

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

**Rate and Service Changes to
Implement Functionally Equivalent
Negotiated Service Agreement With
Bank One Corporation**

Docket No. MC2004-3

**REPLY COMMENTS OF THE
ASSOCIATION FOR POSTAL COMMERCE
IN REGARD TO THE LIMITATION OF ISSUES**

The Association for Postal Commerce (“PostCom”) offers these reply comments regarding the limitation of issues that must be considered in this docket, pursuant to the Presiding Officer’s Ruling of July 23, 2004.

I. For NSAs to Be Economically Viable, the Review Process Must Be Efficient: A Hearing is Warranted Only Where There are Genuine Issues of Material Fact

PostCom believes that for the Postal Service and its customers to achieve the potential mutual benefits offered by prospective Negotiated Service Agreements, the review process for these agreements must be as efficient and streamlined as feasible under law: The applicable legal standards indicate that a hearing is warranted only where there are genuine issues of material fact.¹ The Commission should not permit parties to be dragged into a full-blown hearing without a meaningful threshold showing of a material issue of fact. Issues of law and policy are obviously insufficient to warrant a

¹ See 39 U.S.C. §3624(a) (incorporating 5 U.S.C. § 556 and 557). Decisions and orders of this Commission have recognized this standard. See, e.g., MC2003-2, Opin. & Rec. Dec. Approving Stipulation and Agreement at n. 10; MC2003-1 (August 27, 2003), Opin. & Rec. Dec. Approving Stipulation and Agreement, slip op. at p. 4 (June 6, 2003); MC99-3, PRC Order No. 1237 (April 12, 1999), 64 Fed.Reg. at 18947.

hearing. Before ordering a hearing, and the Commission should "smoke out" any asserted issues of fact that are not genuinely disputed or material.

II. In Functionally Equivalent Cases, Issues To Be Litigated Should Be Carefully Limited, and Re-arguing Issues Should be Avoided.

The Commission's policy goals of evaluating functionally equivalent NSAs on an accelerated schedule are violated when parties, with only a minimal showing, can force the parties proposing the NSA to bear the expense of a full hearing. The Commission should recognize that each and every issue litigated adds to the parties' litigation costs, and detracts from the economic benefits of the NSA. The Commission's failure to demonstrate in these first few NSA cases that NSA cases will be streamlined would create an expectation that the litigation costs of pursuing an NSA are prohibitive. Mailers would thus be less likely to pursue NSA, to the detriment of both the Postal Service and its customers. Therefore, Commission should carefully but vigorously apply the applicable legal standard in determining whether to set each issue raised for hearing. The test is not whether an issue of fact *might* arise, and if so, *might* it be material. The test is whether: (a) a genuinely disputed issue *has been shown* to have arisen, through an offer of proof or otherwise; and (b) the disputed fact *is* material, i.e., likely to be dispositive of the outcome.²

Furthermore, whether or not a hearing with cross-examination is ordered, the parties to each NSA should not be permitted to re-argue general policy questions in each NSA case. Individual NSA proceedings, particularly functionally equivalent NSA proceedings, are not the appropriate forum for raising full blown rate and classification

² See, e.g., *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 219-20 (1980) (where the court held an applicant seeking a hearing must meet a threshold burden of tendering evidence suggesting the need for a hearing).

issues. To apply a different policy to Capital One's competitors than was applied to Capital One would be unfair, inequitable, and unreasonably discriminatory. The Commission's recommendation of the Capital One NSA was premised on the understanding that "similarly situated" mailers would have a "realistic chance" of obtaining a comparable NSA;³ obviously, these "similarly situated" mailers should not now be required to wait for the Postal Service to resolve more general classification issues, nor should they even be burdened with responding to such arguments on brief.

III. No Hearing is Warranted to Consider A Cap On Total Discounts.

ValPak and OCA raise the question of whether a "stop-loss cap" similar to that recommended in the Capital One case should be recommended here. Bank One and the Postal Service have submitted evidence which, if credited, shows that (1) Bank One's First Class volumes in recent years have been quite stable, unlike Capital One's, and (2) the proposed declining block rate discounts will encourage Bank One to enter significantly more First-Class Mail. The evidence clearly demonstrates that a "stop loss cap" in this case would constrain the potential contribution of the NSA.⁴ There is no evidence -- nor has even a theory been suggested -- that this analysis is incorrect. The mere fact that a question has been asked and answered during discovery does not elevate that question to the level of a genuine issue of material fact. Proper application of this legal standard must give meaning to the words "genuine" and "material". In light of the policies of expedition underlying functionally equivalent NSAs, the Commission should

³ MC2002-2 Op. & Rec. Dec. ¶7021.

⁴ *Direct Testimony of Michael K. Plunkett On Behalf of the Postal Service* (USPS-T-1), at pp. 15-17 (June 21, 2004).

find that the intervenors have failed to identify any genuine issue of material fact relating to the stop-loss cap.

Respectfully submitted,

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