

ORDER NO. 1429

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

Before Commissioners:

George Omas, Chairman;  
Tony Hammond, Vice Chairman;  
Dana B. Covington, Sr.;  
Ruth Y. Goldway; and  
Dawn A. Tisdale

Solicitation of Comments on  
First Use of Rules Applicable to  
Negotiated Service Agreements

Docket No. RM2005-2

NOTICE OF ADVANCE RULEMAKING  
SOLICITING COMMENTS ON FIRST USE OF RULES  
APPLICABLE TO NEGOTIATED SERVICE AGREEMENTS

(Issued January 25, 2005)

On February 11, 2004, the Commission promulgated rules applicable to the review of Postal Service requests predicated on baseline and functionally equivalent Negotiated Service Agreements.<sup>1</sup> The Postal Service first invoked the rules applicable to functionally equivalent Negotiated Service Agreements (§ 3001.196) in requests filed on June 21, 2004, for proposed Negotiated Service Agreements with Discover Financial

---

<sup>1</sup> Order Establishing Rules Applicable to Requests for Baseline and Functionally Equivalent Negotiated Service Agreements, PRC Order No. 1391, February 11, 2004. The rules applicable to Negotiated Service Agreements are incorporated into the Commission's rules at subpart L.

Services, Inc. (Discover) and Bank One Corporation (Bank One).<sup>2</sup> Both agreements were proffered as functionally equivalent to the recently recommended Negotiated Service Agreement with Capital One Services, Inc. (Capital One).<sup>3</sup> The Postal Service has not submitted a request for a new baseline agreement. Thus, the rules for new baseline Negotiated Service Agreements (§ 3001.195) remain untested.

PRC Order No. 1391 at 48 explains the purpose of the rules applicable to functionally equivalent Negotiated Service Agreements:

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.

Once the Commission determines that it is appropriate to proceed under rule 196, a procedural schedule is established to allow for issuing a decision within 60 days if no hearing is scheduled, or within 120 days if a hearing is scheduled. In both the Discover and the Bank One dockets, the participants requested hearings, the hearings were scheduled, and schedules were initially established to allow for a decision to be issued within 120 days.<sup>4</sup>

The Commission recommended that the Postal Service enter into the Negotiated Service Agreement with Discover 72 days after making the decision to hear the request under the rules for functionally equivalent Negotiated Service Agreements (101 days

---

<sup>2</sup> Request of the United States Postal Service for a Recommended Decision on Classifications, Rates and Fees to Implement Functionally Equivalent Negotiated Service Agreement with Discover Financial Services, Inc., June 21, 2004; Request of the United States Postal Service for a Recommended Decision on Classifications, Rates and Fees to Implement Functionally Equivalent Negotiated Service Agreement with Bank One Corporation, June 21, 2004.

<sup>3</sup> PRC Op. MC2002-2, May 15, 2003.

<sup>4</sup> In both instances, the requests for hearings were withdrawn before the hearings occurred.

after the filing of the request).<sup>5</sup> This was well within the 120 day time frame contemplated by the rules. The Commission found the Discover Negotiated Service Agreement functionally equivalent, albeit not identical, to the Capital One Negotiated Service Agreement, and recommended the request only with minor modification. Proceeding under the rules for functionally equivalent Negotiated Service Agreements successfully developed a sufficient record upon which to issue a decision and expedited the procedural schedule as envisioned when the rules were first developed.

Application of the rules for a functionally equivalent Negotiated Service Agreement in the Bank One docket also was successful. A sufficient record upon which to base a decision was developed, and the docket was expedited through reliance on record testimony from the previous Capital One docket. However, due to the complexity of the specific issues involved, procedural issues that arose, and more extensive than anticipated litigation and negotiation, issuing the decision exceeded the 120 day procedural schedule by 27 days. The Commission recommended that the Postal Service enter into the Negotiated Service Agreement with Bank One 147 days after making the decision to hear the request under the rules for functionally equivalent Negotiated Service Agreements (179 days after the filing of the request).<sup>6</sup>

A large number of unusual issues delayed a decision on the Bank One Negotiated Service Agreement. The testimony of Bank One witness Buc was filed seven days late, with no indication in the initial request that additional testimony was forthcoming. Potential intervenors were not alerted to important differences between the baseline and the proffered functionally equivalent agreement by less than full compliance with rule 196(b)(2). Within two weeks of the filing of the request, Bank One merged with J. P. Morgan Chase, requiring additional discovery efforts, and creating uncertainty over how to analyze the initial request. The Bank One Negotiated Service Agreement as proposed was not functionally equivalent to the Capital One Negotiated

---

<sup>5</sup> PRC Op. MC2004-4, September 30, 2004.

<sup>6</sup> PRC Op. MC2004-3, December 17, 2004.

Service Agreement.<sup>7</sup> Participants litigated and negotiated issues that were not present in the baseline docket. This culminated in the submission of two proposed Stipulations and Agreements late in the proceeding addressing risks identified by the participants.<sup>8</sup> Finally, the details of the Bank One agreement and the specific facts presented in this docket were more complex than what was presented in the baseline docket. The Commission believes it unlikely that this many complicating factors are likely to be present in future requests for functionally equivalent Negotiated Service Agreements. Thus, the anticipated time for the Commission to review a request and render a recommendation still appears to be realistic.

The Presiding Officer decided to proceed under the rules for functionally equivalent Negotiated Service Agreements to lend structure to the Bank One proceeding. He recognized that future revelations might require a change in direction.<sup>9</sup> Although there were unanticipated complications in the Bank One docket, the rules for functionally equivalent Negotiated Service Agreements proved flexible and sufficient to hear the request and render a recommended decision.

The Commission indicated in the Discover and the Bank One recommendations that it would solicit comments on the first use of the new rules. The comments will be used to evaluate whether improvements should be made to the rules to facilitate the Commission's review of future requests predicated on functionally equivalent Negotiated Service Agreements. Comments are welcome of a general nature, or that address specific procedural or data requirement issues. By this Order, the Commission hereby

---

<sup>7</sup> Significantly, the request did not provide for adequate protection of mailers not party to the agreement (for example, an equivalent to the stop-loss cap as recommended in the Capital One docket was not proposed even though similar risks were apparent). As recommended, after modification, the Bank One Negotiated Service Agreement is functionally equivalent to the Capital One Negotiated Service Agreement.

<sup>8</sup> The rules for functionally equivalent Negotiated Service Agreements should provide adequate expedition without the need to file Stipulations and Agreements. Stipulations and Agreements should not be used as a procedural mechanism to expeditiously conclude a docket. In this docket, the Stipulations and Agreements were properly used to resolve issues unique to the request.

<sup>9</sup> An alternative could have been to reject the request as submitted, with directions to supplement testimony where necessary and refile as a new baseline docket. This would have considerably added to the length of the procedural schedule.

gives notice that comments from interested persons concerning the first use of the rules applicable to Negotiated Service Agreements are due February 28, 2005. Reply comments may also be filed and are due March 28, 2005.

In conformance with § 3624(a) of title 39, the Commission designates Shelley S. Dreifuss, Director of the Commission's Office of the Consumer Advocate, to represent the interests of the general public in this proceeding. Pursuant to this designation, Ms. Dreifuss will direct the activities of Commission personnel assigned to assist her and, upon request, will supply their names for the record. Neither Ms. Dreifuss nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding.

It is ordered:

1. Docket No. RM2005-2 is established to solicit comments on possible improvements to the Commission's rules applicable to Negotiated Service Agreements.
2. Interested persons may submit comments no later than February 28, 2005.
3. Reply comments also may be filed and are due March 28, 2005.
4. Shelley S. Dreifuss, Director of the Office of the Consumer Advocate, is designated to represent the interests of the general public in this docket.

5. The Secretary shall arrange for publication of this Notice of Proposed Rulemaking in the *Federal Register*.

By the Commission.  
(SEAL)

Steven W. Williams  
Secretary