

UNITED STATES OF AMERICA
Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Experimental Rate and Service Changes)
To Implement Negotiated Service Agreement)
With Capital One Services, Inc.)

Docket No. MC2002-2

OFFICE OF THE CONSUMER ADVOCATE
REPLY COMMENTS CONCERNING
THE LEGALITY OF THE
CAPITAL ONE NSA
(April 14, 2003)

The Office of Consumer Advocate (OCA) hereby submits comments on the legality of the Capital One negotiated service agreement.

Respectfully submitted,

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Three initial briefs question the authority or wisdom of the Commission's recommending the negotiated service agreement (NSA) at issue in this docket. The Newspaper Association of America (NAA) alleges that the Postal Reorganization Act (Act) prohibits the creation of a classification for a single mailer. Valpak alleges that the specific NSA requested by the Postal Service is unduly preferential. The Greeting Card Association (GCA) argues that the Postal Service has failed to establish that Capital One's mail is so unique as to justify an NSA over a niche classification. The Office of the Consumer Advocate (OCA) respectfully disagrees.

NAA's argument that NSAs are unduly discriminatory¹ is logically deficient. The question of whether a discrimination or preference is *undue* is a factual one. Any classification is discriminatory in that it separates, or discriminates between, categories. Whether a particular classification is *unduly* discriminatory depends on whether there is a rational basis for distinguishing between two categories. Thus, the issue of undue-ness can only be decided in context. It cannot be determined *a priori* that there can never be a rational basis for treating a single mailer differently from all others. Providing a rational basis for an NSA is a burden that falls on the Postal Service. But flatly refusing to give the Postal Service an opportunity to carry its burden would be arbitrary.

¹ "Confining the NSA to a single mailer . . . violates well-established principles of non-discrimination in regulatory law, and Section 403(c) of the Act specifically." Initial Brief of NAA at 29 (April 3, 2003).

Valpak and GCA essentially argue that the Postal Service has failed to carry its burden in the context of the Capital One NSA.² Is there a rational basis for treating Capital One differently from all other mailers? The record establishes why Capital One is so different as to justify separate treatment.

In its initial brief Valpak observes that any mailer can be made to appear unique.³ However, in order to justify a separate classification for a mailer, the Postal Service must show that the mailer is unique in ways that relate to classification criteria. At the most fundamental level, classifications are justified by differences in cost or differences in value of service (*i.e.*, demand). The Commission has recognized this basic principle since its opinion in the first general classification case, Docket No. MC76-5.⁴ Thus, the Commission must find—at a minimum—that Capital One's mail differs in a meaningful way from other mail on the basis of cost or demand. If such a meaningful distinction exists, then a rational basis for separate classification treatment also exists, and claims of *undue* discrimination can be rejected.

Capital One's extensive use of First-Class Mail to solicit new customers has cost and demand consequences that justify separate classification treatment. Capital One is not required to use First Class for its solicitation mailings. Such mailings could be sent

² "Considerations of fairness, the absen[ce] of clear mutual benefits, and the lack of a showing of a relationship between the value proposed to be singularly conferred on COS and the rates proposed all militate against the approval of this NSA." Initial Brief of GCA at 31. "NSAs . . . present risks and potential opportunities to the [Postal] Service, to other NSA parties, and to others who mail and receive First-Class [M]ail." *Id.* at 6 (April 3, 2003). "Valpak believes that this initial NSA violates most of the fundamental principles discussed" in its initial brief. Initial Brief of Valpak at 12 (April 3, 2003). "Valpak is of the view that NSAs, properly designed and implemented, have the potential to give the Postal Service a new mechanism to change mailing practices in ways that would . . . be of mutual benefit to mailers and the Postal Service." *Id.* at 6.

³ "Every major mailer has some characteristic, or combination of characteristics, that distinguishes its mail sufficiently to make it unique." Initial Brief of Valpak at 31 (April 3, 2003).

⁴ "A DMCS should categorize products and services so that those products and services that are likely to bear different rates are clearly distinguished from one another. What characteristics justify

via Standard Mail. The availability of this close substitute implies a higher-than-average elasticity of demand for Capital One's First-Class solicitations. This high elasticity offers the Postal Service an opportunity to generate new volume (and contribution) by offering an optional non-linear tariff to Capital One.

Capital One's extensive use of First-Class Mail for soliciting new customers also affects the Postal Service's costs. Address lists for solicitation purposes tend to generate more forwards and returns. Capital One's First-Class solicitation return percentage is about eight times the average. Because the Postal Service provides free return service in First Class, Capital One imposes higher costs on the Postal Service. These higher costs present the Postal Service with an opportunity to affect mailer behavior and reduce costs, to the benefit of all mailers.

Capital One's singular use of First-Class Mail generates significant cost *and* demand differences that justify separate classification treatment.⁵ If other mailers make similar use of First Class, they will be entitled to seek separate classification treatment under the new DMM regulations appearing in Attachment D of the Stipulation. And the data collected during the three-year experiment will permit more rigorous evaluation of uniqueness in the future. Based on the record of this proceeding, Capital One deserves its own classification for its First-Class solicitation mailings.

different rates? We know of only three: differences in cost, differences in value of service, and statutory command." PRC Op. MC76-5 at 14-15 (November 29, 1978).

⁵ Thus, Valpak's claim that there is "no economic rationale [for] joining the two" elements of the NSA (cost savings and volume discounts) is incorrect. Initial Brief of Valpak at 31 (April 3, 2003). Both opportunities flow from Capital One's extensive use of First-Class Mail for solicitations.