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ORDER NO. 1391

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners: George Omas, Chairman;
Tony Hammond, Vice Chairman;
Dana B. Covington, Sr.;
and Ruth Y. Goldway

Rules Applicable to Baseline
And Functionally Equivalent
Negotiated Service Agreements

Docket No. RM2003-5

ORDER ESTABLISHING RULES APPLICABLE TO REQUESTS FOR BASELINE AND FUNCTIONALLY EQUIVALENT NEGOTIATED SERVICE AGREEMENTS

(Issued February 11, 2004)

On August 27, 2003, the Commission issued PRC Order No. 1383 to establish a rulemaking docket for the purpose of considering new procedural rules applicable to Postal Service requests for baseline and functionally equivalent Negotiated Service Agreements.[1] The Order included a proposal for the text of the procedural rules, and established a period, which concluded on September 29, 2003, for interested persons to comment. Seventeen parties submitted comments, arranged into twelve separate filings, expressing diverse opinions and suggesting many potential improvements to the

[1] Notice and Order Establishing Rulemaking Docket for Consideration of Proposed Rules Applicable to Baseline and Functionally Equivalent Negotiated Service Agreements, PRC Order No. 1383, August 27, 2003 (Order).

proposed rules.[2] The Order also established a period for reply comments, which concluded on October 14, 2003. Eight parties submitted reply comments, arranged into seven separate filings.[3] In addition, two parties filed supplemental comments.[4] The Commission appreciates the efforts that went into the preparation of the comments and reply comments, and has considered all views and suggestions for improving the proposed rules.[5]

The comments express opinions on many issues, with most issues receiving a fair balance of comments from more than one perspective. Even with differences of opinion on specific rules, all parties appear to acknowledge the desirability of

[2] PostCom Comments on Notice and Order Establishing Rulemaking Docket for Consideration of Proposed Rules Applicable to Baseline and Functionally Equivalent Negotiated Service Agreements [NSA Rulemaking], September 25, 2003 (PostCom); Comments of Capital One Services, Inc., September 29, 2003 (Capital One); Comments of The Direct Marketing Association, Inc., Magazine Publishers of America, Inc., Mail Order Association of America, and National Postal Policy Council, Parcel Shippers Association, September 29, 2003 (DMA et al.); Comments of Discover Financial Services, Inc., September 30, 2003 (Discover); Comments of EW Consulting Relative to Retail Applications, September 30, 2003 (EW); Comments of First Data Corporation, September 29, 2003 (First Data); Initial Comments of Major Mailers Association, September 29, 2003 (MMA); Comments of the National Newspaper Association on Proposed Negotiated Service Agreement Rules, September 29, 2003 (NNA); Office of the Consumer Advocate Comments, September 29, 2003 (OCA); Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. Comments on Proposed NSA Rules Pursuant to Commission Order No. 1383, September 29, 2003 (Valpak); Comments of Pitney Bowes Inc., September 29, 2003 (Pitney Bowes); Initial Comments of the United States Postal Service, September 30, 2003 (Postal Service).

[3] Reply Comments of Discover Financial Services, Inc., October 14, 2003 (Discover Reply); Reply Comments of Major Mailers Association, October 14, 2003 (MMA Reply); Reply Comments of the Newspaper Association of America, October 14, 2003 (NAA Reply); Office of the Consumer Advocate Reply Comments, October 14, 2003 (OCA Reply); Reply Comments of United Parcel Service, October 14, 2003 (UPS Reply); Reply Comments of the United States Postal Service, October 14, 2003, Errata to Reply Comments of the United States Postal Service, October 16, 2003, Notice of the United States Postal Service of Filing of Corrected Version of Reply Comments, October 16, 2003, Reply Comments of the United States Postal Service, October 16, 2003 [Corrected Version] (Postal Service Reply); Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. Reply Comments on Proposed NSA Rules Pursuant to Commission Order No. 1383, October 14, 2003 (Valpak Reply).

[4] Office of the Consumer Advocate Supplemental Comments on NSAs vs. Pilot Tests, October 10, 2003 (OCA Supplemental); Supplemental Comments of the United States Postal Service, October 17, 2003 (Postal Service Supplemental).

[5] The following motions are granted: Motion for Late Acceptance of Comments by Discover Financial Services, Inc., September 30, 2003 (Discover Motion); Motion for a One-Day Extension of Time to File Comments, September 30, 2003 (EW Motion); Motion for a One-Day Extension of Time to File Comments, September 29, 2003 (Postal Service Motion); Office of the Consumer Advocate Motion to be Permitted to File Supplemental Comments on NSAs vs. Pilot Tests, October 10, 2003 (OCA Motion); Motion of the United States Postal Service for Leave to File Supplemental Comments, October 17, 2003 (Postal Service Supplemental Motion).

implementing rules specific to Negotiated Service Agreements. The Postal Service (the party that is directly responsible for complying with the rules) provides excellent commentary which tends to express an opinion that falls in the center of the extremes of all other commentary and is generally supportive of most provisions of the proposed rules. The comments from all parties have provided the Commission with a better appreciation of the benefits, and more importantly, the limitations of each rule proposal. As everyone gains experience with the new rules, there are sure to be suggestions for improvement that may be implemented in the future. The changes made to the proposed rules resulting from incorporating suggestions from the comments are relatively minor, and given the anticipation of future rulemakings in regard to these rules, the Commission has decided not to solicit further comments after incorporating these changes. The factors discussed above indicate that the rules as proposed are reasonable and appropriate for initial implementation. Thus, the Commission finds it appropriate to issue final rules at this time. The final rules appear following the Secretary's signature.

Several general themes run through the comments. An overview of the most frequently addressed themes will be summarized below, followed by a rule by rule examination of each significant comment.

The perceived burden that the rules impose is a common topic in most of the commentary. Some parties consider the burden imposed by the rules so great that it would inhibit mailers from pursuing Negotiated Service Agreements. There are comments indicating that it is premature to establish any detailed requirements before gaining further experience with Negotiated Service Agreements. There is support for adapting the arguably less burdensome rules for experimental classifications for use with Negotiated Service Agreements as an alternative to the proposed rules. Other parties want to add more requirements to the proposed rules. There are suggestions to add requirements to further justify a Negotiated Service Agreement classification versus a niche classification. There are suggestions to add provisions to facilitate the propagation of functionally equivalent agreements. There also are requests to add rules

applicable to specific types of agreements, for example, agreements predicated on declining-block discounts. The fairly even balance of comments on burden, both pro and con, from this diverse group of mailers indicate to the Commission that it has struck the appropriate balance on burden in the proposed rules.

The requirements in regard to presenting a financial analysis of the Negotiated Service Agreement received many comments. There is limited disagreement over whether the financial analysis should be preformed over the duration of the agreement as proposed. There is considerable discussion of potential problems with obtaining mailer-specific information, and the ability to make projections into the future. Some comments indicate that the Commission is requesting too much information, with suggestions that the Postal Service should only have to show that the agreement improves its financial position. Other comments indicate the need for considerably more information. For example, there is a request to require all cost information to be presented by cost segment. There are other suggestions to require the Postal Service to show that each element of an agreement adds to contribution and that the overall agreement materially improves the financial position of the Postal Service. Again, the proposed rule appears to represent a fair compromise among the parties wanting less onerous requirements and those wanting more detailed requirements.

The Commission and the Postal Service are substantially in agreement on what a financial analysis should include for the first year of a multi-year Negotiated Service Agreement. For the potential second and third years of an agreement, the Notice of Proposed Rulemaking suggests a fairly mechanical approach to the analysis of the follow-on years. It requires the presentation for the second and third years to mimic the presentation of the first year. The Postal Service, alternatively, proposes to focus on factors that might cause a material change to the first year's financial analysis in presenting the financial analysis for the follow-on years. Both approaches should provide a sufficient financial analysis. Both approaches also suffer from the same problems of availability and reliability of information the further out in time that information is projected. Because there is potentially some advantage to the Postal

Service's approach, the Commission will adopt the Postal Service's proposal as presented in its initial comments.

Comments in regard to the analysis of competitive effects range from full endorsement, to considering the requirement exceedingly burdensome. The requirement is written in general terms that allow the proponents to formulate a response that is appropriate under the circumstances. Other than potential difficulties with complying with the proposed rule, the comments focus on whether the proponents of an agreement or the parties challenging the agreement should have the initial burden of making a competitive effects argument. The Commission considers the proponents of the agreement to be the most knowledgeable and have the better resources available, after going through the negotiation process, to most efficiently respond to this information request. In many instances, such as worksharing arrangements, the response might be minimal. Several parties argue that it should be the responsibility of parties in opposition to the request to intervene and protect their own interests. The Commission is not persuaded that the parties concerned with the potential impacts of a request should carry the initial burden of proving adverse competitive effects. The Postal Service, as a governmental entity, has an obligation to consider the impact of its actions on the market, and to avoid causing unreasonable harm to private enterprises. It is appropriate that it make public its analysis in fulfilling this obligation. The Commission acknowledges that analyzing competitive effect issues can be complex, and will require time and thought, but it is necessary given the requirements of the Act. This requirement shall remain in the final rule as originally proposed.

There is considerable concern about the protection of sensitive information. For the Commission to fulfill its statutory duty in a way favorable to the proponents, it requires information on which to base its recommendations. This is part of the "cost" of obtaining a special arrangement with the Postal Service. Participants will be required to cooperate with the Commission and provide relevant information to justify all requests, even if this information is considered sensitive. Requesting the application of protective

conditions to safeguard sensitive information from public disclosure, if appropriate, remains an option.

The Commission expressed its intent to make the actual text of proposed Negotiated Service Agreements public. This position resolves many issues such as providing transparency, curtailing claims of secret dealings and discrimination, being able to openly review the terms and conditions of the agreement, and making sufficient information available so that similarly situated mailers can seek the opportunity to benefit from a functionally equivalent agreement. Theoretically, the imposition of protective conditions remains available even for the text of an actual agreement, but this procedural step likely would make the review process more cumbersome and, especially as to monopoly products, commentators failed to describe circumstances where such a step would seem justified.

There is considerable discussion on the procedures to be followed when information required by the rules is either not available and cannot be made available without undue burden, or is not required in light of the characteristics of the request. Comments represent both ends of the spectrum, from making all filing requirements mandatory, to requiring only a certification. The Commission will require the Postal Service to request waivers early in the process in the interest of resolving issues quickly in keeping with the goal of issuing recommendations in an expeditious manner.

Finally, there are suggestions that the Commission establish a 150-day procedural schedule for reviewing requests predicated on baseline Negotiated Service Agreements. The Commission has decided to not establish an artificial deadline for issuing a recommended decision at this time, but may revisit this issue in the future.

The Commission recognizes that the rules apply in an area where it has only the experience of one Postal Service request, and anticipates future rulemakings to fine tune the rules as future experience might warrant. However, the Commission finds it is important to issue these rules at this time to gather real experience with their implementation, and to provide guidance for future Postal Service requests predicated on Negotiated Service Agreements. The Secretary shall arrange for the publication of

this Order Establishing Rules Applicable to Requests for Baseline and Functionally Equivalent Negotiated Service Agreements in the *Federal Register.*

The following is a rule by rule discussion of the comments received by the Commission in regard to this rulemaking.

Section 3001.5(r) Definitions

The proposed definition for "Negotiated Service Agreement" is stated in § 3001.5(r) as follows: "*Negotiated Service Agreement* means a written contract, to be in effect for a defined period of time, between the Postal Service and a mailer, that provides for customer-specific rates or fees and/or postal services in accordance with the terms and conditions of the contract."

The Postal Service contends that although it would not be inaccurate in all instances, the term "postal services" might be too restrictive. It suggests that the definition focus on the Commission's statutory function, and proposes changing the term "postal services" to "classification changes." It argues that "classification changes" encompasses both distinct levels of service, as well as less expansive changes to the Domestic Mail Classification Schedule. The definition proposed by the Postal Service states: "*Negotiated Service Agreement* means a written contract, to be in effect for a defined period of time, between the Postal Service and a mailer, that provides for customer-specific rates or fees and/or classification changes in accordance with the terms and conditions of the contract." Postal Service Reply at 2-3, Attachment at 1.

The Commission finds that in most instances either "postal services" or "classifications" would be appropriate for use in the definition.[6] However, based on the

[6] The Commission omits the word "changes" from the Postal Service's suggestion of "classification changes" because a Negotiated Service Agreement typically should describe a classification.

Postal Service's contention that "postal services" might be too restrictive,[7] the Commission explored alternative terminology which could provide the Postal Service with the greatest flexibility and place the least restrictions on what it can propose when negotiating a Negotiated Service Agreement. The Commission decided upon the general terminology "terms of service" in place of either "postal services" or "classifications" for use in the final rule. "Terms of service" is very broad, but still refers to a functional or "service" element of an agreement. The definition appearing in the final rule shall state: "*Negotiated Service Agreement* means a written contract, to be in effect for a defined period of time, between the Postal Service and a mailer, that provides for customer-specific rates or fees and/or terms of service in accordance with the terms and conditions of the contract."

Subpart B – Rules Applicable to Requests for Changes in Rates or Fees § 3001.51 Applicability

Section 3001.51, which is currently in effect, governs the applicability of rules for requests to change rates or fees. The rulemaking proposes to add a sentence to § 3001.51 which specifies that a request based on a Negotiated Service Agreement, which otherwise would be considered pursuant to the rules applicable to requests for changes in rates or fees, shall instead be considered pursuant to the rules applicable to Negotiated Service Agreements. The proposed sentence states: "For requests of the Postal Service based on Negotiated Service Agreements, the rules applicable to Negotiated Service Agreements, Subpart L, supersede the otherwise applicable rules of this subpart."

[7] The Commission hypothesizes that "classifications" also might be too restrictive. Assume a multi-element Negotiated Service Agreement where one element involves a function (or term of service) that falls short of being considered a classification on its own under the Commission's statutory authority. If the overall Negotiated Service Agreement is within the Commission's jurisdiction, then the term of service assumed above would be included in the Commission's review by virtue of the Commission's jurisdiction over the overall agreement.

The Postal Service contends that the reference to "this subpart" is somewhat ambiguous, and should be changed to specifically identify the referenced subpart as "subpart B." Postal Service at 26-27.

Although the Postal Service's suggestion may add clarity to the proposed rule, it does not conform to the existing drafting conventions for material that will be published in the Code of Federal Regulations. The final rule shall reference "this subpart" as originally proposed.

Subpart C – Rules Applicable to Requests for Establishing or Changing the Mail Classification Schedule, § 3001.61 Applicability

Section 3001.61, which is currently in effect, governs the applicability of rules for requests to change the mail classification schedule. The rulemaking proposes to add a sentence to § 3001.61 which specifies that a request based on a Negotiated Service Agreement, which otherwise would be considered pursuant to the rules applicable to requests for establishing or changing the mail classification schedule, shall instead be considered pursuant to the rules applicable to Negotiated Service Agreements. The proposed sentence states: "For requests of the Postal Service based on Negotiated Service Agreements, the rules applicable to Negotiated Service Agreements, Subpart L, supersede the otherwise applicable rules of this subpart."

The Postal Service contends that the reference to "this subpart" is somewhat ambiguous, and should be changed to specifically identify the referenced subpart as "subpart C." Ibid.

Although the Postal Service's suggestion may add clarity to the proposed rule, it does not conform to the existing drafting conventions for material that will be published in the Code of Federal Regulations. The final rule shall reference "this subpart" as originally proposed.

Subpart L – Rules Applicable to Negotiated Service Agreements § 3001.190 Applicability

Subsection (a) establishes that the rules proposed under subpart L are applicable to Postal Service requests based on Negotiated Service Agreements. The last sentence of proposed subsection (a) states: "The requirements and procedures specified in these sections apply exclusively to requests predicated on Negotiated Service Agreements, and except where specifically noted, do not supersede any other rules applicable to Postal Service requests for recommendation of changes in rates or mail classifications."

OCA suggests a stylistic change, which proposes to separate the last sentence into two separate sentences as follows: "The requirements and procedures specified in these sections apply exclusively to requests predicated on Negotiated Service Agreements. Except where specifically noted, this subpart does not supersede any other rules applicable to Postal Service requests for recommendation of changes in rates or mail classifications." OCA at 6.

OCA's suggestion is an acceptable alternative, and may improve clarity. The Commission also has become aware that the proposed sentence references "changes in rates or mail classifications," but omits any reference to "fees." Correction of this oversight, along with the OCA's proposed modification, shall appear in the final rule. The last sentence of subsection (a) will state: "The requirements and procedures specified in these sections apply exclusively to requests predicated on Negotiated Service Agreements. Except where specifically noted, this subpart does not supersede any other rules applicable to Postal Service requests for recommendation of changes in rates, fees, or mail classifications."

Subsection (b) states in part that "it shall be the policy of the Commission to recommend Negotiated Service Agreements that are consistent with statutory criteria, and benefit the Postal Service, without causing unreasonable harm to the marketplace."

OCA proposes to expand these policy considerations by requiring: "It shall be the policy of the Commission to recommend Negotiated Service Agreements each of

whose elements are consistent with statutory criteria, unambiguously benefit the Postal Service, and do not cause unreasonable harm to the marketplace." OCA wants to ensure that a proposed Negotiated Service Agreement, "in whole and in part, materially improves the financial condition of the Postal Service." Id. at 6-10. The OCA asserts that the requirement for each element to unambiguously benefit the Postal Service will help overcome any uncertainty in Postal Service estimates and any transaction costs associated with implementing the agreement.[8]

The Postal Service contends that the benefits of a Negotiated Service Agreement need to be considered as a whole. It objects to the OCA's proposal because requiring each element to benefit the Postal Service would bar Negotiated Service Agreements that are on balance beneficial to the Postal Service just because one element in isolation is not beneficial. Postal Service Reply at 4-6.

The Commission anticipates that negotiating a multi-element Negotiated Service Agreement will involve some give and take for the parties to reach agreement. Requiring each element to benefit the Postal Service could hinder this give and take process, and eliminate many possible arrangements from consideration. The Commission will review each element of an agreement, and integrate each element into a review of the agreement as a whole. The overall agreement must benefit the Postal Service. An individual element that does not benefit the Postal Service or that represents a high risk may receive added attention, and potentially could prevent a positive Commission recommendation. However, the OCA's policy proposal to require at the outset every element to benefit the Postal Service, without looking at the element's relationship to the overall agreement, is too restrictive. It will not be incorporated into the final rule.

OCA proposes an additional policy requirement related to declining-block rates which states: "It shall be the policy of the Commission to require declining-block rates

[8] The proposal also is consistent with the OCA's stated preference to not recommend revenue neutral Negotiated Service Agreements. OCA at 3-4.

to be supported by a company-specific demand analysis justifying each volume threshold and corresponding rate." OCA at 6.

The Postal Service objects to the addition of this requirement because it would amount to a bar on declining-block arrangements. The Postal Service asserts that it is unlikely that a company-specific demand analysis would be available, and if it were available it is unclear how it would be used to justify the thresholds and rates. Postal Service Reply at 7.

The Commission has proposed general rules designed to be applicable to a broad variety of potential Negotiated Service Agreements. It chooses not to include rules specific to only one type of agreement at this point in time. The Commission's preference is to allow the Postal Service flexibility in fashioning each request to provide, within general guidelines, the appropriate information under the circumstances. The Postal Service's requests will be litigated, and precedent will be developed to guide future requests. Participants are always free to challenge any aspect of the Postal Service's request during the proceeding, and ask for additional information.[9] The Commission will not adopt the declining-block rate policy proposal at this time.

Subsection (b) also states: "Except in extraordinary circumstances and for good cause shown, the Commission shall not recommend Negotiated Service Agreements of more than three years duration; . . .."

NNA proposes an additional restriction which specifies that the Commission will not recommend a Negotiated Service Agreement if a general or niche classification change will achieve substantially similar effects upon the Postal Service's revenues or costs. NNA's concern is with the competitive effects that a Negotiated Service Agreement could have on the smaller competitors of the proponent receiving the benefits of a Negotiated Service Agreement. It contends that including a presumption in favor of a less restrictive classification, such as a niche classification, is one possible protection that might be offered. NNA would modify the last sentence of subsection (b)

[9] The OCA suggestion seems excessively restrictive, as rate cell-specific elasticities are not normally available in any Commission proceeding.

to state: "Except in extraordinary circumstances and for good cause shown, the Commission shall not recommend Negotiated Service Agreements of more than three years duration or if a general or niche classification change will achieve substantially similar effects upon the Postal Service's revenues or costs; . . .." NNA at 4-6 (emphasis omitted).

Valpak, NAA, and UPS support the NNA position on general or niche classifications. Valpak Reply at 8; NAA Reply at 6-7; UPS Reply at 7. NAA also offers a suggestion that the Commission adopt a presumption that if a baseline Negotiated Service Agreement is premised on worksharing, then a niche classification is preferable.

The Postal Service is opposed to the NNA proposal, which essentially requires it to prove that a niche classification would not be an equally reasonable approach. Postal Service Reply at 7-8. The Postal Service contends that the Commission has already rejected this approach. *See* PRC Op. MC2002-2 at 33-34.

The Commission supports the basic premise that, all other things being equal, more inclusive mail classifications are preferable to more restrictive alternatives, and has maintained a consistent policy of entertaining and acting upon claims that new mail classifications should be available on more inclusive terms than were originally proposed. However, the Commission's preference for more inclusive mail classifications does not reach the level of a presumption that must be overcome by the proponents of single mailer agreements.

The rules as proposed already require the Postal Service to provide a written justification for requesting a Negotiated Service Agreement classification as opposed to a more generally applicable form of classification, § 3001.195(a). This requires the Postal Service to explain why a Negotiated Service Agreement is the preferable classification. It does not require the Postal Service to prove (what amounts to a negative) that a more inclusive classification could not be implemented, or is otherwise not appropriate. Recognizing foremost that the Postal Service is burdened with demonstrating that the proposed Negotiated Service Agreement complies with the requirements of the Act, it is not reasonable to impose this additional burden on the

Postal Service. If the Postal Service provides a persuasive justification pursuant to § 3001.195(a), the Commission may find that the Postal Service has selected the appropriate classification. Participants are free to challenge this issue during the course of the proceeding.

NNA also suggests that each docket contain a procedural opportunity for participants to petition the Commission to use the Commission's statutory authority, when appropriate, to initiate a separate niche classification. NNA at 4-6.

The Commission will not incorporate an explicit procedural mechanism for participants to petition the Commission requesting that the Commission employ its statutory authority to initiate a separate niche classification. Participants are free to petition the Commission at any time on this matter. Participants should keep in mind that where rates or fees are involved, the Commission typically is limited to recommending a shell classification. To progress beyond a shell classification, participants would require the support of the Postal Service.

Section 3001.191 Filing of Formal Requests

No substantive comments in opposition to proposed § 3001.191 have been received. Section 3001.191 shall be included in the final rule as originally proposed.

Section 3001.192 Filing of Prepared Direct Evidence

No substantive comments in opposition to proposed § 3001.192 have been received. Section 3001.192 shall be included in the final rule as originally proposed.

Section 3001.193 Contents of Formal Requests

Subsection (a) General requirements. Subsection (a) in part establishes the requirement to request a waiver if information required to be submitted pursuant to § 3001.193 is (1) not available and cannot be made available without undue burden, or (2) is not required in light of the characteristics of the request. The request for waiver would be in the form of a motion.

DMA et al. propose that the Commission only require a satisfactory explanation, and not a waiver. The satisfactory explanation would end the inquiry into the necessity to provide the information, unless another party challenges the issue. If challenged, the burden of going forward would shift to the challenging party as is done under the experimental rules. DMA et al. argue that this would be less burdensome and still protect the rights of the challenging party. DMA et al. at 9-10.

Pitney Bowes contends that the requirement to request a waiver will further dissuade mailers from pursuing Negotiated Service Agreements because there is no meaningful ability to determine whether or not a waiver will be granted when first negotiating and preparing a Negotiated Service Agreement. It suggests that where information is not needed in light of the nature of the request, § 3001.193(a)(3) should only require a certification stating this fact. Presumably, the inquiry into whether the information must be provided would end at this point, unless challenged. Pitney Bowes at 5-6.

UPS argues that only requiring a certification would effectively eliminate the Commission as a meaningful participant in the decision-making process. Thus, it is opposed to Pitney Bowes' proposal. UPS Reply at 2.

OCA contends that Negotiated Service Agreements are extraordinary arrangements requiring extraordinary justification. It asserts that all § 3001.193 filing requirements should be mandatory. OCA suggests deleting the special provisions on waivers, and alternatively relying on the general waiver provisions of § 3001.22. If these suggestions are not adopted, OCA requests clarification as to whether it is necessary to reserve one's right to challenge the potential absence of information when answering the request for waiver. It also requests clarification as to when a potential challenge would be permitted. OCA at 10-15.

The Postal Service is generally not opposed to the procedures in regard to unavailable or not required information. It is opposed to relying solely on the general waiver provisions of § 3001.22 as proposed by OCA, and it is specifically opposed to requiring a waiver where information is unavailable and unduly burdensome to produce.

The Postal Service contends that requiring a waiver in this instance might amount to a daunting entry barrier, which may dissuade potential partners from negotiating. It might invite opposition to granting the waiver. It also might require a factual examination as to whether the information is unavailable and whether the burden of producing the information is undue. The Postal Service also notes that this requirement is not consistent with other seemingly parallel sections of the Commission's rules. For example, §§ 3001.54(a)(2) and 3001.64(a)(2) both require "a statement explaining with particularity," and not "a request for waiver." Accordingly, the Postal Service proposes that "a request for waiver" be replaced with "a statement explaining with particularity," which would make this requirement consistent with other provisions of the Commission's rules.

The Postal Service is not opposed to a request for waiver where information is not required in light of the characteristics of the request. It argues that determining such relevance issues early in the proceeding is useful and will aid in the development of the record. Furthermore, the Postal Service does not oppose the burden shifting provisions of § 3001.193(a)(4), which similarly appear in other Commission rules. Postal Service Reply at 7-11.

The Commission included the requirement to request a waiver in §§ 3001.193(a)(2) and (a)(3) because of the emphasis placed on the desire for the Commission to expeditiously issue recommendations on requests predicated on Negotiated Service Agreements. Requiring waivers assures immediate focus on informational issues, and necessitates prompt resolution of any concerns early in the proceeding.

Section 3001.193(a)(2) concerns information that is not available and cannot be made available without undue burden. It applies to information presumed to be relevant to the proceeding. Requiring only "a statement explaining with particularity" does not expedite resolving issues that could be central to a Commission recommendation. It

would necessitate additional motions practice and result in delay.[10] The Commission will retain the requirement to request a waiver in this instance.

Section 3001.193(a)(3) concerns information that is not required in light of the proceeding. This category of information is information that is presumed not relevant to the proceeding. The request for waiver in most instances should be straightforward. It is not anticipated that this process would cause unnecessary delay to the procedural schedule. In instances where the relevance of the information is challenged, it will benefit the schedule by resolving the issue early in the proceeding. Requiring a request for a waiver versus a mere "certification" also stresses the importance of promptly resolving issues given a goal of expeditiously issuing a recommendation. The Commission also will retain the requirement to request a waiver in this instance.

Parties are not required to reserve an objection to a Postal Service request for a waiver under §§ 3001.193(a)(2) or (3). If it is apparent that granting a waiver is not warranted, the Commission expects the party opposed to the waiver to file in opposition at the time the request for waiver is pending. In the instance where it only later becomes apparent that there is an issue involving information for which a waiver has been granted, § 3001.193(a)(4) sets the standard for contending that providing the information was in fact necessary. This contention must be raised by motion before the close of the record so that all parties have an opportunity to respond to the issue.

Pitney Bowes requests a clarification of whether available information, which is unduly burdensome to produce, should be considered unavailable for the purposes of § 3001.193(a)(2). Pitney Bowes at 5-6. The Commission would entertain the argument that available but burdensome to produce information is effectively unavailable. However, because this category of information is presumed relevant to the proceeding, a successful argument where the information is available would likely focus on limiting the scope of the information provided, or on providing a substitute form of the information.

[10] Participants considering the "statement" inadequate would file motions at a subsequent stage of the proceeding, which could not be resolved prior to additional pleadings.

The Postal Service proposes the elimination of §§ 3001.193(2)(iii) and (v) in regard to a request for a waiver where information is not available and cannot be made available without undue burden. These sections require a request for waiver to include discussion of "[t]he steps or actions which would be needed to make each such item of information available, together with an estimate of the time and expense required therefore" and "[w]hether sufficiently reliable estimates are available to mitigate the need for such information, and if so, the specifics of such estimates." The Postal Service contends that these requirements invite unnecessary litigation directed at the sufficiency of the response, which could prolong the proceeding. Discover supports the Postal Service's position. Discover Reply at 2-3.

The implication in § 3001.193(2) is that the required information is "relevant" to the proceeding. Because it is relevant to the proceeding, if the information cannot be produced the Commission requires certain information to weigh its relevance, to determine whether the information could be produced in the future, and if not, to determine whether a suitable substitute can be provided. If the Commission finds the unavailable information highly relevant with little hope of future production and without a reasonable substitute, the unavailability of the information could be important in the Commission's review of the Postal Service's request. Therefore, it is reasonable for the Commission to inquire about the time, and effort, involved in making the information available, and about the possibility of substitute information in order to avoid a negative outcome. Once identified, a potential filing deficiency in regard to presumed relevant information should be resolved as promptly as possible because it could have a direct effect on the outcome of the proceeding. Sections 3001.193(2)(iii) and (v) provide important information for resolving this issue, and thus, shall remain in the final rule.

The Postal Service suggests an editorial change to replace the word "schedule" in § 3001.193(a)(1) with "schedule(s)" to reflect the fact that the DMCS is made up of more than one schedule. The Commission shall incorporate this suggestion into the final rule.

Subsection (b) Negotiated Service Agreement. Subsection (b) requires the Postal Service to include a copy of the Negotiated Service Agreement with its request. Comments were directed at the Commission's position that an unsigned text copy of the agreement will meet this filing requirement, the Commission's role in reviewing the agreement, public disclosure of the agreement, and the broader issue of potential public disclosure of sensitive information.

PostCom proposes that the Commission require the Postal Service to file a *signed* copy of the Negotiated Service Agreement with the request. PostCom argues that a signed agreement is required to avoid the expenditure of energy on an approval process where the parties are free to walk away during the approval process because they are not bound by an executed agreement. PostCom at 4-5.

As the Postal Service correctly interprets the Commission's intention, the Commission expects that requests will be based on executed Negotiated Service Agreements. Postal Service Reply at 5-6, fn. 4. The proponents would be at the greatest risk of expending energy if they choose not to proceed with the agreement. This alone should act as a deterrent to filing a request with no intent of carrying out the terms and conditions of an agreement. The Postal Service also properly points out that not requiring a signature is partially based on the requirements of the Commission's electronic filing system and the inconvenience of creating pdf files containing signatures. The Commission is not persuaded that the filing of a signed copy of the agreement is required, or that requiring a signature will or should act as a deterrent to a party's decision not to proceed once the review process begins.

The Commission reasoned that filing an unsigned text file copy of the agreement is sufficient because: "the agreement does not go into effect until after the Commission submits its opinion and recommended decision, and the Governors of the United States Postal Service provide its approval." PRC Order No. 1383 (August 27, 2003) at 9. The Postal Service is correct in pointing out that the Commission is speaking to the provisions of the agreement that are under review by the Commission. The agreement

might include other provisions, which become binding upon the signature of the parties to the agreement. Postal Service Reply at 5-6, fn. 4.

NAA contends that the copy of the agreement filed with the request should be signed, but only to assure that the version of the contract being filed is in fact the correct version, and not an earlier draft. NAA Reply at 4.

Under the Commission's rules, the filing party has the obligation to assure that the proper documents are filed. *See* § 3001.11(e). The Commission is not persuaded that requiring the copy of the Negotiated Service Agreement to be signed would offer anything more than a minimal improvement to assure that the correct version of a document is filed.

PostCom contends that requiring the filing of a signed contract would bring the Commission's proceeding closer to an "after the fact" review as suggested by the President's Commission. PostCom at 4-5; *see also*, Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service, Report of the President's Commission on the United States Postal Service, July 31, 2003 at 88-89, 174.

Current law requires a more pro-active role for the Commission that goes beyond an "after the fact review." The Commission's role is to protect the public interest by bringing to light potential problems "before" the Postal Service proceeds with a new rate, fee, or classification. The Commission's statutory responsibility is foremost to review Postal Service requests for compliance with the requirements of the Act, and to issue a recommended decision on its findings. Through the Commission's recommendations, the Commission also provides the Governors of the United States Postal Service with an independent review of proposals put forth by the Postal Service. This independent review, which may incorporate additional views solicited from interested participants either through written comment or the hearing process, is used to inform the Governors in their decision-making process. Mailers in general further benefit because the transparency provided through the overall process adds to a better understanding of the Postal Service. The Commission's role in reviewing Postal Service requests is much broader than implied by PostCom.

Discover suggests that the final rules state that the Commission will not redraw the contract or rebalance the benefits and risks of the agreement. It further contends that the Commission's review should not include ensuring that the Postal Service has reached the best deal possible in the manner most appropriate. Discover at 5.

PostCom views the Commission's role as limited to ensuring the agreement is in compliance with the Act, and providing approval in the shortest time possible. PostCom's comments otherwise generally parallel the comments of Discover. PostCom at 4-5.

The Commission has no intent of acting as a bargaining party, or is its interest in renegotiating the terms and conditions of a Negotiated Service Agreement. However, the Commission's role is not so limited as to only providing either a positive or negative recommendation. For example, if the initial request does not support an agreement that complies with the requirements of the Act, the Commission might, if possible, recommend modifications to the agreement to bring it into compliance. Another example is in the area of data collection. The Commission frequently recommends changes such that the Commission will have access to information for performing future statutory functions.

Nor does the Commission view its role as ensuring that the Postal Service has made the best possible deal. However, the Commission will express its views and suggest (as opposed to recommend) potential changes such that the Postal Service is informed of the Commission's opinion when entering into future agreements. These same views and suggestions are also meant to independently inform the Governors in their decision-making process when considering the current agreement.

Final positive Commission recommendations are frequently conditioned on implementation of the Commission's recommended modifications. It would cause considerably more delay and waste of resources if the Commission were restricted to recommending either a positive or negative recommendation. A negative recommendation then would require the Postal Service to file a new request and start anew. After the Commission issues its final recommendations, the proponents are free

to accept the Commission's recommendations, or abandon the agreement. The Postal Service has exhibited sufficient proficiency in drafting its agreements to allow parties to opt out of the agreement if they choose not to accept the Commission's recommended modifications.

First Data is concerned about the Commission's indication that the actual text of the agreement will be made publicly available, and that the Commission will impose a high burden before granting a request for protective conditions on the contract itself. It contends that a Negotiated Service Agreement which involves changes in a mailer's operating practices is likely to require understandings on sensitive operational details. This could raise issues of the information being competitively sensitive, and of concerns about the physical security of the mail and the employees who handle it. First Data proposes that the Commission adopt a rule specifying that contractual terms specifying operational arrangements whose disclosure could jeopardize the safety of persons or property be redacted from public disclosure, and subject to protective conditions. In general, First Data suggests that the Commission not adopt a presumption in favor of general disclosure, and resolve these issues on a case-by-case basis. First Data at 5-7. Pitney Bowes expresses similar concerns that the proposed rules may not sufficiently protect the confidentiality of certain contract information. Pitney Bowes at 7.

NAA argues in favor of public disclosure of the text of the contract. It contends that this will facilitate evaluation of the agreement, and will help mailers determine whether they might be eligible for a functionally equivalent agreement. NAA is concerned over the negative connotations of keeping an agreement secret. NAA Reply at 4-5.

The Postal Service contends that the Commission's indication of a higher burden may be required to justify confidential treatment of the actual contract is not well advised and may be unnecessary. It asserts that other agencies have been able to come up with the proper balance as discussed in First Data's comments at 5-7.[11] Postal Service Reply at 13-15.

[11] First Data generally discusses the procedures used by the Surface Transportation Board.

The Commission's intent is to make the actual contract publicly available on the Commission's web site in accordance with the general policy for documents filed at the Commission. The Commission has alerted the parties to the contract that any request for protective conditions placed on the contract itself will have to meet a high burden before being granted. *See* PRC Order No. 1383 (August 27, 2003) at 9.

The general rule at the Commission has been and remains that requests for protective conditions must meet a high burden.[12] Reminding participants of the general rule serves several purposes. Drafting an agreement in a fashion that does not require protective conditions is procedurally expedient. It does not require the additional step of requesting protective conditions, interested parties do not have to apply to view the material, and the overall proceeding is facilitated by being able to openly discuss, reference, and write about the subject material. Public disclosure also provides transparency, which helps curtail arguments of discrimination and secret dealings. Public disclosure also provides mailers with the information necessary to decide whether they wish to seek similar agreements with the Postal Service. The Commission will adhere to its preference, and presumption, that the contents of the actual contract shall be made publicly available. The application of protective conditions remains an option, but the negative effects of applying protective conditions must be recognized.

Several comments broaden the discussion of public disclosure of the terms and conditions of the contract to a discussion of the general disclosure of sensitive and confidential business data used to support the request during the course of the proceeding. Discover contends that private-sector firms must not be expected to reveal confidential business information in order to participate. Discover at 2, 6-7. It foresees that the more the Commission delves into mailer-specific data, the more likely the Commission will be faced with litigants whose main purpose is to uncover or gain access to a competitor's propriety information. Discover Reply at 4. Discover urges the Commission not to create the situation where a mailer seeking a functionally equivalent

[12] The Postal Service's characterization that the Commission is imposing a higher burden than normal is not accurate.

agreement must disclose confidential information, even if its competitor disclosed the same information in a baseline proceeding. In a related matter, Discover suggests the information collected through data collection plans also could raise competitive concerns. Id. at 6-7. MMA urges the Commission to assure mailers that they will not be required to disclose highly confidential business information because this possibility might dissuade mailers from seeking Negotiated Service Agreements. MMA at 6.

The Postal Service contends that the issue of confidentiality of mailer-specific information potentially presents a serious problem. It argues that the lack of procedural guarantees may become an impediment to exploring and developing beneficial Negotiated Service Agreements in the future. The Postal Service notes that the Commission was faced with similar problems in formulating rules for international services. It suggests that this issue be revisited in a subsequent rulemaking that could focus on specific solutions. Postal Service Reply at 13-15.

The Commission has well-established policies for protecting sensitive information, and has not been persuaded that reviewing Negotiated Service Agreements require any changes to those policies. Protective conditions, where appropriate, remain an option to prevent public disclosure of sensitive information. At the same time, the Commission has a statutory role to fulfill in reviewing Postal Service requests predicated on Negotiated Service Agreements. If sensitive co-proponent information is relevant to the Commission's review of a specific request, then the co-proponent should anticipate that this information will have to be disclosed in some form for the Commission to execute its review. The cooperation of the proponents of an agreement is expected, and it is required for the Commission to effectively carry out its statutory duties.[13] Negotiated Service Agreements are optional voluntary agreements that can mutually benefit mailers and the Postal Service by capitalizing on mailer-specific characteristics. There is no right or guarantee that any mailer will obtain a mailer-specific Negotiated Service Agreement. The standard rates, fees, and

[13] In Docket No. MC2002-2, co-proponent Capital One was extremely cooperative in providing important information while identifying certain business plans it viewed as extremely confidential. The Commission was able to perform its function without the production of any of this confidential information.

classifications remain available for universal application. Thus, part of the "cost" of obtaining the special benefits associated with a Negotiated Service Agreement is participation in the review process, and the potential to have to disclose information relevant to the proceeding.

Subsection (c) Rates and standards information. Proposed subsection (c) requires in part that the Postal Service provide a statement describing and explaining the proposed changes to the Domestic Mail Classification Schedule and any associated rate schedule. The Postal Service alerts the Commission to the fact that there are fee schedules in addition to the referenced rate schedules. Postal Service at 28. The Commission will correct this omission in the final rule by changing the words "rate schedule" to "rate or fee schedule." Section 3001.193(c) shall be modified to state: "Every formal request shall include a description of the proposed rates, fees, and/or classification changes, including proposed changes, in legislative format, to the text of the Domestic Mail Classification Schedule and any associated rate or fee schedule."

Subsection (d) Description of agreement. No substantive comments in opposition to proposed § 3001.193(d) have been received. Section 3001.193(d) shall be included in the final rule as originally proposed.

Subsection (e) Financial analysis. Subsection (e) requires every formal request to include an analysis of the effects of the Negotiated Service Agreement on Postal Service volumes, costs and revenues. Comments are fairly balanced between parties considering the specific requirements too onerous, and parties arguing in support of the proposed rule. The Postal Service contends that the rule generally solicits information necessary to explain and justify the financial components of a Negotiated Service Agreement, but has concerns over the rule's structure. Several parties also provide detailed suggestions for improving particular requirements of subsection (e).

Capital One foresees several problems in complying with the proposed rule. It contends that in general mailer specific costs are not known. It questions the reliability of mailer-specific elasticities and their projection over a three-year period. It argues that obtaining mailer-specific volumes over the possible three years of an agreement is just wishful thinking. Furthermore, it foresees frequent use of waivers claiming that information is unavailable and cannot be produced without undue burden. Alternatively, Capital One favors adapting the rules for experimental requests for use with requests predicated on Negotiated Service Agreements. It argues that there is no reason to believe that future Negotiated Service Agreements will have any greater impact or be more complex than the typical experimental case. Capital One at 3-7.

DMA et al. contend that the proposed rules "are so burdensome and broad that . . . they would deter most from seeking NSAs and substantially increase the costs of obtaining NSAs to those who might be willing to go forward." It suggests, as a procedural alternative, that the Postal Service only be required to prove that a Negotiated Service Agreement improves the Postal Service's financial position, and require sufficient data to prove this point. It further argues for the adoption of rules analogous to the rules governing experimental classifications. DMA et al. are particularly troubled over the requirements to analyze costs, revenues and volumes over the life of the agreement versus just a test year, the use of mailer-specific costs, volumes, and elasticities, and certain aspects of providing a response in regard to contribution. DMA et al. further discuss the difficulty of developing estimates and the difficulty of defending estimates without disclosing a significant amount of proprietary information. DMA et al. at 6-8.

Discover considers the DMA et al. comments as instructive, and believes that even the Postal Service's proposals (discussed below) are too rigid. It suggests that the level of detail specifying evidentiary support should not be written into stone at this time. Discover proposes the rule should just require that "'[e]very formal request shall include a sufficient analysis of the effects of the Negotiated Service Agreement on Postal Service volumes, costs and revenues . . ..'" It argues that the details of each Negotiated

Service Agreement could then dictate the type and level of financial analysis required. Discover Reply at 5.

First Data interprets the rule as establishing a rebuttable presumption which requires the presentation of data quantifying the additional mail volume potentially generated by the Negotiated Service Agreement, and the associated elasticity factors. It contends that volume and elasticity studies of this kind are time consuming and costly to generate. It argues that such data may be appropriate for some Negotiated Service Agreements (such as the Capital One agreement), but may not be appropriate for others. First Data further requests clarification "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."[14] First Data at 2-3.

MMA's concern is with the requirements for mailer-specific information. It requests clarification that the Commission is interested in the costs incurred by the Postal Service for handling the specific mailer's mail, and not the costs incurred by the mailer to prepare the mail (for example, the mailer's cost of preparing workshare type mail). It also requests clarification that a mailer is not required to provide mailer-specific information or develop mailer-specific elasticity factors unless such information is relevant to the Commission's review. MMA at 5-6.

Pitney Bowes also interprets § 3001.193(e) as creating a presumption that mailer-specific cost, volume, revenue, and elasticity information will be required, notwithstanding that such data and information may not be important for every agreement. It requests clarification that there is no presumption for extensive mailer-specific information for every request predicated on a Negotiated Service Agreement. It also requests an express provision in the rules stating that data is not required where the proponents present a plausible explanation that the effects to be measured by the information would be *de minimis.* Pitney Bowes at 4-5.

[14] The Commission's analysis is not limited to analyzing the benefit to the Postal Service on a per piece basis. In most instances, volume information will be necessary to determine the agreement's aggregate effect on the overall finances of the Postal Service. Thus, the Commission can not adopt First Data's proposal.

PostCom interprets § 3001.193(e) as contemplating that a Negotiated Service Agreement cannot be approved in the absence of mailer-specific information. It contends that this would be an unacceptable standard. It argues that few, if any, mailers collect, or retain, mailer-specific information at the level of detail that the Postal Service does on a system-wide basis. PostCom proposes changes to § 3001.193(e)(5) to stress that the focus is on the costs to the Postal Service. It further uses the terminology "to the extent practical" presumably to allow for the use of proxies for mailer-specific information when it is unavailable. PostCom's proposal states:

> Include an analysis which sets forth, to the extent practical, estimated mailer-specific costs to the Postal Service and the estimated volumes and revenues which will result from implementation of the Negotiated Service Agreement;

PostCom at 6-7. PostCom also proposes complementary changes to §§ 3001.193(e)(6)-(8).

The Postal Service supports PostCom's proposal to modify §§ 3001.193(e)(5)-(8), and has incorporated the essence of PostCom's proposal into its revised proposal. The Postal Service contends that these modifications streamline the structure of the rule and remove certain redundancies. Postal Service Reply at 15-16.

Valpak contends that the rules in regard to requiring mailer-specific cost information are reasonable and necessary. It asserts the relevant issue is the necessity to obtain reliable cost estimates on which the Commission can base its rate recommendations. It dismisses some commentary provided by other parties as arguing it is impractical to require the Postal Service to meet virtually any burden to obtain a desired change in rates. Valpak's comments provide examples discussing the importance of good proxies and mailer-specific costs.

In regard to PostCom's proposal to focus on Postal Service costs, Valpak does not object to the rewording of § 3001.193(e)(5). However, it contends that PostCom's implication that the proposed rule requires anything other than Postal Service costs is rather stretched. Valpak also objects to the addition of the phrase "to the extent

practical." It argues that this could vitiate the rule, potentially acting as a permanent waiver. Valpak Reply at 1-5.

NAA contends that since the Postal Service does not have residual claimants to answer to if it enters into unwise deals, it is more important, not less, to understand the costs of what it is committing to. It is dismissive of other comments paying "lip service" to the concept that mailer-specific data is desirable, but that actually obtaining such data generally would be too difficult. It remains unconvinced of the Postal Service's position, which it summarizes as mailer-specific costs are unknowable, but average costs should usually suffice. NAA contends that private regulated carriers routinely engage in such cost analysis. NAA Reply at 5-7. NAA also supports requiring the financial analysis to be considered over the life of the agreement stating: "If the Postal Service truly cannot arrive at a reasonably realistic assessment, taking into account all pertinent considerations, whether a particular deal would raise or lower contribution, it should not enter the agreement." Id. at 7-8.

UPS views the gathering of mailer-specific information as the cost of offering mailer-specific rates, the absence of which draws into question the very concept of Negotiated Service Agreements. It asserts that "large" mailers are urging the Commission to abandon attempts to obtain mailer-specific costs and other information, but they do not contend that such information is not relevant to the proceeding. Generally, UPS supports the mailer-specific information requirements. UPS Reply at 3-4. UPS also supports the multi-year financial analysis proposed by the rules. Id. at 4-7.

The Commission assumes that the negotiators and the decision-makers involved with entering into Negotiated Service Agreements require a certain level of information in order to exercise appropriate business judgement. Where information is unavailable that is necessary to exercise this judgement, the Commission expects the expenditure of some level of effort to gather the required information. In most instances, the information sought by the Commission is the minimum information that should be under consideration during the negotiation and decision-making process. The Commission

requires this information in order to carry out its statutory functions. Thus, the Commission is not persuaded by arguments that the rules impose too high of a burden, or that it is unreasonable to ask proponents to gather information required to justify any one particular request.

Requests predicated on Negotiated Service Agreements are not requests for experimental classifications. The purpose of an experimental classification is for the Postal Service to learn something. Experimental rules anticipate that certain information might not be available because a purpose of the experiment might be to gather that information. The existence of these rules does not prevent the Postal Service from filing requests for experimental authority to test potentially beneficial arrangements.

Nor are requests predicated on Negotiated Service Agreements the same as a request in an omnibus rate case. The rules for an omnibus rate case allow for a wide spectrum of material with its associated levels of uncertainty that potentially could effect postal services for an unknown period of time. Because of these and other characteristics, a test year approach is appropriate for an omnibus rate case. In contrast, Negotiated Service Agreements are limited in both scope and duration. The Postal Service should not be entering into a Negotiated Service Agreement unless it has good reason to believe the agreement benefits the Postal Service. Because of limited scope and duration, and the requirement to benefit the Postal Service, it appears reasonable to assume that the proponents of an agreement should and could have a high level of understanding as to the bases of that agreement. Without this understanding, it might be unwise to continue considering such an agreement. Because of the characteristics of Negotiated Service Agreements, compared with the characteristics of experimental and omnibus rate cases, the Commission believes that the financial analysis rule is appropriate under the circumstances, and is not unduly burdensome.

The Commission is not persuaded by the argument that because a Negotiated Service Agreement typically might not have a substantial effect on the finances of the

Postal Service, the less burdensome rules for experimental classifications might be more appropriate. While it might be true that any one Negotiated Service Agreement may have little effect on overall Postal Service finances, there has been an indication that many parties are interested in pursuing Negotiated Service Agreements. Assuming that multiple Negotiated Service Agreements are approved, the Commission has concern that the cumulative effects of multiple agreements could have an appreciable effect on Postal Service finances, and will have a further effect on the analysis of any future omnibus rate case. This makes it important to appropriately review every request predicated on a Negotiated Service Agreement.

There does not appear to be any suggestion that the information that the rules require is not relevant. Most of the commentary is on the burden imposed with gathering information, the difficulties in obtaining mailer-specific information, or in making projections into the future. The Commission requires information relevant to analyzing a request over the proposed duration of the agreement. If information is unavailable over the duration of the agreement, this analysis cannot be accomplished, and the agreement cannot be reviewed for compliance with the requirements of the Act. Proponents have the option of requesting shorter duration agreements, if that is all that can be justified given the available information.

The clarifications suggested by MMA are appropriate. For example, where discussion focuses on “mailer-specific costs,” the concern is with costs incurred by the Postal Service to handle the mail of the specific mailer. Furthermore, if an element of analysis, such as mailer-specific elasticity factors, is not relevant to the Commission’s review of a specific request, it need not be developed.

The financial analysis rule as proposed provides the Postal Service with considerable latitude to appropriately formulate its response to the characteristics of the particular request. Because of this inherent flexibility, the Commission will apply the rule of reason in interpreting compliance with the rule. The Postal Service is sufficiently sophisticated to know generally what information is relevant, and must be submitted, and what is not relevant and need not be submitted. Thus, the Commission is not

persuaded that the rules will result in the submission of substantial amounts of information not relevant to the analysis of the request.

The Commission requires certain information in order to carry out its statutory duties. It is not persuaded that it is imposing an unfair burden on any proponent by requiring that this information be provided. Negotiated Service Agreements provide participating mailers with benefits that are not available to other mailers in general. The requirement to substantiate a request for a Negotiated Service Agreement is part of the cost of receiving those benefits. The Commission believes that the rules strike the right balance to provide the Commission with the information necessary to review the request, without unduly burdening the proponents of the agreement.

The Postal Service supports § 3002.193(e) in that the requirements "appear to be intended to elicit a workable set of materials that should be sufficient to explain and justify the financial components of a proposed NSA." Nevertheless, the Postal Service has concerns over the structure of the requirement, and over a few of its provisions. Postal Service at 6-14.

The Postal Service does not oppose (even though it is not convinced that it is the preferred approach) a multi-year financial analysis versus a test year financial analysis to analyze the financial effects of a Negotiated Service Agreement. It argues that the scope and reliability of estimates might not be consistent when going from the first year of an agreement to the subsequent years. From its Capital One experience, it asserts it found difficulty in obtaining a one-year forecast. Thus, it contends that projecting a forecast over multiple years would present serious challenges.

To cope with these challenges, the Postal Service proposes a restructuring of subsection (e).[15] Subsection (e) would be subdivided into two subdivisions. The first subdivision would focus on the first year of the agreement and essentially provide the same information as proposed in the Commission's rule. The second subdivision would

[15] The Commission's comments and analysis are directed at the Postal Service proposal as it appears in its initial comments. Postal Service at Attachment 2-4. The Postal Service revises its initial proposal in its reply comments based on suggestions from other commentators. Postal Service Reply at Attachment 3-4. The suggestions of the other commentators incorporated by the Postal Service are addressed separately in this order.

continue to require a yearly financial analysis for the subsequent years. However, the focus in the subsequent years would shift to analyzing identifiable changes from the first year, rather than to build a separate analysis for each subsequent year from the ground up. The Postal Service would first identify factors that "might" cause the relevant elements of the analysis to differ materially from the corresponding elements in the first year. The potential effects of each factor would then be examined and quantified. Finally, the projected effects of all such factors would be aggregated into a restated financial analysis for each component of the agreement. The intent of the Postal Service's proposal is to better align the rule with what it views as the reality of the significant limitation on the amount and quality of information available past the first year of the agreement.

The Postal Service also has concerns in regard to the mailer-specific cost provisions of the rule. It reiterates its past position that determining "mailer-specific costs in all but the most extraordinary circumstances would be nigh impossible." It asserts that generally speaking it cannot hope to trace any particular customer's mail through the postal system. Given these concerns, however, the Postal Service believes that subsection (e) as proposed will provide it with the necessary latitude to structure its financial analysis, without the necessity to resort to routine requests for waivers. It acknowledges the importance of using the most accurate costs available, and does not intend to use, for example, subclass averages where it does not believe that will do a good job of estimating true costs. Finally, the Postal Service recognizes that special studies may be appropriate in some instances.

The Commission compliments the Postal Service for its well-reasoned commentary, analysis and proposals in regard to the proposed financial analysis rule. The Commission shares many of the Postal Service's observations and concerns in drafting rules applicable to a basically uncharted territory. Either the Commission's approach or the Postal Service's alternative approach could form the basis of a rule to analyze the financial consequences of a multi-year Negotiated Service Agreement. The two approaches substantially coincide for the first year of any agreement. For the

potential second and third years of an agreement, the differences appear more philosophical than substantive.

The Postal Service's approach potentially has one time savings advantage. It should present, up-front, potential changes to the financial analysis that might occur beyond the first year without requiring the Commission or interested parties to discover this information on their own. This could reduce the time necessary for analyzing a Postal Service request. The risk is that the Postal Service could apply a loose standard to interpreting what factors "might" cause the relevant elements of the analysis to differ "materially" from the corresponding elements in the first year, which would negate any benefit.

The Commission shall adopt the Postal Service's approach as proposed in its initial comments. This decision is substantially based on the slight advantage inherent in the Postal Service's approach. Both the Commission's approach and the Postal Service's approach, if properly applied, have the potential to provide the Commission with the information necessary to make an informed recommendation. If the Postal Service's approach proves inadequate, the Commission has the option of revisiting these provisions at a later time.

The Commission recognizes as valid many of the concerns raised by the Postal Service, and other intervenors. The rule requires the estimation of future events. It is a valid and acceptable argument that the farther out in time an estimation is made, the less certain the reliability of that estimation. The end effect will be that at a certain point in the future, the information becomes so unreliable that it is no longer of any use to justify a request. This might act to limit the duration of any proposed agreement. The Commission also accepts the Postal Service argument that it might not know every aspect of a mailer's costs. However, the Commission expects the Postal Service to know and understand mailer-specific costs where they have a bearing on a request. This is all part of analyzing the financial aspects of any proposed agreement.

Subsection (e)(3) requires the financial analysis to: "Be prepared in sufficient detail to allow independent replication, including citation to all referenced material."

OCA proposes to include a reference in subsection (e)(3) to the § 3001.193(h)(4) workpaper rules to make clear that the citation requirements of subsection (e)(3) are as stringent as the requirements for workpapers. OCA at 15. The Postal Service is opposed to this proposal because the requirement already requires the analysis to "'be prepared in sufficient detail to allow independent replication.'" Postal Service Reply at 16.

The Commission finds subsection (e)(3) acceptable as proposed, and is not persuaded that the OCA proposal suggests a necessary or desirable change.

Subsection (e)(4) requires the financial analysis to: "Include an analysis, which sets forth the estimated mailer-specific costs, volumes, and revenues of the Postal Service for each year that the Negotiated Service Agreement is to be in effect assuming the then effective postal rates and fees absent the implementation of the Negotiated Service Agreement." Subsection (e)(5) requires the financial analysis to: "Include an analysis which sets forth actual and estimated mailer-specific costs, volumes, and revenues of the Postal Service which result from implementation of the Negotiated Service Agreement."

PostCom and OCA note that subsection (e)(4) requires "estimated" mailer-specific costs, volumes, and revenues, whereas subsection (e)(5) requires "actual and estimated" mailer-specific costs, volumes, and revenues. PostCom suggests deleting the requirement for "actual" information from subsection (e)(5) because much more commonly, the costs and volume data will be estimates. PostCom at 5. OCA proposes to make subsection (e)(4) and (e)(5) symmetrical by adding "actual" to subsection (e)(4). OCA at 15-16. The Postal Service endorses the approach taken by PostCom by noting that the "availability of actual financial information for a future period seems equally unlikely in either scenario." Postal Service Reply at 15-16.

The Commission shall delete "actual" from subsection (e)(5). Both subsections (e)(4) and (e)(5) require the Postal Service to perform a prospective analysis of future

events. The mailer-specific costs, volumes, and revenues might be known in the past, or at the present, but they would only be estimates in the future.[16]

Subsection (e)(6) requires the analysis to: "Include a discussion of the effects of the Negotiated Service Agreement on contribution to the Postal Service (including consideration of the effect on contribution from mailers whom [sic] are not parties to the agreement)." OCA proposes to require an "analysis" rather than a "discussion."[17] OCA at 16. The Postal Service does not support changing the terminology to "analysis." It questions whether anything useful is gained by making the substitution, and contends that the term "analysis" might be misconstrued. Postal Service Reply at 16-17.

The Commission interprets OCA's concern as with the level of detail required to comply with this rule. Parties on their own should be able to determine the first order effects on contribution from the cost, volume, and revenue requirements of subsections (e)(4) and (e)(5). However, subsection (e)(6) is meant to emphasize the importance of the consideration of contribution to the overall recommendation, and alert the Postal Service that this issue warrants separate treatment. Subsection (e)(6) requires a quantitative as well as qualitative response. Because the word "analysis" may be interpreted as more inclusive, the Commission will accept the OCA proposal and change the word "discussion" to "analysis" in the final rule.

NNA proposes the addition of a requirement for all costs to be presented by cost segment in regard to worksharing type Negotiated Service Agreements. It argues that the purpose of this requirement is to allow small competitors and the Commission to better identify potential functionally equivalent arrangements. NNA at 6-7. In addition, NNA proposes to add a requirement to § 3001.193(e)(6) for the Postal Service to provide a plan demonstrating how it will make the individual features of a Negotiated Service Agreement available to mailers not party to the agreement. Id. at 7-8.

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[16] This appears as § 3001.193(e)(1)(ii) after incorporation of the Postal Service's proposed restructuring of § 3001.193(e).

[17] OCA proposes a similar change to the last sentence of § 3001.193(e) which delineates the procedures to be followed when mailer-specific costs or elasticity factors are not available. Within the context of the last sentence of § 3001.193(e) [renumbered § 3001.193(e)(1)], it is appropriate to "discuss" the suitability of proposed proxies for cost or elasticity factors.

The Postal Service is opposed to the NNA proposal requiring estimated costs to be presented by cost segment. Given the purported purpose of enabling smaller mailers to identify potentially functionally equivalent arrangements, and the ability of the uninitiated to understand and utilize arcane cost segment data, the Postal Service cannot conceive how this information could benefit a small mailer. Thus, the Postal Service contends that the proposed requirement is unnecessary and burdensome. Postal Service Reply at 17-18.

In instances outside of omnibus rate cases, the Commission does not always require cost estimates to be presented by cost segment.[18] If this information becomes necessary to analyze a specific request, a participant or the Commission can request it separately. The Commission interprets NNA's goal as requiring the Postal Service to provide detailed information for examining the potential for developing new or functionally equivalent Negotiated Service Agreements, and not for analyzing the instant request. The inference is that picking and choosing desirable functional elements from a proposed multi-element Negotiated Service Agreement could be used to develop new Negotiated Service Agreements. While the Commission considers it a requirement that similarly situated mailers have the opportunity to obtain functionally equivalent Negotiated Service Agreements, dissecting an agreement for the purpose of developing and promoting future agreements is beyond what the Commission requires. It also is beyond what is necessary to evaluate the merits of any one Postal Service request.

OCA proposes the addition of a ninth requirement to subsection (e) which states: [the analysis shall] "demonstrate that the impact of the Negotiated Service Agreement on the net present values of the Postal Service is significant and positive." The OCA asserts that this would insure that the time value of money is accounted for in estimating the effect of a Negotiated Service Agreement on Postal Service finances. OCA at 16. The Postal Service opposes the addition of this requirement as it adds far more needless complication than real substance. Postal Service Reply at 17.

[18] However, this level of detail might become necessary when integrating the effects of a Negotiated Service Agreement into an omnibus rate case.

The Commission concurs with the Postal Service. OCA fails to provide any persuasive explanation of how analyzing an effect on net present value, in light of all of the other informational requirements, would add further insight to the Commission's recommendations.

Subsection (f) Impact analysis. Subsection (f) requires the Postal Service to include an estimate of the impact of the Negotiated Service Agreement on: competitors of the parties to the Negotiated Service Agreement other than the Postal Service; competitors of the Postal Service; and mail users.

First Data contends that the requirements of subsection (f) are burdensome and suggests that the subsection be deleted. First Data at 3-5. MMA asserts that subsection (f) is burdensome, of questionable value, and also suggests that it should be deleted. MMA at 6. DMA et al. contend that subsection (f) is burdensome, and that the requirement is vague. DMA et al. at 11. Capital One objects to subsection (f) in general, and (f)(2) specifically. It contends that complying with the requirement would be an onerous task, and that the "Panzar" effects that this subsection arguably responds to are too remote for consideration. It also asserts that the Commission's obligation is to ensure that proposals promote rather than harm competition, and not to assess the benefit or harm to any particular competitor as Capital One argues is required by subsection (f)(2). Capital One at 6-7.

NAA emphatically supports analyzing the competitive effects of Negotiated Service Agreements. NAA Reply at 8-11. UPS argues that subsection (f) is supported by the factors of the Act and urges the rejection of proposals to eliminate this requirement from the rule. UPS Reply at 4. Valpak supports a broad analysis on the consequences that Negotiated Service Agreements have on third parties. Valpak at 8-11; Valpak Reply at 10-11. OCA opposes elimination of subsection (f). It argues that because the Commission must find that each Negotiated Service Agreement serves the public interest, it should insist that the Postal Service's filing contain what is essentially a social cost-benefit analysis. OCA Reply at 8-9.

The Postal Service's concern is with the potential burden imposed by subsection (f), and it questions whether the information required to comply with the requirement will even be available. It suggests that the Postal Service could first provide some analysis, but then the burden should shift to the competitors to raise competitive issues. The Postal Service implies that it should really just be reacting to third-party claims of competitive harm brought up in the proceeding. The Postal Service states that it "would be willing to provide information with its filing concerning the competitive context in which the NSA takes place, and otherwise qualitatively demonstrate that it has considered such competitive effects prior to filing the NSA request." Postal Service at 15-19; Postal Service Reply at 18-20.

The Commission anticipates that the burden of complying with subsection (f) will vary considerably depending on the specifics of the Negotiated Service Agreement and the parties involved. The subsection is written using general language to allow the Postal Service the flexibility to formulate a response appropriate under the circumstances. The commentary on the rule fairly equally argues in support of and in opposition to the proposed rule. The rule addresses a difficult subject area. However, the information it requires is necessary for the Commission to analyze the request in relation to the requirements of the Act. It is particularly important for Negotiated Service Agreements involving mail subject to the Postal Service monopoly. The Commission will retain this rule in the final rules, but will be willing to entertain suggestions for future improvements after gaining further experience.

Several comments discuss whether it is appropriate for the Postal Service to have the initial burden of presenting competitive issues or whether third party competitors should be required to protect their own interest by intervening in the proceeding. First Data argues that the Commission should rely on the normal adversarial process for third parties to protect their interests. First Data at 3-5. MMA contends that the Commission should rely on intervention by third-party competitors to protect their own interests, and intervention by the OCA to represent the interests of the general public. MMA at 6. OCA supports the adversarial approach assuming that all

adversely affected parties are of similar size and financial resources to the proponents of the Negotiated Service Agreement. However, OCA contends that if a large number of small firms were adversely affected, no single small firm would find it worthwhile to incur the costs of litigation, even if the aggregate negative effects of the Negotiated Service Agreement were large. OCA Reply at 8-9.

The Commission believes that the adversarial process, in most instances, is the preferred methodology of resolving issues before the Commission. This methodology is most efficient where adversaries possess comparable resources and knowledge. In this situation, parties can be presumed to have the responsibility to intervene in a proceeding if their interests are at stake.

However, requests predicated on Negotiated Service Agreements present a different situation to the Commission. Competitors of the proponent requesting a Negotiated Service Agreement cannot be presumed to have comparable resources and knowledge to intervene for the purpose of protecting their own interests. For example, the Capital One NSA experience showed very few competitors approaching Capital One's resources and knowledge. It is unreasonable to expect small businesses to be constantly aware of the potential impact of Negotiated Service Agreements filed with the Commission, and to be prepared to raise their concerns in the limited time frames established by these rules. This could leave multiple, similar small competitors not represented and unprotected when considering the aggregate effect of a Negotiated Service Agreement, especially since these cases are expected to proceed with expedited timetables. Thus, the Commission is not persuaded that total reliance on the adversarial system is consistent with its statutory obligations, or is in the best interest of all mailers or the postal system. Subsection (f) is intended to complement the adversarial process. Requiring the proponents of a Negotiated Service Agreement to initially analyze competitive issues and provide analysis to the Commission is a modest step in the direction of assuring an adequate record on this important issue.

The Commission considers it fair and equitable to place the initial burden on the Postal Service and its co-proponents. The Postal Service is likely to have greater

access to information about mail markets and be better able to evaluate potential impacts than the vast majority of mailers who may be concerned about the possible impacts of a Negotiated Service Agreement. Its co-proponents are assumed to be in the industry that would be affected by the Negotiated Service Agreement, and should be knowledgeable about competitive issues within their own industry, and competitive relationships within the industry. Both the Postal Service and its co-proponents presumably have recently undertaken the negotiation process where many of these issues may have been considered. Thus, the Postal Service and its co-proponents are in a superior position to efficiently address this topic.

Providing information on the competitive issues of a Negotiated Service Agreement with the request also facilitates issuing a prompt decision. Expediting the proceeding has been stressed in many of the comments. The Commission found it necessary to sponsor a witness to address certain issues when it evaluated the Capital One Negotiated Service Agreement. This was time consuming both from the aspect of providing time for the witness to develop the required testimony, and of providing time for interested parties to respond to the testimony. Assuring the availability of an analysis of impact on competition up front, with the request, appears to be a more efficient way to proceed.

Discover and Pitney Bowes suggest textual changes that could make compliance with the requirement less onerous. Discover proposes that the word “discussion” be used in place of the words “analysis” and “estimate” in subsection (f). It argues that most Negotiated Service Agreements only have limited impact on competition, providing there is rapid approval of functionally equivalent agreements. Thus, anything more than requiring a simple statement will only increase the transaction costs of the review process. Discover Reply at 5-6. Discover also suggests that the Commission distinguish between different types of Negotiated Service Agreements in setting requirements for analyzing the impact of a Negotiated Service Agreement. Id. at 7-8. Pitney Bowes suggests that subsection (f) only require the parties to “consider” competitive effects. It also suggests that extensive data or information is not necessary

if competitors do not appear to oppose the Negotiated Service Agreement.[19] Pitney Bowes at 6-7.

The Commission shall not adopt suggestions only to require that proponents "consider" or "discuss" the effect of a Negotiated Service Agreement. The Commission considers the effects of a Negotiated Service Agreement to be an important issue requiring more than the implied limited discussion or consideration. A simple statement that the effects of the Negotiated Service Agreement have been considered, or a broad statement about competition in general will not suffice in providing the Commission with the information necessary to evaluate the effects of a Negotiated Service Agreement.

The Postal Service proposes to change the term "estimate" to "analysis" in subsection (f). Postal Service at 15-19.

The Commission interprets the Postal Service's intent as to require more of a qualitative than a quantitative response. The Commission expects an analysis to provide both quantitative and qualitative information, and thus will change the final rule to refer to an "analysis." This could be revisited in a future rulemaking after the Commission and the Postal Service come to a better understanding, through experience, of what information might reasonably be presented.

Subsection (f) is written with inherent flexibility. The Commission tasks the Postal Service with using this flexibility to its advantage, and through the rule of reason, provide a response that is appropriate under the circumstances.

Subsection (g) Data collection plan. Subsection (g) requires Postal Service requests to provide a proposal for a data collection plan. The Postal Service alerts the Commission to a typographical error in a reference to a subsection. Postal Service

[19] Pitney Bowes questions whether there is a distinction between analyzing the impact on mail users as a group and analyzing overall system contribution. In many instances, changes in contribution will be the major impact on users of the mail. In other instances, a Negotiated Service Agreement could have an impact for example on service standards, which could effect users of the mail. The Commission does not know what types of Negotiated Service Agreements that the Postal Service is contemplating. The specifics of a particular Negotiated Service Agreement will determine how the Postal Service chooses to comply with this requirement.

at 27-28. The Commission shall correct the typographical error by referencing the correct sections of renumbered § 3001.193(e) in the final rule.

OCA suggests an amendment to § 3001.193 to make clear that a proposed data collection plan is subject to change by the Commission. The OCA proposes to specifically state: "The proposed data collection plan will be subject to amendment by the Commission in its recommended decision." OCA at 16.

The Commission has the right to task proponents with collecting data and performing analyses appropriate under the specific circumstances of any request. The data collection plan proposed in a request predicated on a Negotiated Service Agreement serves a different purpose, and is anticipated to be less burdensome, than a data collection plan appropriate for an experiment. *See* PRC Order No. 1383 (August 27, 2003) at 13. The data gathered and analysis performed is anticipated to be that which would be done anyway in the normal course of business to quantify the benefit to the Postal Service. The Commission does not find it necessary to adopt OCA's suggestion in the final rule.

Subsection (h) Workpapers. No substantive comments in opposition to proposed § 3001.193(h) have been received. Section 3001.193(h) shall be included in the final rule as originally proposed.

Subsection (i) Certification by officials. No substantive comments in opposition to proposed § 3001.193(i) have been received. Section 3001.193(i) shall be included in the final rule as originally proposed.

Subsection (j) Rejection of requests. Subsection (j) provides that the Commission may reject any Postal Service request which patently fails to substantially comply with any requirements of the subpart (subpart L). Subsection (j) is modeled after identical language appearing in §§ 3001.54(s) and 3001.64(i).

The Postal Service reiterates its position expressed in rulemaking Docket No. RM80-1 in regard to rules 3001.54 and 3001.64 that rejection by the Commission of a Postal Service request made under §§ 3622 and 3623 falls outside the bounds of the Commission's lawful authority.[20] Further, the Postal Service preemptively rejects any argument that a rejection of a Postal Service request would affect the Postal Service's authority to impose temporary rate and classification changes under § 3641, and specifically requests that the provisions of § 3641 be cited in § 3001.195. Postal Service at 19-21, Attachment at 5.

The legal authority of the Commission to reject a Postal Service request that patently fails to substantially comply with filing requirements was litigated in Docket No. RM80-1, and comprehensively explained in PRC Order No. 354. The finding of legal authority was based on the holdings presented in *Municipal Light Boards of Reading and Wakefield Massachusetts v. Federal Power Commission,* 450 F.2d 1341 (D.C. Cir. 1971), which is still current law. The Postal Service has not produced any new argument that would persuade the Commission to alter its position. Therefore, subsection (j) shall remain as part of the final rule.[21]

Section 3001.194 Failure to Comply

No substantive comments in opposition to proposed § 3001.194 have been received. Section 3001.194 shall be included in the final rule as originally proposed.

[20] *See* Docket No. RM80-1, Comments of the United States Postal Service in Response to Postal Rate Commission Notice of Proposed Rulemaking, March 12, 1980.

[21] The Commission acknowledges that § 3641 provides the Postal Service with the authority, under limited circumstances, to impose temporary changes in rates and fees. However, the Postal Service can only exercise this authority if it meets all of the requirements of § 3641. The Postal Service must consider the anticipated minimal financial effect of any one Negotiated Service Agreement on the "total" estimated costs and revenues of the Postal Service. *See* § 3641(b). The classification attached to the rate or a fee also would have to exist prior to the Postal Service imposing a temporary change to its rate or fee. For these reasons, the Commission will not adopt the Postal Service's suggestion of providing a cite to § 3641 in § 3001.195.

Section 3001.195 Requests to Recommend a Baseline Negotiated Service Agreement

Section 3001.195 governs Postal Service requests for recommended decisions in regard to a baseline Negotiated Service Agreement. A baseline Negotiated Service agreement is not predicated on a functionally equivalent Negotiated Service Agreement that is currently in effect.

Subsection (a)(1) requires the Postal Service request to include a written justification for requesting a Negotiated Service Agreement classification as opposed to a more generally applicable form of classification.

NNA supports rigorous application of the requirement to justify requesting a Negotiated Service Agreement classification as opposed to a more generally applicable form of classification. NAA Reply at 12-17; further general support is demonstrated by NNA at 4-6, UPS Reply at 7 and Valpak at 8. The requirements of subsection (a)(1) shall appear in the final rule.

Subsection (a)(2) requires each Postal Service request to include a description of the operational bases of the Negotiated Service Agreement, including activities to be performed and facilities to be used by all participants.

DMA et al. argue that the Commission should not be concerned with how the mailer's operations work. With respect to the Postal Service, DMA et al. argue that the Commission only should be concerned to the extent it allows the Commission to probe the validity of cost estimates. DMA et al. at 11.

A thorough understanding of each participant's responsibilities and activities is relevant to the consideration of any request for a Negotiated Service Agreement. In some instances, this will require considerable detail, including information pertaining to operations to be performed, financial information, and the facilities to be used. The Commission also might require a broad understanding of the mailer's operations (and business activities) to review the competitive implications of the agreement. The level of detail required will be dependent on the specifics of the agreement. Negotiated Service Agreements are voluntary agreements; the standard rates, fees, and classifications are always available. Thus, mailers seeking Negotiated Service

Agreements are expected to provide information relevant to the Commission's review of the agreement. The requirements of subsection (a)(2) shall appear in the final rule.

Subsection (a)(3) requires the Postal Service request to include a statement of the parties' expectation regarding performance under the Negotiated Service Agreement.

PostCom contends that subsection (a)(3) should be deleted because it is unlikely that the provision will solicit helpful views, the Commission should not be taking these views into consideration in its consideration of the agreement, and it could lead to regulatory and third-party intrusion into the negotiation process. PostCom at 8. DMA et al. question the relevance of subsection (a)(3), because only the terms and conditions of the agreement, and not expectations, are binding on any of the participants. DMA et al. at 11-12.

The Commission concludes that although the information required by subsection (a)(3) might provide some background, such a response inquiring of expectations would involve unnecessary speculation on the part of the participants, and is unlikely to be relevant to the Commission's final decision. If this issue becomes relevant to a specific request, the Commission can always request this information on a case-by-case basis. Subsection (a)(3) will not appear in the final rule.

Subsection (b) specifies that the Commission will establish a procedural schedule to allow for prompt issuance of a decision. A specific time requirement is not specified in the proposed rule.

The Postal Service suggests the establishment of a 150-day time limit from the date of filing for the Commission to issue its recommended decision. The Postal Service contends that this will lower the perceived transaction costs, and result in sooner implementation of the agreement. Furthermore, the Postal Service argues that the Commission considers far ranging issues within an omnibus rate case within a 10-month time frame. Thus, a more limited inquiry impacting perhaps only several mailers should be manageable within five months. Postal Service at 21-23. DMA et al. similarly argue for establishment of a 150-day time limit from the date of filing. DMA

et al. at 8-9. Discover supports the Postal Service's suggestion to establish a 150-day time limit from the date of filing. Discover Reply at 4. Pitney Bowes does not suggest a specific limit, but argues that the Commission can add some certainty to the process by incorporating time limits into the rule. Pitney Bowes at 7.

OCA and NAA conditionally support the establishment of time limits. Rather than an 150-day deadline, OCA would support an 150-day goal. Adherence to the goal would be predicated on the proponents of the agreement not requesting waiver(s) and fully complying with all filing requirements. OCA Reply at 6. NAA argues that if the Commission adopts a time limit, then it should expressly reserve the right to take longer time if necessary for full and fair consideration. NAA Reply at 11-12.

The Commission is not inclined to include a deadline in the final rules. As the Commission previously stated, "a Negotiated Service Agreement can take many forms, and may include unique and novel issues. Because of this, it is difficult to predict the duration of a proceeding before initial review of the actual request. A schedule will be established in each case, to allow for prompt issuance of a decision consistent with procedural fairness." PRC Order No. 1383 (August 27, 2003) at 15. Although establishing a goal of 150 days appears reasonable, the Commission does not have sufficient experience with requests for Negotiated Service Agreements to be more precise. Uncontested and fully supported requests for Negotiated Service Agreements should take less than 150 days to be reviewed. Requests for Negotiated Service Agreements that are contested or not fully supported might take longer than 150 days to be reviewed — as might be warranted in such cases. The intent of the Commission is to provide reasonable expedition under the circumstances presented when the request is filed.

Section 3001.196 Requests to Recommend a Negotiated Service Agreement that is Functionally Equivalent to a Previously Recommended Negotiated Service Agreement

Section 3001.196 governs Postal Service requests for recommended decisions in regard to Negotiated Service Agreements that are proffered as "functionally

equivalent" to a Negotiated Service Agreement previously recommended by the Commission. The Negotiated Service Agreement previously recommended by the Commission is referred to as the "baseline" agreement. The baseline agreement is required to be in effect on the date that the request for a functionally equivalent Negotiated Service Agreement is filed.

The purpose of § 3001.196 is to provide an opportunity to expedite the review of a request for a functionally equivalent Negotiated Service Agreement by allowing the proponents of the agreement to rely on relevant record testimony from a previous docket. This potentially could expedite the proceeding by avoiding the need to re-litigate issues that were recently litigated and resolved in a previous docket.

The Postal Service contends that the terminology "functional equivalence" will cause unnecessary and unwarranted confusion, and suggests use of "derivative NSA" as an alternative. Postal Service at 23-25. The Postal Service's concern is that previous usage of the terminology "functional equivalence" only referred to the operational functions of a service. For example, the Mailing Online Domestic Mail Classification Schedule language, which references a functionally equivalent service, only referred to the operational functions of Mailing Online.[22] Another example is the Domestic Mail Classification Schedule language proposed in the Capital One Stipulation and Agreement that refers only to the minimal substantive characterizations of that agreement.[23] In regard to Negotiated Service Agreements, the Commission has stated that functional equivalence is broader than the literal terms and conditions of each agreement. The Postal Service notes that the Commission suggests factors such as deriving a functionally equivalent benefit from a proposed agreement might be relevant

[22] The Commission was notified on August 29, 2003 that the Postal Service was no longer offering the experimental Mailing Online service. The Commission subsequently removed references to Mailing Online (including the definition for a functionally equivalent service) from the Domestic Mail Classification Schedule in the October 19, 2003 revision to the Domestic Mail Classification Schedule. Thus, this source of potential confusion no longer exists.

[23] The Postal Service contends that the Commission failed to incorporate language suggested by the Capital One Stipulation and Agreement into the Domestic Mail Classification Schedule in regard to mailers eligible for functionally equivalent Negotiated Service Agreements. The Postal Service assumes that this omission was an oversight. Postal Service at 23-24, fn. 9. The language in question had in fact been incorporated into the Domestic Mail Classification Schedule at § 610.12.

to the determination of functional equivalency. PRC Order No. 1383 (August 27, 2003) at 3. The Postal Service suggests that this broader interpretation of "functional equivalence" is not consistent with previous interpretations, and could cause confusion.

The Commission will not adopt the terminology "derivative NSA" because it does not offer a real improvement over the proposed terminology and it does not address the heart of the problem, which lies in formulating a working definition for a concept that has not been fully explored.

The Commission has an additional concern in that the terminology "derivative NSA" might imply a too expansive definition for what may be considered under the § 3001.196 rules. This can best be described by example. Assume a baseline Negotiated Service Agreement that contains several operational elements. Then assume a second Negotiated Service Agreement that contains the identical operational elements, plus the addition of one or more additional, important, substantive functional elements. The second NSA could be said to be derived from, or a derivative of, the baseline Negotiated Service Agreement. The Commission would not find the second agreement "functionally equivalent" to the baseline agreement because the additional substantive elements, and their interaction with the other elements, would not previously have been reviewed. The Commission believes the term "derivative NSA" might cause confusion in such a case.

As a second alternative to "functional equivalence," the Postal Service suggests even more neutral terms such as "category 1" and "category 2" to respectively describe a baseline and a functionally equivalent Negotiated Service Agreement. Postal Service Reply at 20-21.

The Postal Service's alternate suggestions of category 1 and category 2 Negotiated Service Agreements lends even less clarity to the situation. To be useful, terminology such as category 1 and category 2 necessarily require definitions. Thus, the original definitional problem remains and is only hidden behind more non-descriptive terminology.

The Commission understands the Postal Service's concerns, but does not envision more complete resolution of this issue until further experience with Negotiated Service Agreements has been developed. To better understand the Commission's expectations, the Commission below discusses three terms: "functionally equivalent," "similarly situated," and a new term "comparable benefit." This discussion should add some context in which the terminology can be more fully developed in the future.

"Functional equivalency" focuses on (1) a comparison of the literal terms and conditions of one Negotiated Service Agreement with the literal terms and conditions of a second Negotiated Service Agreement, and (2) a comparison of the effect that each agreement has upon the Postal Service.

The first part of the analysis is an examination of the literal terms and conditions of each Negotiated Service Agreement. For two different Negotiated Service Agreements to be considered functionally equivalent, each agreement must primarily rest on the same substantive functional elements. At this point, the Commission expects to focus on examining how each element functions or works, and not on the specific numeric details (i.e., costs, volumes, breakpoints, etc.).

For example, the Capital One NSA contains two functional elements, an address correction element (which is the primary cost savings element for the Postal Service), and a declining-block rate element. Assume that a second Negotiated Service Agreement consists of a similar address correction element and a similar declining-block rate element, with no additional elements. This would satisfy the first part of the analysis for functionally equivalency. Assume that a third Negotiated Service Agreement consists of a substitute cost savings element (other than the address correction element contained in the first agreement but still providing a comparable cost savings) and a similar declining-block rate element. The cost savings element is not similar and thus this agreement would not satisfy the first part of the analysis for functionally equivalency.[24]

[24] The Commission would entertain waiver requests to avoid re-litigation of similar elements as long as the material is current and remains relevant.

For the second part of the analysis, the Commission will go beyond the literal terms and conditions of the agreements and compare the effect that the baseline and proffered functionally equivalent agreements have on the Postal Service. The Commission gave an example that the analysis might examine whether the Postal Service derives a "functionally equivalent" benefit from a proposed subsequent Negotiated Service Agreement. *See* PRC Order No. 1383 (August 27, 2003) at 3, fn. 3. The choice of words "functionally equivalent benefit" was unfortunate because of the confusion it could cause when considering overall functional equivalency. The Commission will instead adopt the terminology "comparable benefit" to describe this concept. A comparable benefit does not mean an identical benefit, but instead will be placed into context by the terms and conditions of each agreement, and the characteristics of each participant.

For example, again assume the Capital One NSA is proposed as the baseline agreement (an address correction element and a declining-block rate element). The proposed subsequent agreement contains identical terms and conditions to the terms and conditions contained in the Capital One NSA. Thus far, because the literal terms and conditions of both agreements are identical, the first condition of functional equivalency has been met. However, the second mailer, Mailer Two, does not approach the return rate of Capital One to the point that the address correction element is essentially irrelevant, and most if not all of the potential Postal Service cost savings are eliminated. (In reality, the agreement consists solely of a declining-block rate discount.) The Postal Service will not obtain a comparable benefit from such an agreement. The Commission would therefore not consider Mailer Two's agreement to be functionally equivalent to the Capital One Negotiated Service Agreement.

In the above example, it can be concluded that Mailer Two is not "similarly situated" to Capital One. "Similarly situated" refers to a comparison of the relevant characteristics of different mailers as the characteristics apply to a particular Negotiated Service Agreement. Mailer Two's agreement was found not functionally equivalent because it lacked a comparable benefit to the Postal Service. However, whether or not

Mailer Two is similarly situated to Capital One is not dispositive of the issue. It is possible that two mailers who are not similarly situated could qualify for functionally equivalent Negotiated Service Agreements, given comparable benefits to the Postal Service.

Discussions of whether mailers are similarly situated are more appropriately reserved for allegations of possible discrimination or discussion of competitive issues. A qualifying mailer that is similarly situated to a mailer participating in a Negotiated Service Agreement must have a similar opportunity to participate in a functionally equivalent Negotiated Service Agreement. Not providing this opportunity would raise the possibility of discrimination. In an attempt to differentiate the concepts of functionally equivalent from the concept of similarly situated, the Commission will strive to use the terminology similarly situated only when addressing concerns of competition or discrimination, and not to use similarly situated when addressing application of the functional equivalency rules.

The issue of discrimination might arise in a separate complaint where a mailer alleges that it is similarly situated to a mailer operating under the terms and conditions of a Negotiated Service Agreement, but that it has been denied a similar opportunity to participate in a functionally equivalent Negotiated Service Agreement.

The issue of discrimination also might arise in opposition to a Postal Service request to recommend a functionally equivalent Negotiated Service Agreement. In this instance, assume that the proposed Negotiated Service Agreement (the Mailer Two agreement) is found functionally equivalent to a baseline Negotiated Service Agreement. Further assume that Mailer Two is not similarly situated to the mailer in the baseline agreement. For example, Mailer Two is in a different industry than the mailer in the baseline agreement.[25] Further assume the possibility that the industry in which Mailer Two operates might find the functionally equivalent Negotiated Service Agreement anti-competitive or discriminatory. The baseline case might or might not

[25] This might or might not require a more expansive definition of similarly situated than previously proposed. For this discussion, it shall be assumed that the mailer's industry is relevant to a finding of similarly situated.

have addressed the industry specific issue of competition or discrimination in Mailer Two's industry.

Section 3001.196(a)(6)(ii) and (iii), as proposed, alerts the Postal Service that competitive issues will be relevant to every request predicated on a functionally equivalent Negotiated Service Agreement. Assuming compliance with § 3001.196(a)(6)(ii) and (iii), the Commission would likely find application of the expedited functional equivalency rules appropriate for streamlining much of the hypothetical proceeding. However, if substantive issues in regard to competition or discrimination are raised by a representative of Mailer Two's industry, and these industry specific issues were not adequately addressed in the baseline proceeding, the Commission would not bar representatives of Mailer Two's industry from raising these issues in the functionally equivalent proceeding. Furthermore, if these concerns have merit, it might not be possible to adhere to the expedited procedural schedule as proposed in § 3001.196(d).

Valpak advocates articulating specific criteria to determine whether one Negotiated Service Agreement is functionally equivalent to another Negotiated Service Agreement. It contends that this will help mailers argue their case for comparable treatment with the Postal Service, and that it will add certainty to whether the functional equivalency rules apply to review of a new request. Valpak at 4-8.

Valpak's suggestion would add clarity to the rules, however as the preceding discussion highlights, without additional experience it may be neither possible nor wise to attempt to delineate distinctions at this time. The rules as proposed place the burden of arguing functional equivalency on the Postal Service. The Commission will decide this issue on a case-by-case basis early in the proceeding. Given the need to gain experience with the application of these rules, specific criteria defining functional equivalency will not be included in the rules. As noted throughout this discussion, it is the Commission's expectation that these rules will be refined and improved in the future.

Subsection (a) limits the applicability of § 3001.196 to an agreement that is proffered as functionally equivalent to a Negotiated Service Agreement previously recommended by the Commission *and currently in effect.*

The Postal Service suggests the elimination of the limitation "and currently in effect."[26] It contends that the limitation is undesirable because it might encourage longer duration baseline Negotiated Service Agreements even where not appropriate, or because it may influence negotiations by creating a deadline to conclude negotiations. The Postal Service asserts that the option of using a waiver to circumvent the requirement would only inject more uncertainty into the Negotiated Service Agreement development process. It alternatively suggests that the timeliness of the proffered baseline Negotiated Service Agreement could be considered on a case-by-case basis as one element of the § 3001.196 requirement for the Commission to determine whether it is appropriate to proceed under § 3001.196. Postal Service Supplement at 1-4.

The Commission included "and currently in effect" in the rule to add some certainty to what agreements can be used as baseline agreements for functionally equivalent proposals. After a period of time, the probability increases that the material used in support of a baseline agreement will become dated and no longer relevant to the review of a functionally equivalent Negotiated Service Agreement. The Postal Service's concern, that the limitation will encourage entering into agreements that are more lengthy than appropriate to facilitate approval of functionally equivalent agreements, does not seem plausible. If a baseline agreement proves beneficial, it can easily be extended. If it is not beneficial, the desirability of a functionally equivalent agreement is suspect. The Commission will entertain waiver requests where appropriate when it is necessary to use a shorter-term (for example, less than

[26] The following discussion also is applicable to the "currently in effect" limitation appearing in § 3001.195(a).

12 month) Negotiated Service Agreement as a baseline.[27] Use of a longer-term Negotiated Service Agreement as a baseline poses less of a problem. Similarly situated mailers would have early and adequate notice of the potential for a functionally equivalent Negotiated Service Agreement upon approval of the baseline agreement. This then will provide a one to three year window in which to negotiate a functionally equivalent Negotiated Service Agreement. This appears to be adequate, given the emphasis placed on rapidly negotiating and implementing such agreements exhibited by many of the comments. The "and currently in effect" limitation serves as a useful benchmark for excluding outdated baseline agreements. While recognizing that exceptions might be made, the limitation will remain in the final rule.

NAA suggests several items that could be incorporated into § 3001.196. For instance, NAA suggests that the rules expressly provide that particular volume levels are not necessary to be considered "similarly situated" or "functionally equivalent." NAA further requests the Commission to identify the record on which it will determine whether it is appropriate to proceed under § 3001.196, and whether discovery will be allowed for this purpose. NAA Reply at 16-17.

The rules proposed by the Commission are general enough to be applicable to a wide range of potential Negotiated Service Agreements. Consideration of specific issues is better left to case-by-case consideration until further experience is gained with the review of requests for Negotiated Service Agreements. The determination of whether it is appropriate to proceed under § 3001.196 will be based on the Postal Service's request (including the associated and referenced material), the material from the proffered baseline docket, and oral and written argument presented prior to or on the date of the prehearing conference. If necessary, the Commission may request additional material for consideration. Consistent with subpart A of the Commission's

[27] The transaction costs of negotiating and approving short-term Negotiated Service Agreements potentially limit their usefulness, and thus might limit the number of such agreements. Use of waivers to facilitate timely, short-term functionally equivalent agreements should ease this concern. If the Postal Service were to anticipate a great interest in any particular short-term Negotiated Service Agreement, consideration could be given to reformulating the agreement as a niche classification. This potentially will reduce overall transaction costs, and implement the service in a shorter period of time.

rules, discovery will be allowed, for relevant purposes, from the moment of intervention to a period of time following the prehearing conference. This time period may or may not be adequate for the purpose of probing functional equivalency, and if necessary, requests for extensions or special provisions for discovery will be considered on a case-by-case basis.

OCA suggests an amendment to § 3001.196(a)(6)(i) to clarify that the financial consequences of mailer-specific differences from a baseline Negotiated Service Agreement would have to be presented at the same level of detail as for the baseline Negotiated Service Agreement. As originally proposed, § 3001.196(a)(6)(i) states: "[The Postal Service request shall include:] the financial impact of the Negotiated Service Agreement on the Postal Service over the duration of the agreement." OCA proposes to modify this section to read: "[The Postal Service request shall include:] the financial impact of the Negotiated Service Agreement on the Postal Service as set forth in § 3001.193(e)." OCA at 16-17.

The requirement as proposed clearly indicates that the financial impact of the Postal Service request will be relevant to the Commission's decision, and that the Postal Service must cover this topic in its request. The Commission does not want to preclude use of relevant financial information that could be referenced from a baseline docket, or restrict the Postal Service's ingenuity in preparing its request so as to facilitate expedited consideration. This suggestion will not be adopted into the final rule.

Subsection (b) requires the Postal Service to provide written notice of its request to certain participants who are assumed to be those potentially interested in the proceeding. The requirement is in addition to the requirement of providing notice by posting on the Commission's web site. This requirement balances the Commission's intent to limit the time period for intervention, and the requirement for interested participants to be adequately notified of a pending proceeding.

The Postal Service does not object to subsection (b), but notes that after successful implementation of electronic filing, this requirement returns the Commission to the hard copy world. The Postal Service suggests that the Commission experiment

with its e-mail notification system as an alternative to hard copy service. Postal Service at 27.

Although the modest subsection (b) requirement is redundant, the Commission is concerned that the goal of expediting a procedural schedule could be thwarted by a claim of insufficient notice. The Commission will include the subsection (b) requirement in the final rule, but will not be averse to revisiting and potentially eliminating this requirement based on future experience.

The Postal Service's comments about experimenting with the e-mail notification system for providing notice are well taken, and could be considered in the future. However, as it exists today, the e-mail notification system is strictly a voluntary system. It is not sufficiently developed and provides no assurance that a participant will receive notice without the participant properly activating the system.

Subsection (c) establishes that a prehearing conference will be scheduled for each request. The proposed rule specifies that participants shall be prepared to address at the prehearing conference whether or not to proceed under the functional equivalency rules.

Discover proposes a deadline of five days from the date of the prehearing conference for the Commission to determine whether or not to proceed under § 3001.196. Discover at 2.

The Commission intends to take a proactive approach to determine whether to proceed under § 3001.196, rather than adhere to an artificial deadline and quickly issue a less informative ruling with limited guidance. For Postal Service proposals that support the application of the functional equivalency rules, and in which application of the functional equivalency rules are unopposed, the Commission could rule on this issue at the prehearing conference. More complex scenarios might require additional time. Where the issue is controversial, or where the Postal Service has not supported application of the functional equivalency rules, the process will benefit if the Commission takes the necessary time to evaluate the facts and present a well reasoned ruling. The Commission shall not establish a deadline to be included in the rules.

The Postal Service proposes an additional provision to require participants to identify issues they wish to contest not later than five days prior to the prehearing conference. Postal Service at 26; *see also,* Discover Reply at 6.

Assuming that the Commission determines it is appropriate to proceed under § 3001.196, the Commission must then determine whether or not to schedule a hearing. The Postal Service's proposal to identify issues early in the proceeding will provide the Commission with the required basis on which to make this determination. Thus, the Commission sees benefit in the Postal Service's proposal. However, a requirement to identify issues five days prior to the prehearing conference does not provide adequate time for potential participants to study a new Postal Service request, determine whether or not to intervene, receive answers to discovery requests, and file pleadings identifying the issues to be contested. The Commission will establish the later deadline of the prehearing conference. This will provide five additional days to identify issues, and appears more reasonable.

The final rule will modify subsection (c) to require identification of issues that participants wish to contest, and establish a deadline of the prehearing conference. As originally proposed, the second sentence of subsection (c) states: "Participants shall be prepared to address whether or not it is appropriate to proceed under § 3001.196 at that time." The final rule will modify this sentence to read: "Participants shall be prepared at the prehearing conference to address whether or not it is appropriate to proceed under § 3001.196, and to identify any issue(s) that would indicate the need to schedule a hearing."[28]

Subsection (d) specifies that the Commission will establish a procedural schedule to allow for issuing a decision not more than 60 days (if no hearing is held) or 120 days (if a hearing is scheduled) after determining to proceed under § 3001.196.

[28] It is strongly suggested that oral argument on the above issues be accompanied by the filing of a clear and concise written pleading on the date of, or prior to, the prehearing conference. The Commission intends to decide the above issues in a timely fashion, and will work to avoid protracted motions practice.

Discover contends that these time periods are far too long and thus may prejudice or place the party seeking a functionally equivalent agreement at a competitive disadvantage. It suggests shortening the time periods to 30 and 90 days respectively. Discover at 3-4. UPS comments that shortening the schedule to consider a functionally equivalent Negotiated Service Agreement to as little as 90 days is a step in the wrong direction. UPS Reply at 7.

The Commission shares an interest in expediting review of functionally equivalent agreements, but this interest must be balanced against due process and assuring compliance with the requirements of the Act. The 60-day and 120-day timelines are not targets, but maximums. It should be possible to more promptly issue recommendations in some cases. These time frames appear reasonable and necessary to assure due process, and will remain in the final rule.

OCA's Supplemental Comments

The OCA filed supplemental comments which draw interesting comparisons between Negotiated Service Agreements, and the Postal Service's "pilot test" of access to Certified Mail bulk electronic delivery information addressed in Docket No. C2003-2. The OCA asks the Commission to "indicate in its proposed NSA rules under what circumstances it is necessary to file a request for a proposed customer-specific arrangement that is subject to the Commission's jurisdiction under 39 U.S.C. §§ 3622 and 3623."[29]

Discover does not oppose OCA's filing of supplemental comments, but requests that the Commission defer consideration of the issues raised in the supplemental comments until after final consideration of the Negotiated Service Agreement rules proposed in Docket No. RM2003-5.[30] The Postal Service suggests that the Commission reject the supplemental comments as untimely and inappropriate.[31] The

[29] OCA Supplemental at 5.

[30] Response of Discover Financial Services, Inc. to OCA's Motion to File Supplemental Comments, October 14, 2003 (Discover Opposition).

[31] Postal Service Reply at 1-2, fn. 1.

Postal Service notes that OCA's initiative "is founded on a complicated and controversial question involving the circumstances under which any activity pursued by the Postal Service and its customers or others might rise to the level of an undertaking that must be pursued through a rate or classification proceeding at the Commission."

OCA's supplemental comments raise basic issues that the Commission and the Postal Service have been grappling with since the establishment of the Act, and which have led to the initiation of several complaint dockets.[32] The comments concern the institutional relationship between the Postal Service and the Commission whenever the Postal Service decides to propose changes in its services, including rates, fees and classifications. The Commission will allow the supplemental comments to remain in the record of this docket because they might provoke thought on this issue at a future point in time. However, because the issues raised are so broad and encompassing, consideration would unreasonably delay resolution of the issues more pertinent to this rulemaking which is dedicated to rules concerning Negotiated Service Agreements. Thus, the Commission will not entertain the issues raised in the supplemental comments at this time.

[32] OCA states: "In Order No. 1385, the Commission determined that a Postal Service decision to provide a new form of Certified Mail service, consisting of bulk electronic return information to three mailers—Pitney Bowes, US Certified Letters LLC, and Out Source Solutions, explicitly excluding Walz, was in harmony with the requirements of the Postal Reorganization Act, apparently because only three mailers were involved (a 'limited number of participants') and the pilot test was of 'short duration'—either 8/9 months by the Postal Service's reckoning or 19/20 months by the Commission's." OCA Supplemental at 3 (footnote omitted). This is not a correct interpretation of Order No. 1385. The Commission in general found issues related to the pilot test moot because the pilot test had been terminated well prior to the filing of the complaint, and there were no further issues related to the pilot test that could be remedied through the complaint process. *See* PRC Order No. 1385 (October 9, 2003) at 8, fn. 10. Thus, the Commission did not reach a conclusion on whether the pilot test was in harmony with the requirements of the Postal Reorganization Act.

It is ordered:

1. Motion for Late Acceptance of Comments by Discover Financial Services, Inc., September 30, 2003, is granted.

2. The EW Motion for a One-Day Extension of Time to File Comments, September 30, 2003, is granted.

3. The Postal Service Motion for a One-Day Extension of Time to File Comments, September 29, 2003, is granted.

4. Office of the Consumer Advocate Motion to be Permitted to File Supplemental Comments on NSAs vs. Pilot Tests, October 10, 2003, is granted.

5. Motion of the United States Postal Service for Leave to File Supplemental Comments, October 17, 2003, is granted.

6. Any suggestion not specifically addressed by this ruling is not accepted for incorporation into the final rule.

7. The Commission shall incorporate the final amendments to rules 5, 51 and 61; and new Subpart L following the Secretary's signature into the Commission's Rules of Practice and Procedure appearing in 39 CFR § 3001.

8. The Secretary shall arrange for publication of this Order Establishing Rules Applicable to Requests for Baseline and Functionally Equivalent Negotiated Service Agreements in the *Federal Register.* These changes will take effect 30 days after publication in the *Federal Register*.

By the Commission.
(SEAL)

Steven W. Williams
Secretary

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§ 3001.5 Definitions.

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(r) *Negotiated Service Agreement* means a written contract, to be in effect for a defined period of time, between the Postal Service and a mailer, that provides for customer-specific rates or fees and/or terms of service in accordance with the terms and conditions of the contract.

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Subpart B – Rules Applicable to Requests for Changes in Rates or Fees

§ 3001.51 Applicability.

The rules in this subpart govern the procedure with regard to requests of the Postal Service pursuant to § 3622 of the Act that the Commission submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal service if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of the Act. The Rules of General Applicability in Subpart A of this part are also applicable to proceedings on requests subject to this subpart. For requests of the Postal Service based on Negotiated Service Agreements, the rules applicable to Negotiated Service Agreements, Subpart L, supersede the otherwise applicable rules of this subpart.

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Subpart C – Rules Applicable to Requests for Establishing or Changing the Mail Classification Schedule

§ 3001.61 Applicability.

The rules in this subpart govern the procedure with regard to requests of the Postal Service pursuant to § 3623 of the Act that the Commission submit a recommended decision on establishing or changing the mail classification schedule. The Rules of General Applicability in Subpart A of this part are also applicable to proceedings on requests subject to this subpart. For requests of the Postal Service based on Negotiated Service Agreements, the rules applicable to Negotiated Service Agreements, Subpart L, supersede the otherwise applicable rules of this subpart.

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Subpart L – Rules Applicable to Negotiated Service Agreements

Sec.

Subpart L – Rules Applicable to Negotiated Service Agreements

§ 3001.190 Applicability.

(a) The rules in this subpart govern requests of the Postal Service for recommended decisions pursuant to § 3622 or § 3623 that are based on Negotiated Service Agreements. The Rules of General Applicability in subpart A of this part are also applicable to proceedings on requests subject to this subpart. The requirements and procedures specified in these sections apply exclusively to requests predicated on Negotiated Service Agreements. Except where specifically noted, this subpart does not supersede any other rules applicable to Postal Service requests for recommendation of changes in rates, fees, or mail classifications.

(b) In administering this subpart, it shall be the policy of the Commission to recommend Negotiated Service Agreements that are consistent with statutory criteria, and benefit the Postal Service, without causing unreasonable harm to the marketplace. Except in extraordinary circumstances and for good cause shown, the Commission shall not recommend Negotiated Service Agreements of more than three years duration; however, this limitation is not intended to bar the Postal Service from requesting:

(1) The renewal of the terms and conditions of a previously recommended Negotiated Service Agreement, *see* § 3001.197; or

(2) Recommendation of a Negotiated Service Agreement that is functionally equivalent to a previously recommended Negotiated Service Agreement, *see* § 3001.196.

§ 3001.191 Filing of formal requests.

(a) Whenever the Postal Service proposes to establish or change rates or fees and/or the mail classification schedule based on a Negotiated Service Agreement, the Postal Service shall file with the Commission a formal request for a recommended decision. The request shall clearly state whether it is a request for a recommended decision pursuant to:

(1) The review of a baseline Negotiated Service Agreement, *see* § 3001.195;

(2) The review of a Negotiated Service Agreement that is functionally equivalent to a previously recommended Negotiated Service Agreement, *see* § 3001.196;

(3) The renewal of the terms and conditions of a previously recommended Negotiated Service Agreement, *see* § 3001.197; or

(4) The modification of the terms and conditions of a previously recommended Negotiated Service Agreement, *see* § 3001.198.

Such request shall be filed in accordance with the requirements of §§ 3001.9 through 3001.12. Within 5 days after the Postal Service has filed a formal request for a recommended decision in accordance with this subsection, the Secretary shall lodge a notice thereof with the director of the Office of Federal Register for publication in the Federal Register.

(b) The Postal Service shall clearly identify all parties to the Negotiated Service Agreement. Identification by the Postal Service shall serve as Notice of Intervention for such parties. Parties to the Negotiated Service Agreement are to be considered co-proponents, procedurally and substantively, during the Commission's review of the proposed Negotiated Service Agreement.

§ 3001.192 Filing of prepared direct evidence.

(a) Simultaneously with the filing of the formal request for a recommended decision under this subpart, the Postal Service and its co-proponents shall file all of the prepared direct evidence upon which they propose to rely in the proceeding on the record before the Commission to establish that the proposed Negotiated Service Agreement is in the public interest and is in accordance with the policies and the applicable criteria of the Act. Such prepared direct evidence shall be in the form of prepared written testimony and documentary exhibits, which shall be filed in accordance with § 3001.31.

(b) Direct evidence may be filed in support of the Negotiated Service Agreement prepared by, or for, any party to the Negotiated Service Agreement. Direct evidence in support of the Negotiated Service Agreement prepared by, or for, any party to the Negotiated Service Agreement shall not be accepted without prior Postal Service review. The Postal Service shall affirm that it has reviewed such testimony and that such testimony may be relied upon in presentation of the Postal Service's direct case.

§ 3001.193 Contents of formal requests.

(a) *General requirements.*

(1) Each formal request filed under this subpart shall include such information and data and such statements of reasons and bases as are necessary and appropriate fully to inform the Commission and the parties of the nature, scope, significance, and impact of the proposed changes or adjustments in rates, fees, and/or the mail classification schedule(s) associated with the Negotiated Service Agreement, and to show that the changes or adjustments are in the public interest and in accordance with the policies and the applicable criteria of the Act. To the extent

information is available or can be made available without undue burden, each formal request shall include the information specified in paragraphs (b) through (k) of this section. If the required information is set forth in the Postal Service's prepared direct evidence, it shall be deemed to be part of the formal request without restatement.

(2) If any information required by paragraphs (b) through (k) of this section is not available and cannot be made available without undue burden, the request shall include a request for waiver of that requirement supported by a statement explaining with particularity:

(i) The information which is not available or cannot be made available without undue burden;

(ii) The reason or reasons that each such item of information is not available and cannot be made available without undue burden;

(iii) The steps or actions which would be needed to make each such item of information available, together with an estimate of the time and expense required therefor;

(iv) Whether it is contemplated that each such item of information will be supplied in the future and, if so, at what time; and

(v) Whether sufficiently reliable estimates are available to mitigate the need for such information, and if so, the specifics of such estimates.

(3) If the Postal Service believes that any of the data or other information required to be filed under § 3001.193 should not be required in light of the character of the request, it shall move for a waiver of that requirement, stating with particularity the reasons why the character of the request and its circumstances justify a waiver of the requirement.

(4) Grant of a waiver under (a)(2) or (a)(3) will be grounds for excluding from the proceeding a contention that the absence of the information should form a basis for rejection of the request, unless the party desiring to make such contention:

(i) Demonstrates that, having regard to all the facts and circumstances of the case, it was clearly unreasonable for the Postal Service to propose the change in question without having first secured the information and submitted it in accordance with § 3001.193; or

(ii) Demonstrates other compelling and exceptional circumstances requiring that the absence of the information in question be treated as bearing on the merits of the proposal.

(5) The provisions of paragraphs (a)(2) and (a)(3) of this section for the Postal Service to include in its formal request certain alternative information in lieu of that specified by paragraphs (b) through (k) of this section are not in derogation of the Commission's and the presiding officer's authority, pursuant to §§ 3001.23 through 3001.28, respecting the provision of information at a time following receipt of the formal request.

(6) The Commission may request information in addition to that required by paragraphs (b) through (k) of this section.

(b) *Negotiated Service Agreement*. Every formal request shall include a copy of the Negotiated Service Agreement.

(c) *Rates and standards information*. Every formal request shall include a description of the proposed rates, fees, and/or classification changes, including proposed changes, in legislative format, to the text of the Domestic Mail Classification Schedule and any associated rate or fee schedule.

(d) *Description of agreement*. Every formal request shall include a statement describing and explaining the operative components of the Negotiated Service Agreement. The statement shall include the reasons and bases for including the components in the Negotiated Service Agreement.

(e) *Financial analysis*. Every formal request shall include an analysis, as described in § 3001.193(e)(1), of the effects of the Negotiated Service Agreement on Postal Service volumes, costs and revenues in a one-year period intended to be representative of the first year of the proposed agreement. If the agreement is proposed to extend beyond one year, the request shall also include an analysis of the effects of the agreement on Postal Service volumes, costs and revenues in each subsequent year of the proposed agreement, as described in § 3001.193(e)(2). For each year, the analysis shall provide such detail that the analysis of each component of a Negotiated Service Agreement can be independently reviewed, and shall be prepared in sufficient detail to allow independent replication, including citation to all referenced material.

(1) The financial analysis for the one-year period intended to be representative of the first year of the proposed agreement shall:

(i) Set forth the estimated mailer-specific costs, volumes, and revenues of the Postal Service for that year, assuming the then effective postal rates and fees absent the implementation of the Negotiated Service Agreement;

(ii) Set forth the estimated mailer-specific costs, volumes, and revenues of the Postal Service for that year which result from implementation of the Negotiated Service Agreement;

(iii) Include an analysis of the effects of the Negotiated Service Agreement on contribution to the Postal Service for that year (including consideration of the effect on contribution from mailers who are not parties to the agreement);

(iv) Utilize mailer-specific costs for that year, and provide the basis used to determine such costs, including a discussion of material variances between mailer-specific costs and system-wide average costs; and

(v) Utilize mailer-specific volumes and elasticity factors for that year, and provide the bases used to determine such volumes and elasticity factors.

If mailer-specific costs or elasticity factors are not available, the bases of the costs or elasticity factors that are proposed shall be provided, including a discussion of the suitability of the proposed costs or elasticity factors as a proxy for mailer-specific costs or elasticity factors.

(2) The financial analysis for each subsequent year covered by the agreement (if the proposed duration of the agreement is greater than one year) shall:

(i) Identify each factor known or expected to operate in that subsequent year which might have a material effect on the estimated costs, volumes, or revenues of the Postal Service, relative to those set forth in the financial analysis provided for the first year of the agreement in response to § 3001.193(e)(1). Such relevant factors might include (but are not limited to) cost level changes, anticipated changes in operations, changes arising from specific terms of the proposed agreement, or potential changes in the level or composition of mail volumes;

(ii) Discuss the likely impact in that subsequent year of each factor identified in § 3001.193(e)(2)(i), and quantify that impact to the maximum extent practical; and

(iii) Estimate the cumulative effect in that subsequent year of all factors identified in § 3001.193(e)(2)(i) on the estimated costs, volumes, and revenues of the Postal Service, relative to those presented for the first year of the agreement in response to § 3001.193(e)(1).

(f) *Impact analysis*. Every formal request shall include an analysis of the impact over the duration of the Negotiated Service Agreement on:

(1) Competitors of the parties to the Negotiated Service Agreement other than the Postal Service;

(2) Competitors of the Postal Service; and

(3) Mail users.

The Postal Service shall include a copy of all completed special studies that were used to make such estimates. If special studies have not been performed, the Postal Service shall state this fact and explain the alternate bases of its estimates.

(g) *Data collection plan*. Every formal request shall include a proposal for a data collection plan, which shall include a comparison of the analysis presented in § 3001.193(e)(1)(ii) and § 3001.193(e)(2)(iii) with the actual results ascertained from implementation of the Negotiated Service Agreement. The results shall be reported to the Commission on an annual or more frequent basis.

(h) *Workpapers.*

(1) Whenever the Service files a formal request it shall accompany the request with seven sets of workpapers, five for use by the Commission staff and two which shall be available for use by the public at the Commission's offices.

(2) Workpapers shall contain:

(i) Detailed information underlying the data and submissions for paragraphs (b) through (k) of this section;

(ii) A description of the methods used in collecting, summarizing and expanding the data used in the various submissions;

(iii) Summaries of sample data, allocation factors and other data used for the various submissions;

(iv) The expansion ratios used (where applicable); and

(v) The results of any special studies used to modify, expand, project, or audit routinely collected data.

(3) Workpapers shall be neat and legible and shall indicate how they relate to the data and submissions supplied in response to paragraphs (b) through (k) of this section.

(4) Workpapers shall include citations sufficient to enable a reviewer to trace any number used but not derived in the associated testimony back to published documents or, if not obtained from published documents, to primary data sources. Citations shall be sufficiently detailed to enable a reviewer to identify and locate the specific data used, *e.g.,* by reference to document, page, line, column, etc. With the exception of workpapers that follow a standardized and repetitive format, the required citations themselves, or a cross-reference to a specific page, line, and column of a table of citations, shall appear on each page of each workpaper. Workpapers that follow a standardized and repetitive format shall include the citations described in this paragraph for a sufficient number of representative examples to enable a reviewer to trace numbers directly or by analogy.

(i) *Certification by officials.*

(1) Every formal request shall include one or more certifications stating that the cost statements and supporting data submitted as a part of the formal request, as well as the accompanying workpapers, which purport to reflect the books of the Postal Service, accurately set forth the results shown by such books.

(2) The certificates required by paragraph (i)(1) of this section shall be signed by one or more representatives of the Postal Service authorized to make such certification. The signature of the official signing the document constitutes a representation that the official has read the document and that, to the best of his/her knowledge, information and belief, every statement contained in the instrument is proper.

(j) *Rejection of requests.* The Commission may reject any request under this subpart that patently fails to substantially comply with any requirements of this subpart.

§ 3001.194 Failure to comply.

If the Postal Service fails to provide any information specified by this subpart, or otherwise required by the presiding officer or the Commission, the Commission, upon its own motion, or upon motion of any participant to the proceeding, may stay the proceeding until satisfactory compliance is achieved. The Commission will stay proceedings only if it finds that failure to supply adequate information interferes with the Commission's ability promptly to consider the request and to conduct its proceedings with expedition in accordance with the Act.

§ 3001.195 Requests to recommend a baseline Negotiated Service Agreement.

(a) This section governs Postal Service requests for a recommended decision in regard to a baseline Negotiated Service Agreement, *i.e.*, a Negotiated Service Agreement that is not predicated on a functionally equivalent Negotiated Service Agreement currently in effect. The purpose of this section is to establish procedures which provide for maximum expedition of review consistent with procedural fairness, and which allows for the recommendation of a baseline Negotiated Service Agreement. The Postal Service request shall include:

(1) A written justification for requesting a Negotiated Service Agreement classification as opposed to a more generally applicable form of classification; and

(2) A description of the operational bases of the Negotiated Service Agreement, including activities to be performed and facilities to be used by both the Postal Service and the mailer under the agreement.

(b) The Commission will treat requests predicated on a baseline Negotiated Service Agreement as subject to the maximum expedition consistent with procedural fairness. A schedule will be established, in each case, to allow for prompt issuance of a decision.

§ 3001.196 Requests to recommend a Negotiated Service Agreement that is functionally equivalent to a previously recommended Negotiated Service Agreement.

(a) This section governs Postal Service requests for a recommended decision in regard to a Negotiated Service Agreement that is proffered as functionally equivalent to a Negotiated Service Agreement previously recommended by the Commission and currently in effect. The previously recommended Negotiated Service Agreement shall be referred to as the baseline agreement. The purpose of this section is to establish procedures that provide for accelerated review of functionally equivalent Negotiated Service Agreements. The Postal Service request shall include:

(1) A detailed description of how the proposed Negotiated Service Agreement is functionally equivalent to the baseline agreement;

(2) A detailed description of how the proposed Negotiated Service Agreement is different from the baseline agreement;

(3) Identification of the record testimony from the baseline agreement docket, or any other previously concluded docket, on which the Postal Service proposes to rely, including specific citation to the locations of such testimony;

(4) All available special studies developing information pertinent to the proposed Negotiated Service Agreement;

(5) If applicable, the identification of circumstances unique to the request; and

(6) If applicable, a proposal for limitation of issues in the proceeding, except that the following issues will be relevant to every request predicated on a functionally equivalent Negotiated Service Agreement:

(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.

(b) When the Postal Service submits a request predicated on a functionally equivalent Negotiated Service Agreement, it shall provide written notice of its request, either by hand delivery or by First-Class Mail, to all participants in the Commission docket established to consider the baseline agreement.

(c) The Commission will schedule a prehearing conference for each request. Participants shall be prepared at the prehearing conference to address whether or not it is appropriate to proceed under § 3001.196, and to identify any issue(s) that would indicate the need to schedule a hearing. After consideration of the material presented in support of the request, and the argument presented by the participants, if any, the Commission shall promptly issue a decision on whether or not to proceed under § 3001.196. If the Commission's decision is to not proceed under § 3001.196, the request will proceed under § 3001.195.

(d) The Commission will treat requests predicated on functionally equivalent Negotiated Service Agreements as subject to accelerated review consistent with procedural fairness. If the Commission determines that it is appropriate to proceed under § 3001.196, a schedule will be established which allows a recommended decision to be issued not more than:

(1) 60 days after the determination is made to proceed under § 3001.196, if no hearing is held; or

(2) 120 days after the determination is made to proceed under § 3001.196, if a hearing is scheduled.

§ 3001.197 Requests to renew previously recommended Negotiated Service Agreements with existing participant(s). [Reserved]

§ 3001.198 Requests to modify previously recommended Negotiated Service Agreements. [Reserved]