Postal Rate Commission
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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

FIRST USE OF RULES APPLICABLE TO NEGOTIATED SERVICE AGREEMENTS	))	Docket No. RM2005-2

COMMENTS OF
VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
IN RESPONSE TO PRC ORDER NO. 1429
(February 28, 2005)

Pursuant to Commission Order No. 1429, Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. (hereinafter "Valpak") submit the following comments on First Use of Rules Applicable to Negotiated Service Agreements ("NSAs"). At the time the current rules were issued (February 11, 2004), the Commission had heard only one case involving an NSA — Docket No. MC2002-2, the Capital One Services, Inc. ("Capital One") case, now considered a baseline case (*Op. & Rec. Dec.* dated May 15, 2003).

Now, with the Bank One Corporation ("Bank One") (Docket No. MC2004-3) and Discover Financial Services, Inc. ("Discover") (Docket No. MC2004-4) dockets, there have been two additional completed cases involving allegedly functionally equivalent NSAs. Valpak has been involved with each NSA case that the Commission has considered as well as the rulemaking docket establishing the rules now being considered. Another allegedly functionally equivalent NSA involving HSBC North American Holdings, Inc. ("HSBC"), Docket No. MC2005-2, was filed on February 23, 2005. As for the future, the first data collection report submitted with regard to the Capital One NSA in Docket No. MC2002-2 on January 31, 2005,

states that several more "comparable" NSAs are in various stages of negotiation with mailers in various industries (at p. 16).

1. Determination of Functional Equivalency

"Functional equivalency" is defined in terms of the baseline agreement — *i.e.*, whether the proposed NSA is functionally equivalent to the baseline agreement. PRC Rules section 3001.196(a). No party objected to treating the Discover and Bank One NSAs as functionally equivalent to the Capital One baseline NSA. The Commission's notice in Order No. 1429 demonstrates, however, that those two NSAs differed in various ways from the Capital One NSA.

For example, in the baseline Capital One NSA, all additional First-Class volume was net new volume to the Postal Service, not consisting of mailings converted from those currently being sent by Capital One as Standard mail. In both the Discover and Bank One NSAs, by contrast, additional First-Class volume was projected to migrate from mailings that otherwise would be sent as Standard mail.

Further, the final approved baseline Capital One NSA contained a specified cap. The final, approved Discover NSA contains a different cap. The Bank One NSA, as proposed, contained no cap whatsoever, but no party objected to treating the case as being functionally equivalent to the Capital One baseline NSA. The Commission conditioned its approval of this Bank One NSA on the imposition of a cap, and this matter is currently in dispute between the Commission and the Governors.

A distinguishing characteristic of NSAs as compared with niche classifications is the ability of NSAs to serve as a flexible vehicle for recognizing the circumstances and differences of each individual mailer. Thus, as more and more NSAs that are functionally equivalent to the baseline NSA are approved, **an expanding range of differences** may be recognized within each family of functionally equivalent NSAs. For example, some may have a stop-loss cap like that in the Capital One baseline NSA, others may have a stop-loss cap like that in the Discover NSA, still others may have a third type of stop-loss cap yet to be developed, and it is conceivable that yet others may have no cap at all (as was originally sought by Bank One).

An issue that the Commission will need to face sooner or later is whether, when the nth NSA is asserted to be functionally equivalent, equivalency will be measured solely in terms of similarity to the original baseline NSA (*e.g.*, the Capital One NSA), or whether equivalency is an expanding term which includes anything and everything in the family of previously-approved functionally equivalent NSAs.

The Opinion and Recommended Decision in Docket No. MC2004-3, the Bank One NSA, refers to:

> A request for a Negotiated Service Agreement that is functionally equivalent to a Negotiated Service Agreement previously recommended by the Commission and **currently in effect** (a baseline agreement) …. **[**¶ 6001 (emphasis added).**]**

As the functionally equivalent NSAs deviate from the baseline NSA, a question arises as to whether the functionally equivalent NSAs can ever be viewed as baseline NSAs, so that each generation of NSA becomes **further and further removed** from the model originally litigated fully and approved by the Commission in the baseline NSA.

Further, the Capital One NSA will expire at the end of August 2006. The limited duration of baseline NSAs raises several questions.

1. If the Capital One NSA were **extended on substantially the same terms**, does it continue to be a baseline agreement which is "currently in effect"?
2. If the Capital One NSA were **renegotiated and substantively modified, and then extended**, does it continue to be a baseline agreement which is "currently in effect"?
3. If the Capital One NSA were allowed to lapse, would there will be no baseline NSA "currently in effect" and therefore must the next NSA that resembles the original one be filed as a new baseline agreement? Or would a subsequently-approved functionally equivalent NSA (*e.g.*, Bank One, Discover) be viewed as a new baseline?[1] If so, which one — the oldest functionally-equivalent NSA?
4. Should the rules make any kind of provision for NSAs that "resemble," but are not functionally equivalent to, the baseline agreement? (*See* Docket No. MC2004-3, *Op. & Rec. Dec.*, ¶¶ 6011 and 6012.)

2. Timing of Request for Hearing in Allegedly Functionally Equivalent NSAs

For functionally equivalent NSA dockets, Commission rules provide:

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[1] While this appears a possibility under a reading of section 3001.196 of the Commission's rules ("that is proffered as functionally equivalent to [an NSA] previously recommended by the Commission and currently in effect."), it would cause a conflict with section 3001.195, which describes a baseline NSA as an NSA "that is not predicated on a functionally equivalent [NSA] currently in effect."

> The Commission will schedule a prehearing conference for each request. **Participants shall be prepared at the prehearing conference to address whether or not it is appropriate to proceed under § 3001.196, and to identify any issue(s) that would indicate the need to schedule a hearing.** After consideration of the material presented in support of the request, and the argument presented by the participants, if any, the Commission shall promptly issue a decision on whether or not to proceed under § 3001.196. If the Commission's decision is to not proceed under § 3001.196, the request will proceed under § 3001.195. [PRC Rules, section 3001.196(c). Emphasis added.]

This rule does not expressly require intervenors to request a hearing at the prehearing conference, but this apparently was the view of some. Whether the rule addresses issue identification only, or also addresses requests for a hearing, it was discovered during the litigation of the Discover and Bank One dockets that the requirement that an intervenor be able to identify all factual issues in dispute at the very outset of the case is a virtual impossibility. The prehearing conference, which occurs on about the date on which notices of intervention must be filed, is far too early a date for intervenors to be able to identify factual issues. This presents them with an impossible burden. The rules should permit additional time for intervenors to study the request and to receive meaningful responses to at least some discovery prior to being required to make a request for a hearing.

Indeed, as a result of the demands by some that intervenors either request a hearing or waive the right to request a hearing in those two functionally equivalent NSAs (*i.e.*, Discover and Bank One), Valpak was compelled to make protective requests for a hearing, which were later withdrawn when the responses to discovery were reviewed. In the Bank One NSA case, Valpak described its dilemma as follows:

> 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 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. 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.)
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> 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.
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> 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. [Docket No. MC2004-3, Valpak's Reply Comments on Limitation of Issues at 3-4.]

Commission rules for functionally equivalent NSAs should be modified to clarify that the Commission does not seek to give intervenors the impossible burden of identifying factual issues in dispute and requesting a hearing at the very outset of the litigation.

Respectfully submitted,

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