

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Rules Applicable To Baseline And)
Functionally Equivalent Negotiated Service) Docket No. RM2003-5
Agreements)

**COMMENTS
OF FIRST DATA CORPORATION**

Steven F. Stratman
Joan C. Jackson
FIRST DATA CORPORATION
10825 Farnam Dr., C-46
Omaha NE 68154-3238
(402) 222-4663

David M. Levy
Joy M. Leong
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington DC 20005-1401
(202) 736-8000

Counsel for First Data Corporation

September 29, 2003

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Rules Applicable To Baseline And)
Functionally Equivalent Negotiated Service) Docket No. RM2003-5
Agreements)

**COMMENTS
OF FIRST DATA CORPORATION**

First Data Corporation (“First Data”) respectfully submits these comments in response to Order No. 1383 in Docket No. RM2003-5, *Rules Applicable To Baseline And Functionally Equivalent Negotiated Service Agreements*, 68 Fed. Reg. 52546 (2003).

Description of First Data

First Data is a publicly traded company that provides payment and e-commerce services to customers in the United States and abroad. The company’s main lines of business are: (1) credit, debit, smart card and stored-value card issuing and merchant transaction processing services, (2) Internet commerce solutions, (3) money transfer services, (4) money orders, and (5) check processing and verification services. First Data serves approximately 3 million merchant locations, 1,400 card issuers and millions of consumers; employs 30,000 individuals; and earns \$8 billion in annual revenue.

First Data believes that it is one of the largest, if not the single largest, originators of First Class mail in the United States. Most of this mail consists of credit cards and monthly credit card statements sent to individual cardholders on behalf of First Data’s card-issuing clients. First Data is currently evaluating potential opportunities for reducing its postage costs through a Negotiated Service Agreement (“NSA”) with the United States Postal Service.

Summary of Comments

First Data believes that the proposed rules are generally well-designed and appropriate. Three aspects of the proposed rules, however, raise concern: (1) the requirement that all NSA requests include detailed volume forecasts and elasticity studies, regardless of whether the information is relevant to the particular NSA; (2) the requirement that all NSA requests include an analysis of the effect of the NSA on competitors of the parties to the NSA; and (3) the Commission's proposal to adopt a general presumption that all NSA terms should be made public. We discuss each issue in turn.

Volume Forecasts and Elasticity Data

The proposed rules would require that any request for approval of an NSA include data quantifying the additional mail volume that the NSA is expected to generate, as well as the elasticity factors underlying these volume estimates. See proposed Rule 3001.193(e) and subparts (4), (5), (8). Volume and elasticity studies of this kind are time-consuming and costly to generate. These data requirements may have made sense for the NSA proposed in Docket No. MC2002-2, *Experimental Rate and Service Changes to Implement Negotiated Service Agreement With Capital One*. The discounts in that case took the form of declining block rates, and thus lacked a direct correlation with the per-piece cost savings offered to justify the discounts. In many other kinds of NSAs, however, volume and elasticity projections are likely to have little or no relevance, and requiring such data would be needlessly burdensome.

The most obvious example is an NSA that offers the mailer a rate discount calculated as a uniform percentage of the Postal Service's expected savings per piece from additional worksharing that the mailer commits to perform. Such discounts would be applied to *every* piece for which the mailer performs the agreed-upon worksharing, not just to the increment in volume

above the base volume projected without the discount. If the expected per-piece savings from the change in mail preparation or mailer operations exceed the per-piece discount, the incremental volume of mail generated by the NSA should be immaterial.

Proposed Rules 3001.193(a)(2) and (3) allow the Postal Service to seek a waiver of data requirements otherwise imposed by Rule 3001.193 on the grounds, respectively, that the provision of the data would be unduly burdensome or that the data should not be required “in light of the character of the request.” The default requirements of proposed Rule 3001.193(e), however, appear to establish at least a rebuttable presumption that the full-blown volume and elasticity analyses will normally be required for every NSA. The mere existence of such a presumption, even if rebuttable, will provide a disincentive for mailers to commit the resources needed to pursue an innovative baseline NSA—particularly because many of the costs of evaluating and negotiating an NSA may be sunk by the time that the NSA proponents can submit, and Commission can rule on, a waiver request. Accordingly, First Data asks the Commission to clarify that detailed volume and elasticity studies will not be required for proposed volume discounts that equal a uniform percentage of anticipated cost savings per piece.

Analyses of Competitive Impacts

Proposed Rule 3001.193(f) would require that each request for approval of an NSA include an “impact analysis” of the effect of the NSA, over its lifetime, on (1) competitors of the USPS, (2) competitors of the other party or parties to the NSA, and (3) mail users generally. This requirement is likely to be highly burdensome. Satisfying the requirement could require a detailed and sophisticated cost and competitive analysis of every major firm in every market affected, directly or indirectly, by the proposed NSA.

This burden is unjustified. The detailed and elaborate content requirements established by the Commission for the Postal Service's formal requests in rate and classifications cases¹ normally make sense because the Postal Service is typically the best (and often the only) source of most of the required data. On the issue of competitive injury, however, competitors and other third parties should be able to assess the effect of the NSA on their own competitive interests, and prepare testimony on this issue for the Commission, as readily as the proponents of the NSA can. Moreover, in many cases (as in the Capital One NSA case), most of the third parties potentially affected by the NSA may conclude that the competitive threat posed by the NSA (if any) does not warrant intervening and challenging the NSA. When the competitive dogs do not bark, the cost and effort of including an anticipatory competitive analysis in the initial request is a deadweight loss. Imposing such a filing requirement in all cases could needlessly deter mailers or the Postal Service from entering into NSAs that would have been competitively beneficial.

Accordingly, First Data respectfully requests that the Commission delete proposed Rule 3001.193(f), and rely instead on the normal adversarial process to develop evidence on competitive issues. If no other participant is sufficiently concerned to raise the issue, the Commission should conclude that the proposal does not raise serious competitive concerns. If one or more participants raise the issue, the Commission should resolve it based on the best evidence of record, with the proponents of the NSA bearing the ultimate burden of persuasion.

This allocation of the burden of proof—with competitors and others wishing to claim competitive injury bearing the initial burden of production, and the proponents of the NSA bearing the ultimate burden of persuasion—is well supported by precedent. The standards for

¹ See Rule 3001.54 (contents of requests for changes in rates for fees); Rule 3001.64 (contents of requests for classification changes).

setting just and reasonable rates for freight transportation in geographic and product markets where railroads have market dominance are a good example. To show that a proposed rate increase does not exceed just and reasonable levels, the railroad proposing the increase generally must show that the increased rate does not exceed the stand-alone cost of the transportation. Stand-alone costs, however, may be defined for any subset of a railroad's traffic, ranging from a single movement to the entire traffic base. Shippers are entitled to submit evidence for whatever combination of traffic maximizes traffic densities (and thereby tends to minimize per-unit costs). In theory, the number of traffic combinations to which the stand-alone cost test could be applied in any rate case is large, and the expense of performing a stand-alone cost study for every combination would be unmanageable. To make the test workable, the Interstate Commerce Commission and its successor, the Surface Transportation Board, have imposed on ratepayers the initial burden of producing a stand-alone cost study for the subset of the railroads' traffic that the shipper wants to use for the cost test. The railroad then bears the burden of rebutting the study, as well as the ultimate burden of proof with respect to the proposed rate increase.² The same approach is warranted here.

Protection of Proprietary Data

First Data is also concerned by proposed Rule 3001.193(b), requiring the filing of the complete text of any NSA, and by the Commission's stated intention to "make the actual

² See *Coal Rate Guidelines—Nationwide*, 1 I.C.C.2d 520, 543-44 (1985), *aff'd*, *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3rd Cir. 1987); ICC Docket No. 37038, *Bituminous Coal—Hiawatha, Utah, to Moapa, Nevada*, 1987 WL 98994 (1987) (shippers have the right to "define the grouping of shippers and the rail lines which, in the shipper's view, will create the lowest cost transportation system"); *id.*, 1998 ICC LEXIS 364 (1988) (same); *id.*, 6 I.C.C.2d 1, 48-49 (1989); see also *Interstate Rail Rate Authority—Virginia*, 367 I.C.C. 527, 529 (1983). These standards have been upheld repeatedly by the Courts of Appeals. *Consolidated Rail Corp.*, *supra*; *Wheeling-Pittsburgh Steel Corp. v. ICC*, 723 F.2d 346, 355-56 (3d Cir. 1985); *Potomac Electric Power Co. v. ICC*, 744 F.2d 185, 192-94 (D.C. Cir. 1984).

contracts publicly available on the Commission’s website,” and to impose a “high burden” before granting any “request for protective conditions being placed on the contract itself.” Order No. 1383, 68 Fed. Reg. at 52549 (col. 1). NSAs involving changes in the mailer’s operating practices—particularly the timing of mail entry, the consolidation of mail volumes from multiple plants or origins to a single site for entry, and the like—are likely to require detailed understandings between the mailer and the Postal Service on highly sensitive operational details. This kind of information is not only competitively sensitive, but also raises concerns about the physical security of the mail itself, and the employees who handle it. Particularly since 9/11 and the anthrax crisis, for example, First Data has gone to great lengths to protect against disclosure of the dispatch times and locations of its internal mail handling operations.

First Data is mindful of the Commission’s desire to make public enough information about the terms of each NSA “to curtail any claim of discrimination or secret dealing,” and “to provide other similarly situated mailers the opportunity to seek similar negotiated service agreements.” *Id.* Other regulatory agencies operating under statutes with similar anti-discrimination provisions, however, have managed to accommodate these concerns without requiring general disclosure of all terms of the negotiated agreement.

The Surface Transportation Board, for example, requires railroads to disclose publicly only summaries of transportation contracts with shippers of agricultural commodities. 49 C.F.R. § 1313.6. The summaries need *not* reveal the amount of any rate discount provided to the contracting shipper, or the terms or amount of any “special features, such as transit-time commitments, credit terms, discounts, switching, special demurrage, guaranteed or minimum percentages, etc.” *Id.*, § 1313.6(a)(7), (9). A competing shipper is entitled to challenge such a contract on the ground, *inter alia*, that the railroad has “unreasonably discriminated by refusing

to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue,” *id.*, § 1313.9(a)(3)(i). To discover the terms of the contract omitted from the contract summary, however, the complaining shipper must first petition the Surface Transportation Board for discovery of the undisclosed terms. *Id.*, § 1313.10(a). If the Board grants the petition, disclosure of the contract terms is conditioned on a protective order that “shall limit to the contract complaint proceeding the use of contract information or other confidential commercial information which may be revealed in the contract.” *Id.*, § 1313.10(d).

First Data does not suggest that the terms and conditions of postal NSAs warrant the same degree of protection from public disclosure. At a minimum, however, First Data requests that the Commission adopt a rule that contractual terms specifying operational arrangements whose disclosure could jeopardize the safety of persons or property be redacted from public disclosure, and that disclosure of such information in the NSA case be subject to protective conditions under the Commission’s usual standards and procedures governing disclosure of sensitive and proprietary data in rate and classification cases. As to disclosure of other contract terms, First Data asks the Commission to refrain from prejudging the issue by adopting any general presumption in favor of public disclosure of all contract terms, and to resolve the competing issues at stake here on a case-by-case basis, at least until the Commission has gained substantial further experience with additional NSA proposals.

CONCLUSION

For the foregoing reasons, First Data requests that the Commission modify its proposed rules in the three areas discussed above.

Respectfully submitted,

Steven F. Stratman
Joan C. Jackson
FIRST DATA CORPORATION
10825 Farnam Drive
Omaha NE 68154-3238
(402) 222-4663

David M. Levy
Joy M. Leong
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington DC 20005-1401
(202) 736-8000

Counsel for First Data Corporation

September 29, 2003