

Before the  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Solicitation of Comments on )  
First Use of Rules Applicable to ) Docket No. RM2005-2  
Negotiated Service Agreements )

OFFICE OF THE CONSUMER ADVOCATE  
COMMENTS IN RESPONSE TO COMMISSION ORDER NO. 1429  
(February 28, 2005)

In Order No. 1429,<sup>1</sup> the Commission established a new rulemaking proceeding for the purpose of soliciting comments on the first use of rules applicable to Negotiated Service Agreements. The rules applicable to functionally equivalent Negotiated Service Agreements (NSAs), codified at 39 C.F.R. § 3001.196, were first applied in Docket Nos. MC2004-3 (Bank One NSA) and MC2004-4 (Discovery Financial Services NSA).

OCA understands the purpose of rule 196 to be expedition—particularly for competitors of the party obtaining the baseline NSA. Thus, all of OCA’s proposals are directed at speeding up the evaluation of functionally equivalent NSAs. Basically, OCA’s suggestions are aimed at making all aspects of a functionally equivalent request as similar as possible to the Commission’s recommendation in the baseline case.

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<sup>1</sup> “Notice of Advance Rulemaking Soliciting Comments on First Use of Rules Applicable to Negotiated Service Agreements,” issued January 25, 2005.

As NSA cases have been presented, litigated, and resolved, it has become clear that there are three major elements in each case: (1) the NSA agreement between the Postal Service and its partner, (2) the Domestic Mail Classification Schedule (DMCS) provision creating a new NSA classification; and (3) the financial model of the NSA's costs, revenues, and overall financial impact. An NSA proposal that closely mimics the characteristics of the baseline NSA in these three areas is a good candidate for functionally equivalent treatment and expeditious resolution. NSAs that deviate from the baseline in one or more of these areas can begin to look more like new baseline NSA cases and less like functionally equivalent cases.

For true functional equivalency, OCA suggests that the DMCS language proposed for a functionally equivalent NSA mimic the DMCS language recommended by the Commission in the baseline case. In Dockets MC2004-3 and -4, the Postal Service did not understand such a requirement to be part of the current rule.<sup>2</sup> Thus, the Postal Service proposed *no* cap on aggregate discounts paid in the Docket No. MC2004-3 request, and proposed a different cap in MC2004-4. For its part, the Commission was troubled by the lack of a Capital-One-style stop-loss cap, remarking that the Docket No. MC2004-3 NSA "did not provide for adequate protection of mailers not party to the agreement."<sup>3</sup> Only with the addition of a savings cap did the "Bank One Negotiated Service Agreement [become] functionally equivalent to the Capital One Negotiated Service Agreement."<sup>4</sup> A sentence in rule 196 requiring that functionally

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<sup>2</sup> See Decision of the Governors, Docket No. MC2004-3, February 16, 2005, at 4, n.7.

<sup>3</sup> Order No. 1429 at 4, n. 7.

<sup>4</sup> *Id.*

equivalent requests adhere to the DMCS language recommended in the baseline case would prevent a recurrence of this situation.

The OCA also submits that the NSA contract in a functionally equivalent case should mimic the structure of the baseline NSA contract. To this end, OCA requests that rule 196 require a side-by-side analysis, like those for different versions of proposed legislation, in addition to the narrative discussion of differences now required.

With respect to the third major element, OCA suggests that requests under rule 196 utilize the financial analysis spreadsheets from the baseline NSA. It will then be readily apparent to the Commission and participants whether and how the new request deviates from the baseline case. For example, the Postal Service's addition of spreadsheet pages to account for Standard Mail volume shifts in Dockets MC2004-3 and -4 reflected the additional complexity of those requests. Furthermore, the Discover and Bank One NSAs presented a markedly different "profit" profile than the Capital One baseline NSA. Capital One's NSA was for the purpose of spurring new First-Class Mail volume and to reduce the physical return costs of its existing First-Class Mail solicitations. The Discover and Bank One NSAs, on the other hand, were primarily intended to induce a shift of Standard Mail solicitations into First Class. Valpak alerted the Commission to the possibility that the extremely high UAA levels of Standard Mail solicitations might introduce proportionately high levels of new return and forwarding costs—much higher than was the case with Capital One.<sup>5</sup> Valpak feared that these new

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<sup>5</sup> "Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Restated Request for Hearing, Preliminary Statement of Issues, and Submission of Proposed Hearing Schedule," July 23, 2004, Docket No. MC2004-4, at 4.

costs might actually drive the NSA negative at the highest discount tiers. This was never a risk with the Capital One NSA.

The Commission has suggested in three recent orders that it may not look favorably on settlement agreements in NSA proceedings. Both Order Nos. 1409 and 1410,<sup>6</sup> that established the Bank One and Discover NSA proceedings, respectively, contained the statement that, with respect to functionally equivalent proceedings: “[C]onducting a settlement conference for the purpose of eventually developing a proposed Stipulation and Agreement is both unnecessary and could interfere with the intent of the rules to expedite the schedule.” In the instant proceeding, the Commission expresses a similar view. Order No. 1429,<sup>7</sup> for example, contains the observation: “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.”

OCA believes that there is value in having the participants discuss informally, in settlement meetings, matters that need to be clarified or that may initially be in dispute. To the extent that OCA (or another participant) achieves an earlier understanding of the NSA proposal or underlying support through informal meetings, the litigation phase of the NSA proceeding may be amenable to some shortening. For example, participants may not need to file several rounds of interrogatories or follow-up interrogatories.

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<sup>6</sup> “Notice and Order on Filing of Request Seeking Recommendation of Functionally Equivalent Negotiated Service Agreement” (with Bank One Corporation), issued June 24, 2004, Order No. 1409, at 7; and “Notice and Order on Filing of Request Seeking Recommendation of Functionally Equivalent Negotiated Service Agreement” (with Discover Financial Services), issued June 24, 2004, Order No. 1410, at 7.

<sup>7</sup> At 4, n. 8.

Fewer discovery questions may be possible. It may also be unnecessary to ask for a hearing to cross-examine proponent witnesses. The number of issues to be briefed may be reduced substantially.

In addition to achieving an earlier understanding of the NSA filing, settlement agreements may result in fewer (or no) issues disputed by the participants. In such cases, litigation procedures may also be amenable to truncation. The shortening of the litigation phase of a functionally equivalent NSA proceeding in no way implies that the Commission should have less time for consideration of a Stipulation and Agreement. Some settlement agreements may result in greater conformity with the Commission's views. In such cases, the Commission may be able to review, analyze, and approve agreements of this type more rapidly.

On the other hand, a settlement agreement that submits a novel approach for Commission consideration, such as the settlement approach in the Bank One proceeding, may extend the time that the Commission requires to develop its decision. OCA favors giving the Commission the flexibility to take whatever time is needed to evaluate novel settlement approaches not introduced earlier in the proceeding. In OCA's view, however, the potential benefits of settlement meetings (and settlement agreements) outweigh the disadvantages of possibly extending the length of time for issuance of a recommended decision.

In a variety of statements, the Postal Service and NSA partners have mentioned that the expense in litigating NSA cases can act as a deterrent to formulating NSAs

with the Postal Service.<sup>8</sup> Settlement, which frequently results in a reduction in litigation activities, tends to allow lower-volume potential NSA partners to participate in NSAs. The fact that the Commission justifiably requires additional time to consider novel settlement approaches would not result typically in additional expense for the NSA partner.

OCA suggests that the 60/120-day deadlines be eliminated in favor of a 120-day/open-ended deadline for a recommended decision. This would, of course, not preclude the Commission from recommending a decision in less than 120 days, circumstances permitting. The use of the 120-day deadline should be based on the extent to which a new request mimics the baseline case—not on whether a participant requests a hearing. If a new request, or novel settlement approach, adds complexity to the baseline case (as happened in the Bank One case<sup>9</sup>) then it is fairly likely that evaluation of the new request will take longer than if the new request (or settlement) were basically a carbon copy of the baseline case.

A Commission decision not to adhere to a 120-day schedule would mean that a “functionally equivalent” case would proceed as rapidly as the Commission and participants could evaluate new matters. However, the case would proceed without a refiling as a baseline case.<sup>10</sup> Depending on the complexity of new matters and on the

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<sup>8</sup> See, e.g., “Comments of Pitney Bowes Inc.,” September 29, 2003, Docket No. RM2003-5, at 2; “Comments of the Direct Marketing Association, Inc.; Magazine Publishers of America, Inc.; Mail Order Association of America; National Postal Policy Council; Parcel Shippers Association,” September 29, 2003, Docket No. RM2003-5, at 6; and “Reply Comments of Discover Financial Services, Inc.,” October 14, 2003, Docket No. RM2003-5, at 2.

<sup>9</sup> See Order No. 1429 at 3.

<sup>10</sup> See *id.* at 4, n.9.

cooperation of the Postal Service and its NSA partner, the case could be concluded in well under ten months and in not much more than 120 days.

Respectfully submitted,

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SHELLEY S. DREIFUSS  
Director  
Office of the Consumer Advocate

EMMETT RAND COSTICH  
Attorney

1333 H Street, N.W.  
Washington, D.C. 20268-0001  
(202) 789-6830; Fax (202) 789-6819