated Service Agreements, i.e., effectively establishing a precedent for review of volume-based Negotiated Service Agreements. The Postal Service has anticipated the need to solicit comments on this material. The Chase position is that the signators of the settlement agreement should be inhibited from commenting on this material if it is accepted into the record.

   The participants that have signed the Modified Stipulation and Agreement have agreed: "to the extent that matters presented in the Postal Service/Bank One Request, in any Commission Recommended Decision on that Request, or in any decision of the Governors of the Postal Service in this docket, have not actually been litigated, the resolution of such matters will not be entitled to precedential effect in any other proceeding." Agreement at para. 14. Because the Commission believes that similarly situated mailers should be allowed an opportunity to participate in Negotiated Service Agreements under similar terms and conditions, whatever recommendations the Commission makes in one case has precedential value in the next case.

   a. How do the participants who signed the settlement agreement view the status of the settlement agreement in light of (1) the Chase petition to reopen the record, (2) the issues outlined above, including the potential for establishing precedent, and (3) paragraphs 9 and 10 of the settlement

agreement which specify the record upon which the agreement is based, and the limitations on filing further pleadings or testimony?[15]

b. How should the Commission balance any due process rights available to the settlement participants to subject new testimony to adversarial testing, and the commitments made by the settlement participants in the settlement agreement?

6. The Commission has noted, in PRC Order No. 1443, that adequacy of notice is an extremely important issue especially where a request has been filed under expedited rules for functionally equivalent agreements. The functionally equivalent rules are meant to send a clear signal that no new major issues are present in the request. Reopening the record opens the possibility for consideration of novel issues related to pure volume-based discount Negotiated Service Agreements. Interested persons who have not intervened in this docket potentially may allege that inadequate notice has been provided to alert them to the existence of novel and precedent setting issues. How should the Commission view this potential problem, and what possible steps can the Commission take to alleviate this situation?

---

[15] The undersigned participants agree that the direct testimony and designated written cross-examination of the Postal Service, Bank One, and their witnesses provide substantial evidence supporting and justifying a Recommended Decision recommending the rate and classification changes proposed by the Postal Service and Bank One in this docket, as reflected in the proposed DMCS language and rate schedule attached hereto as Attachments A and B, respectively. On the basis of this record, for this proceeding only, the undersigned participants stipulate and agree that the experimental DMCS and Rate Schedule changes set forth in Attachments A and B to this Stipulation and Agreement comply with the polices of Title 39, United States Code, and in particular, the criteria and factors of 39 U.S.C. §§ 3622 and 3623. The undersigned parties also agree that the Bank One NSA is functionally equivalent to the NSA in Docket No. MC2002-2 (Capital One NSA). Id. at para. 9.

This Stipulation and Agreement is offered in total and final settlement of this proceeding. The undersigned participants agree not to file any further pleadings or testimony with the Commission in this proceeding, except for: (a) pleadings or testimony explicitly requested by the Commission or in reply to such pleadings; (b) pleadings or testimony opposing pleadings or testimony filed in opposition to this Stipulation and Agreement; or (c) pleadings, testimony or comments in support of this Stipulation and Agreement. Id. at para. 10.

7. The Bank One Negotiated Service Agreement is based on a declining block rate volume discount element and an address correction cost savings element. The Bank One Negotiated Service Agreement request was filed as an agreement functionally equivalent to the Capital One Negotiated Service Agreement, which also included volume discount and cost savings elements. The Bank One record was developed considering both elements. Reopening the Bank One record potentially will lead to the consideration of issues directly related to Negotiated Service Agreements based solely on pure volume-based discounts. Given this potential, both participants and interested persons who have not intervened in this docket are invited to comment on the use of the Bank One docket to potentially decide issues related to Negotiated Service Agreements based solely on pure volume-based discounts.

8. The Commission realizes that until the Postal Service and Chase actually present new data and/or testimony it may not be possible for a participant to evaluate whether it will conduct discovery or file rebuttal testimony. Given this limitation, participants are invited to comment on any plans or considerations for discovery and/or rebuttal testimony.

9. The Commission invites comments on possible improvements and/or changes to the procedural framework detailed in PRC Order No. 1443. Comments will be considered that either include the reopening of the record, or base the reconsideration on the existing record.

Participants are invited to submit comments on these issues on or before October 14, 2005. Reply comments may be submitted on or before October 24, 2005.[16] Because several questions encompass issues that exceed the scope of the Bank One case, comments and reply comments also will be entertained from interested persons who have chosen not to intervene in the Bank One docket.

By the Commission.
(S E A L)

Steven W. Williams
Secretary

[16] Paragraph 10 of the Modified Stipulation and Agreement provides an exception to the prohibition of filing further pleadings which allows participants to file pleadings or testimony explicitly requested by the Commission or in reply to such pleadings.