

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

RATE AND SERVICE CHANGES TO) Docket No. MC2004-3
IMPLEMENT FUNCTIONALLY EQUIVALENT)
NEGOTIATED SERVICE AGREEMENT WITH)
BANK ONE CORPORATION)

VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
REPLY COMMENTS ON LIMITATION OF ISSUES
(August 5, 2004)

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. ("Valpak") hereby respond to written comments on the Postal Service's Proposal for the Limitation of Issues. POR No. MC2004-3/1 requested written comments on the Postal Service's proposal by July 29, 2004 (at which time the Office of Consumer Advocate ("OCA"), Valpak, Bank One Corporation ("Bank One"), and the Postal Service filed comments), with written responses by August 5, 2004.

Generally, Valpak agrees with the Postal Service's filing of July 29, 2004, urging that functionally equivalent Negotiated Service Agreements ("NSAs") be treated with expedition. Valpak believes that the Commission's rules accomplish this objective, while protecting the due process rights of intervenors and OCA. And Valpak agrees in concept that the Commission should look favorably on efforts to limit the issues litigated to achieve that expedition. Indeed, Valpak's major concern is for the protection of the due process rights of intervenors and OCA to explore the three issues set out in Rule 3001.196(a)(6), as well as such issues necessarily raised by each filing for a functionally equivalent NSA. As demonstrated in its July 29, 2004 filing on limitation of issues, Valpak has no real opposition to the Postal

Service's proposal to limit issues in this docket. Valpak has chosen to raise no issues in this docket which are not subsumed by the three issues set out in the Postal Service's proposal to limit issues.

On the other hand, Valpak finds little to agree with in the 22-page filing of Bank One made on July 29. This filing addresses both the issue of limitation of issues as well as the related issue of identification of issues to be litigated at a hearing. It is curious that Bank One has spent much time preparing a long position paper opposing the due process rights of intervenors or OCA to participate in a docket considering a functionally equivalent NSA at the same time that Valpak and OCA have been working with the Postal Service to avoid the need for a hearing. While Valpak, OCA, and the Postal Service have been working to narrow and eliminate issues, Bank One has been drafting a tome castigating OCA and Valpak for not identifying enough factual issues to warrant a hearing. Fortunately, it appears that Valpak, OCA, and the Postal Service's efforts to conduct informal discovery are succeeding, and, at least for Valpak, it appears that all that is needed is reasonable responses from the Postal Service — that it fully expects to receive — to its final few interrogatories, which have grown out of informal consultations between the Postal Service lawyers and economists, and Valpak lawyers and economists. Valpak hopes to be able to notify the Commission that it would withdraw its protective request for a hearing before the August 17, 2004 deadline. Therefore, presumably the Commission will not need to address any of the myriad novel propositions of administrative law on which Bank One has expounded. Nevertheless, a few comments on the procedural issues involved are in order.

Bank One appears not to understand the fundamental conundrum faced by intervenors and OCA in litigating a case such as this. At the outset of a docket, Commission rules require parties to contest or concede the appropriateness of handling a case as a functionally equivalent NSA. No party objected to the treatment of this NSA as a functionally equivalent NSA, although there were important differences between the Bank One NSA and the Capital One Services, Inc. (“Capital One”) NSA. First, all First-Class volume of the Capital One NSA was new volume, whereas all First-Class volume of the Bank One NSA is Standard Mail migrating to First-Class Mail. This requires a new and different type of analysis, which considers the fact that, under this NSA, the current contribution to institutional costs as Standard Mail will be lost. Second, the Capital One NSA was based on the business model of a mailer which maintained its own in-house solicitation lists, whereas the Bank One NSA is based on the business model of a mailer which has a very different method of obtaining names for solicitation mailings. Finally, the Bank One NSA does not contain any stop-loss provision, whereas the approved Capital One NSA did.¹ These are important issues which need to be explored, by intervenors, OCA, and the Commission.

Apparently lost on Bank One is the reality that a party’s decision to seek a hearing is not an uncomplicated or inconsequential matter. A hearing may be necessary, for example, to explore disputed issues of fact, but sometimes more than one round of discovery is necessary to determine whether such disputes exist. A party may submit written interrogatories, but

¹ Any of these issues could be grounds for contesting whether the Bank One NSA is functionally equivalent to the Capital One NSA, but Valpak elected not to raise such a challenge.

whether the answers it receives will be satisfactory is far from guaranteed. The many objections to Valpak interrogatories filed by Bank One attest to this reality.² When a party receives nonresponsive responses it can submit follow-up interrogatories, but there is no guarantee that responses to those will be satisfactory, either. In that instance, the only real remedy available is the use of oral cross-examination at a hearing. Failure to request a hearing would waive the opportunity for oral cross-examination. Proponents who successfully pressured intervenors into waiving their right to cross-examine orally, of course, would also be insulating themselves from the need to submit responsive answers. (Fortunately, Valpak can report that the responses of the Postal Service to discovery in this docket to date have been responsive, if not commendably forthcoming.)

Further, Bank One appears not to understand that until answers to interrogatories are received, in many cases, it may be difficult, and in some cases impossible, to know whether it will be necessary to file testimony to amplify the record for the benefit of the Commission.

For both reasons, no party should be put to the decision of being forced to request a hearing or waive it at the outset of the docket. At the July 21, 2004 settlement conference, no agreement was reached as to whether a hearing was warranted (*see* Report of Settlement Coordinator, July 22, 2004, p. 1), and both OCA and Valpak filed statements of known issues on July 23, 2004.

² Although Bank One objected to most of the interrogatories propounded to it by Valpak, counsel for Bank One never contacted counsel for Valpak to attempt to resolve the dispute, such as by limiting certain of the topics addressed.

While Valpak and the Postal Service have focused in this litigation on the elimination of issues, and the narrowing of the differences between the parties, Bank One has faulted Valpak for not identifying more issues to justify a hearing. While Valpak has been trying to gather information that would reduce sources of controversy, Bank One has criticized Valpak for not coming up with enough issues or more problems.

Although the Commission specified that it would be liberal in applying rules in this first docket of an NSA asserted to be functionally equivalent (Prehearing Conference, July 15, 2004, Tr. 1/6, ll. 18-22), the co-proponent has asked the Commission to be extremely strict in defining new rules limiting participation by intervenors and OCA.

Counsel for Bank One argues that Valpak's business is such that it lacks a sufficient interest which would justify any valid inquiries into the proposed NSA. But it should be clear by now that each NSA is not a private, special deal between a mailer and the Postal Service, but rather a matter which potentially could affect all mailers, in at least three ways: (1) insofar as the proposed NSA could result in a loss of contribution to the Postal Service; (2) insofar as the proposed NSA is discriminatory as to other mailers; and (3) insofar as the principles resolved in a proposed NSA are precedential to the consideration and approval of future NSAs that would affect other mailers.

Fortunately, the Postal Service appears to have taken a more reasonable path, recommending that the issue of a hearing be deferred until after the August 17, 2004 date set for parties to request oral cross-examination of Postal Service witnesses. United States Postal Service Response to Motions for Hearing by OCA and Valpak, p. 4, July 28, 2004.

Bank One appears to view Valpak and OCA's raising questions, and reserving the right to ask for a hearing or making a protective request for a hearing, as inappropriate, resulting in needless delay and expense. Bank One has ignored the fact that, from the beginning of this docket, Valpak has stated that it wanted to avoid oral cross-examination, and to avoid the need to file testimony, but was forced to make a protective request to ensure that it obtained adequate responses to written discovery.³

Valpak's interest in the NSA approval process is not news. Valpak was among the most active intervenors in the Capital One NSA (Docket No. MC2002-2), as well as the Commission's NSA rulemaking docket (Docket No. RM2003-5). It should come as no surprise that Valpak would be interested particularly in the first functionally equivalent NSA docket(s). Valpak has never expressed general opposition to NSAs. It believes, however, that niche classifications should be preferred over NSAs wherever possible. Valpak's principal goal has been to enhance accountability for this proposed NSA. Valpak has worked to refine

³ In Valpak's Restated Request for Hearing and Preliminary Statement of Issues filed July 23, 2004, it stated that the request was merely a protective one, due to the roadblocks to determining certain issues: "Valpak would like to reiterate that it would like to avoid the need to orally cross-examine any witnesses of the co-proponents, and avoid the need to file any testimony. In the event that there proves no need for such oral cross-examination or testimony, the request for a hearing would be withdrawn, and depending on the position of other parties, the case could proceed rapidly, perhaps within the alternative 60-day period set out in the Commission rules." [p. 2.]

In its Comments filed on July 29, 2004, Valpak reiterated its desire to avoid hearings: "It continues to be Valpak's hope that, having an opportunity to brief the issues above, it will not feel compelled to seek or file record evidence beyond the co-proponents' written responses to discovery, particularly in view of the helpful and forthcoming manner in which the Postal Service has been willing to share information informally during the pendency of this docket." [p. 5.]

the model being used by the Postal Service. The principal refinements deal with making explicit certain assumptions that were made in the Postal Service's case, and building those assumptions into the model. In the future, when data on this NSA are collected, such refinements are the only way that either the Commission or intervenors will be able to determine whether the NSA made or lost money.

Intervenors and OCA should not be asked to accept blindly the proponents' evidence as accurate and devoid of errors. Indeed, the entire system — all parties included — benefits when established rules and procedures are fairly employed.

Respectfully submitted,

William J. Olson
John S. Miles
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102-3860
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc. and
Valpak Dealers' Association, Inc.