

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

RATE AND SERVICE CHANGES TO)
IMPLEMENT FUNCTIONALLY EQUIVALENT) Docket No. MC2004-4
NEGOTIATED SERVICE AGREEMENT WITH)
DISCOVER FINANCIAL SERVICES, INC.)

REPLY BRIEF

OF

VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.

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September 15, 2004

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INTRODUCTION

Pursuant to Presiding Officer's Ruling ("POR") No. MC2004-4/3, on September 8, 2004, five parties filed initial briefs in this docket: American Bankers Association; Discover Financial Services, Inc. ("DFS"); Office of the Consumer Advocate ("OCA"); United States Postal Service; and Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. ("Valpak").

This Reply Brief responds only to certain arguments advanced by the DFS Initial Brief with regard to how the Commission should analyze the proposed Negotiated Service Agreement ("NSA").

ARGUMENT

Based on its initial brief, it seems fair to describe DFS's view of the role of the Commission in a functionally equivalent NSA as follows: the Commission should defer to the position of the co-proponents and approve the NSA. The Commission is urged not only to defer to the Postal Service, but also asked to defer to the mailer involved. At one point, DFS even argues that the Commission should defer to DFS' legal opinion on the central issues of the docket. ("The Commission should give deference to DFS' Views of What Constitutes Competitive Parity and Should Approve Its Negotiated Cap," DFS Initial Brief at 20.) DFS argues that the Commission should not "override reasonable negotiated provisions" (*id.* at 3). But whether the co-proponents' assumptions are reasonable is among the very matters for the Commission to resolve in a proposed NSA. Although Valpak does not in principle oppose this NSA, surely the Commission's central statutory obligation under 39 U.S.C. sections 3622 and 3623 is not to turn a blind eye to every assumption that underlies the NSA, but to use its technical expertise to analyze and evaluate the proposal, and to issue its own reasoned opinion and recommended decision.

DFS argues (DFS Initial Brief at 1) that the case should be resolved with great "speed" and "economy," and that the proposal is "not complicated" (*id.* at 4). If this docket was so uncomplicated, it is unclear why the Postal Service's testimony setting out its final financial projections had to be revised on the eve of the deadline for initial briefs on September 8, 2004. *See* Notice of Errata to Direct Testimony of Ali Ayub, USPS-T-1, filed September 2, 2004, and Notice of Second Errata to Direct Testimony

of Ali Ayub, USPS-T-1, filed September 3, 2004. It also is unclear how such an uncomplicated case could have been the subject of the following series of negotiations, as described by DFS:

The negotiation of this contract took almost two years from start to finish, involved many phone calls, countless emails, and a number of face-to-face meetings. The course of the negotiations took several turns and a number of issues were considered. As in all bargaining, some propositions were accepted, some were rejected, some were countered, and some of the counters were in turn countered. Ultimately, there were compromises and rebalances. [DFS Initial Brief at 7.]

It should have been no surprise to DFS that Valpak, OCA, and the Commission have needed some time to understand a proposal that took almost two years to develop.

The three issues that the Commission must consider and decide in this proposed functionally-equivalent NSA are those set out in Commission Rule 196(a)(6).¹ See POR No. MC2004-4/2, p. 6. DFS seems to argue that the financial impact on the Postal Service (criterion (i)) and fairness to other mailers (criterion (ii)) tests are met simply by reasserting the claim that the projected net financial impact is a positive \$7.1 million. DFS Initial Brief at 12-14. DFS' reasoning is that if the financial impact of a proposed NSA is alleged to be positive, then it satisfactorily answers the issues concerning financial impact and fairness to competitors. *Id.* Of course, it is the

¹ (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.

reasonableness of the Postal Service's assumptions as to financial impact that the Commission needs to review, to satisfy itself that other mailers are not being disadvantaged. Further, as Valpak pointed out in its Initial Brief, the Commission should satisfy itself that it does not approve marginal rates that knowingly fail to cover attributable costs during the life of the agreement. Valpak Initial Brief at 15.

As to criterion (iii), fairness "to the competitors of the parties to the Negotiated Service Agreement," DFS seems to argue that fairness **to itself** should be the exclusive concern:

The issue at the core of the competitive concern is fairness — the fair and equitable treatment of all competitors, which are by definition similarly situated companies, by the government. DFS's view of a fair and equitable deal *turns on the notion of its ability to receive an opportunity proportionate in size and scope to that which was afforded Capital One, as measured in dollars and cents.* [DFS Initial Brief at 21 (emphasis original).]

As a result, DFS seems to analyze the fairness-to-competitors issue from the perspective of a single competitor of Capital One Services, Inc. ("Capital One") (the baseline NSA) — *i.e.*, DFS. It would appear clear that this is not what the Commission's rule requires. The analysis of fairness to competitors should be from the perspective of the competitors of DFS (one of the "parties to the Negotiated Service Agreement" at issue), not competitors of Capital One (one of the parties to the baseline Negotiated Service Agreement).

If the Commission were to agree with Valpak's concerns, as argued in its initial brief, that there is a substantial risk that the financial effect on the Postal Service, at least at the margin, would be negative, it is submitted that some remedy would need to

be crafted in order to approve the proposed NSA. The issue is not one of deference, but one of the Commission's sound judgment.

Respectfully submitted,

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