



allegations of a factual dispute are not enough. Nor are disagreements over law or policy.<sup>2</sup> Such disagreements may be handled without a hearing.

### **NON-GERMANE MATTERS.**

In approaching the question of the limitation of issues, DFS urges the Commission to carefully consider the special context of a functionally equivalent NSA proceeding. In the Capital One Decision, this Commission held that the very notion of allowing NSAs must be predicated on giving competitors the ability to obtain similar agreements quickly.<sup>3</sup> By its own internal logic, that holding should preclude from consideration in a functionally equivalent NSA proceeding any issue that goes to preventing, as a matter of general policy, a competitor from obtaining an NSA that is functionally equivalent to a baseline NSA.<sup>4</sup>

Two of the issues initially identified by Valpak as requiring a hearing fall into this category: whether this NSA should be offered as a niche classification and not a functionally equivalent NSA; and whether approving DFS' functionally equivalent NSA would make a systemwide fix of the UAA pricing problem more difficult for the Postal Service. Valpak Comments of July 29, 2004 at 3. While Valpak seems to have backed off of these issues somewhat, DFS urges the Commission to preclude both those issues in its ruling as a matter of policy and law

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<sup>2</sup> *Id.*

<sup>3</sup> See for example, the Commission's Decision in the Capital One Case, Docket MC 2002-2 at 4, ¶¶ 2006-2007, May 15, 2003 as well as the Commission's orders that opened the rulemaking and later promulgated the rules for functionally equivalent NSA proceedings. Postal Rate Commission Order No. 1383 opening Docket RM2003-5 at 2-3, August 27, 2003; Postal Rate Commission Order No. 1391 in Docket RM2003-5, February 11, 2004.

<sup>4</sup> If one firm gets a baseline NSA, its competitors are due a functionally equivalent NSA. If there is a policy problem in the structure of the particular type of NSA, the initial baseline NSA should not have been approved. DFS suggests that once the Commission approves a baseline NSA, it is committed to approving functionally equivalent NSAs where the Postal Service would make money, assuming that there is no showing of harm to other mailers or competitors.

Further, DFS urges the Commission to send a clear message that functionally equivalent NSA proceedings are not going to be “cluttered” by irrelevant issues, no matter how interesting they may be. The Commission should let all potential private sector co-proponents know that it is not going to force them to run the risk of having the Commission recommend a niche classification instead of the agreement they negotiated. Finally, the Commission should also let all potential private sector co-proponents know that it will not force them to spend attorney and economist fees to participate during functionally equivalent NSA proceedings in academic discussions over the future of the delivery system and to what degree problems may be fixed, when they might be fixed, and how they might be fixed. These can be very important issues, but issues that have no place in a functionally equivalent NSA proceeding.

The issue in any functionally equivalent NSA proceeding should be whether there is any reasonable risk that the Postal Service will lose money under the terms of the NSA, assuming that there is no showing of harm to other mailers or competitors.

Respectfully submitted,

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