

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

REPLY BRIEF
OF
ALLIANCE OF NONPROFIT MAILERS
DIRECT MARKETING ASSOCIATION, INC.
MAGAZINE PUBLISHERS OF AMERICA, INC.
PARCEL SHIPPERS ASSOCIATION

April 14, 2003

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

As we noted in our initial brief, for the first time the Postal Rate Commission (PRC or the Commission) has the opportunity to consider a request for a change in the mail classification schedule that would implement a negotiated service agreement (NSA). ANM, DMA, MPA, PSA Brief at 1; Request of the United States Postal Service for a Recommended Decision on Classification, Rates and Fees for Capital One Services, Inc. Negotiated Service Agreement (Request). In that brief we also discussed how we believe NSA proposals should be judged and why we thought the record in this docket supported a recommended decision that the proposed NSA be approved.

The Commission concluded in its February 2002 report to Congress that “rate and service agreements [NSAs] agreed upon by the Postal Service and mailers are legally authorized” under certain conditions,¹ a conclusion the Presiding Officer indicated the Commission was prepared to revisit. Tr. 1/8-9. One party, the Newspaper Association of America (NAA), revisited the conclusion with vigor in its initial brief. NAA Brief. This requires reply since NAA’s contention that this NSA and, by implication, all NSAs are not permissible under the Postal Reorganization Act² is incorrect and should be rejected.

The Office of the Consumer Advocate (OCA) played a constructive role in achieving the agreement of many parties to the Stipulation and Agreement in this

¹ Report to the Congress: Authority of the United States Postal Service to Introduce New Products and Services and To Enter Into Rate and Service Agreements With Individual Customers Or Groups Of Customers, Postal Rate Commission (February 2002)(PRC Report).

² Postal Reorganization Act, Public Law 91-375, 84 Stat. 719, 39 U.S.C. §§ 101 et seq. (the Act).

docket. Overly burdensome requirements proposed by the OCA for future NSAs, however, should be rejected.

II. NAA's CONTENTION THAT THIS NSA AND, BY IMPLICATION, ALL NSAs ARE NOT PERMISSIBLE UNDER THE POSTAL REORGANIZATION ACT IS INCORRECT AND SHOULD BE REJECTED

NAA argues that “single customer NSAs are not permissible under the Postal Reorganization Act.” Brief at 4. The broadside of arguments it fires (all of which miss the target), however, appear targeted at NSAs in general. NAA Brief at 2 (“Indeed, the particular proposal in this case illustrates some of the legal, economic, and policy shortcomings of negotiating postal rate and service *deals.*”)(emphasis added); id. at 14 (“NSAs, *including this one*, would violate the ‘simplicity’ requirement of the Act”)(emphasis added). Apparently, NAA believes all NSAs, *including this one*, are bad.

NAA seems concerned that the Commission is being denied its statutory role in this proceeding. “First, the NSA is inconsistent with the structure of the Act, which presupposes that the Commission issues an independent recommendation of rates and classifications, not a review of a deal previously negotiated between the Postal Service and a large customer. That structure leaves no room for negotiated agreements with single mailers.” NAA Brief at 4. This is not the case with this *proposed* NSA. This Request was “reviewed in a public proceeding, as the Reorganization Act requires,” a condition the Commission suggested for a “legally permissible” NSA. PRC Report at 1. This is no different than the process for other rate and classification proposals reviewed by the Commission under the Act. And, since the NSA does not bind the Commission and has no force unless and until the Commission (which may reject it) approves it, the Commission's

independence is unaffected. NAA says “the NSA improperly would substitute negotiating skill for the substantive criteria of the Act.” NAA Brief at 4. This ignores the fact that the Postal Service may, and always has, quite properly negotiated with mailers as a part of formulating its proposals to the PRC. But, the Commission does not negotiate. It applies the substantive criteria of the Act based on record evidence developed in a hearing governed by formal rules of evidence and subject to a prohibition on *ex parte* communications.

NAA correctly points out that “under the Act the Commission affirmatively recommends rates.” NAA Brief at 7. But it then says “[t]he Act does not contemplate that it engage in a *post-hoc* review of negotiated agreement with single mailer [sic].” Ibid. This use of “*post-hoc* review” is patent equivocation since the agreement is without force unless and until the Commission recommends it.

Next, NAA suggests that the rates proposed in this docket would not be set in accordance with the Act. “By its express terms, the Act contemplates that postal rates are set by class and subclass; not by mailer.” NAA Brief at 7. This is a false distinction. There is no rate for any class. The Act requires the application of certain principles *at a classwide level* when rates are set, but this does not alter the fact that individual rates are set for only a fraction of the mail within a subclass and that their level is often determined primarily with reference to factors not distinctive to the subclass (e.g., weight). Rate categories within subclasses are common. “Similarly, Section 3623 refers specifically to ‘classifications’ of mail, and nowhere contemplates a single-customer rate,” says NAA, defining a class in footnote 5 as “a ‘*grouping*’ of mail matter for the purpose of assigning it a specific rate.” NAA

Brief at 7. This is another equivocation. *Class* means *grouping* in that it is a *categorization by type*. Mail *classification* is a *division of the mail into types*, not an *aggregation of mail into types*. NAA describes this proposed NSA as a “classification sleight-of-hand,” which “the courts have already properly rejected,” citing *United Parcel Service, Inc. v. United States Postal Service*, 604 F.2d 1370, 1375-76 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). NAA Brief at 8. That case, however, addressed the purported *unilateral* creation of “experimental” classifications by the Postal Service, without first seeking a recommended decision from the PRC. It is not on point here.

Finally, NAA invokes the notion of “lobbying” as if to suggest that the exercise of that ancient profession is not permissible anywhere in the postal rate arena. “The hearing record in this case makes abundantly clear that the rates that were negotiated in this case – and undoubtedly would be negotiated in any subsequent NSAs – are the product of, well, lobbying in the sense that they are the result of private discussions between postal management and the interested mailer . . . Contract rates would impermissibly resurrect lobbying and influence as major factors in postal ratemaking – practices that the Act was enacted to stop.” NAA Brief at 11-12.

The rates proposed in this docket are, without question, the result of “private discussions” between the parties to the proposed NSA. But private discussions *preceding* the submission of a request for a recommended decision under the Act are nothing new; and they are certainly not prohibited. The rates proposed in the most recent omnibus rate case and probably every rate case going back to postal

reorganization were preceded by private discussions between the Postal Service and its customers. These proposals are then subject to review and challenge on the record under the Act. And those proceedings are protected by *ex parte* rules. The private discussions to which NAA objects are nothing more than mailers making their views known. This has always been a permissible and desirable part of the formulation of Postal Service rate proposals. If NAA's view were correct, there ought to exist a prohibition on *ex parte* communications not just between the PRC and interested parties during a proceeding, and the Governors and interested parties during consideration of a PRC recommended decision, but also between Postal Service management and mailers during the preparation of a rate request. The fact, of course, is there is no such prohibition.

III. OVERLY BURDENSOME REQUIREMENTS FOR FUTURE NSAs SHOULD BE REJECTED.

The Office of the Consumer Advocate played a constructive role in this docket and was instrumental in reaching a Stipulation and Agreement that appears will be endorsed by many parties in this docket, including the sponsors of this brief. However, in some instances the OCA suggests requirements for future NSAs that could be so burdensome or commercially unrealistic as to deter parties from entering into discussions concerning future NSAs. One participant said:

Pitney Bowes respectfully requests that the Commission decline the invitation presented by some parties to recommend unwarranted and unduly burdensome cost and volume projection requirements and other costly requirements that would unnecessarily discourage the use of NSAs. Such requirements could impose transaction costs that outweigh the benefits sought from the NSA and, thus, could inadvertently prejudice small and mid-size mailers for whom such requirements might be disproportionately more burdensome.

Pitney Bowes Brief at 3.

In comments filed on April 3, 2003 (too late to be addressed in initial briefs), the OCA suggests requirements for future NSAs that would be overly and unnecessarily burdensome. It says “[o]ne lesson that can be learned from this proceeding is that complexity breeds opposition.” Office of the Consumer Advocate Comments Concerning Procedures for Future NSAs (April 3, 2003) at 16 (OCA Comments). As long as the same goals can be achieved, we concur that simplicity is preferred over complexity. One part of the OCA’s initial proposal and one of its suggestions to reduce complexity, however, would result in more, not less complexity and unnecessary transaction costs. In this docket, “[t]he OCA went so far as to propose separate classifications for the different elements of the NSA. The OCA suggests that the Commission require the Postal Service to identify separately the service elements of a proposed NSA, to demonstrate the profitability of *each* service element, and to explain precisely why it is advantageous to the Postal Service to bundle service elements.” *Ibid.*

This degree of “complexity” in developing and proposing an NSA is precisely what should be avoided. And, it is not necessary that “*each* service element” demonstrate profitability. To paraphrase the PRC Report, if the “agreed upon rate-and-service changes [as a whole] will work to the mutual benefit of mail users and the postal system as a whole,” that should be sufficient. PRC Report at 1. In fact, requiring each element to break even would likely lead to suboptimal agreements. For example, one could imagine a version of the Capital One NSA that, in order to ensure the profitability of each element, provides a lump-sum

payment to Capital One for accepting electronic returns and a smaller-than-proposed volume discount (or a significantly higher volume threshold). Such an agreement would be less advantageous to the Postal Service because it would do less to maintain and grow volume.

We are also concerned with the OCA's suggestion that the Postal Service "propose separate classifications" for the different elements of the NSA. This could be counterproductive. Specifically, it would limit the tools that the Postal Service can use to reduce financial risk through "hedging uncertainty." OCA Comments at 18. In this docket, the Postal Service did exactly that – hedging uncertainty by combining separate classifications. As the OCA itself noted, "the Postal Service tied volume-based discounts to new cost-savings behavior by Capital One in order to ensure that the NSA would be profitable." Ibid. The Commission should affirmatively encourage the Postal Service to tie separate classifications together where, in cases such as this one, doing so reduces financial risk or produces other benefits.

IV. CONCLUSION

As the Commission has suggested, under certain conditions NSAs are permissible under the Postal Reorganization Act. NAA's contention that this NSA and, by implication, all NSAs are not permissible is incorrect and should be rejected. Also, overly burdensome requirements for future NSAs, such as those suggested by the OCA, should be rejected. The Commission should recommend the approval of the NSA in this docket.

Respectfully submitted,

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