

**BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON DC 20268-0001**

Rate and Service Changes To Implement)
Functionally Equivalent Negotiated Service) Docket No. MC2005-2
Agreement With HSBC North America Holdings Inc.)

**COMMENTS OF HSBC NORTH AMERICA HOLDINGS INC.
ON “FURTHER COMMENTS” OF THE OCA
(April 29, 2005)**

On April 27, 2005, two days *after* the closing of the evidentiary record,¹ the OCA filed an eight-page pleading entitled “Further Comments on the HSBC NSA.” Relying on cost data recently submitted by the Postal Service in *another* case (Docket No. R2005-1), OCA argued that the ACS savings generated by the NSA are likely to be lower than the values indicated by the record in this docket, and “as a consequence of applying the new cost figures,” a new, lower “stop loss cap should . . . be calculated.” Further Comments at 2-3. OCA based these claims on several pages of extra-record calculations purportedly derived from the extra-record cost data.

On April 28, OCA filed as a library reference 26 Excel worksheets in support of the April 27 “Further Comments.”² Like the Comments, the extra-record calculations set forth in the Excel worksheets were purportedly derived from the extra-record cost data.

¹ Presiding Officer’s Ruling No. MC2005-2/2 (April 25, 2005) at 3 ¶ 5.

² Library Reference OCA-LR-1 (filed April 28, 2005).

Neither the "Further Comments" nor the Library Reference contained a request by OCA for any action by the Commission in this case. OCA did not characterize its Further Comments as a brief; the Further Comments did not purport to respond to anything in the other participants' April 20 initial briefs; and (most importantly) OCA did not ask the Commission to recommend any modification to the proposed NSA terms based on the OCA's calculations. To the contrary, OCA expressly conceded that its limited calculations, and their reliance on "updated cost figures" that "have not yet been fully vetted," were insufficient to support any "assumptions . . . regarding effects [of updated cost data] on the NSA as a whole." Further Comments at 3 (quoting USPS interrogatory response).

A conversation yesterday between HSBC counsel and Shelley Dreifuss, the Director of OCA, has confirmed that OCA offered its comments without any intent to affect the outcome of the current HSBC NSA case, but instead as a preview of an issue that the OCA contemplates will become a consideration in future NSA cases. We are authorized by OCA to state that:

- (1) OCA agrees that its "Further Comments," filed April 27, 2005, and the Library Reference, filed April 28, 2005, do not have any evidentiary weight.
- (2) The Library Reference was not intended to be part of the record in this docket but was provided simply to correct the fact that only a hard copy version had been filed on April 27.
- (3) It was not OCA's intent to seek to reopen the HSBC record.
- (4) OCA's comments were only prospective in nature, for future, as yet unfiled, NSAs.

- (5) OCA is not opposed to the Commission's recommendation of the HSBC NSA, without modification, based on the record as closed on April 25, 2005.

HSBC appreciates these clarifications. At the risk of belaboring the obvious, however, HSBC specifically requests that the Commission refrain from giving weight to the OCA's extra-record calculations *sua sponte*. Relying in any way on these calculations would be a clear violation of the Administrative Procedure Act. And reopening the record for litigation, in this docket, of the merits of the cost studies recently submitted by the Postal Service in Docket No. R2005-1 would make a shambles of the Commission's expedited procedures for review of functionally equivalent NSAs, and would greatly add to the perceived costs and risks of pursuing future such NSAs.

I. GIVING ANY WEIGHT IN THIS DOCKET TO THE EXTRA-RECORD COST STUDIES BELATEDLY SUBMITTED BY THE OCA WOULD BE ARBITRARY AND UNLAWFUL.

OCA's calculations do not provide a lawful basis for reducing the discount cap in this case. The "updated" data purportedly underlying OCA's calculations—i.e., the cost studies and data recently filed by the Postal Service as part of its case-in-chief in Docket No. R2005-1—are not part of the record in this case. Neither the data nor the calculations performed by the OCA with the data have been open to discovery, cross-examination or rebuttal by HSBC. Hence, relying on these calculations would violate the Administrative Procedure Act, 5 U.S.C. §§ 556 & 557. The courts have repeatedly overturned Commission decisions that based rates or cost findings on extra-record or post-record calculations. *See, e.g., Newsweek, Inc. v. USPS*, 663 F.2d 1186, 1205 (2d Cir. 1981), *aff'd sub nom. National Ass'n of Greeting Card Publishers v. USPS*, 462 U.S.

810 (1983); *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 414, 420-21, 424, 427-30 (D.C. Cir. 1993).

These concerns are particularly acute here, because (as OCA itself has conceded) its cost adjustments involve "only a subset of the figures used" by the Postal Service. Hence, "no assumptions should be" drawn from the OCA's calculations "regarding effects on the NSA as a whole." Further Comments at 3.

Even a cursory review of the R2005-1 cost data cited in the OCA analysis underscores why the inferences that OCA would draft from the data cannot be credited without the opportunity for discovery, cross-examination and rebuttal testimony by other parties. The primary reason for the apparent decline in the difference between the cost of manual returns and the cost of electronic returns (i.e., the ACS savings) appears to be a dramatic drop in the Test Year mail processing piggyback factor for Special Services, which is used in calculating the cost of manual returns. According to the Postal Service filing in Docket No. R2005-1, the factor decreased from 1.724 in Test Year 2003 (Docket No. R2001-1) to 1.421 in Test Year 2006 (Docket No. R2005-1).³

The record indicates no explanation for this substantial decrease, and its existence is hardly self-evident. The Test Year mail processing piggyback factor for all mail was about the same in both dockets (1.581 in Docket No. R2001-1; 1.552 in Docket No. R2005-1). *Id.* Substituting the piggyback factor from Docket No. R2001-1 in the Docket No. R2005-1 cost model for manual returns would yield an estimate of FY 2006 unit ACS savings that is virtually *identical* to the value used by the Postal Service in Docket No. MC2005-2 (23 cents).

³ Docket No. R2005-1, USPS-T-15, Attachment 10; Docket No. R2001-1, USPS-T-13, Attachment 9.

Perhaps there is a legitimate reason for the reported decrease in the Special Services piggyback factor. And perhaps no significant offsetting increases in other cost inputs appear elsewhere in the R2005-1 cost studies (a question that OCA's Further Comments and Library Reference do not appear to consider). These questions, however, are matters that the Commission cannot lawfully resolve without giving interested parties an opportunity to scrutinize and challenge these inferences on the record. Absent such an opportunity, the handful of unverified inputs from the R2005-1 cost studies cited by the OCA are insufficient as a matter of law to justify any adjustment to the stop-loss cap.

II. REOPENING THE RECORD TO LITIGATE THE REASONABLENESS OF THE COST DATA OFFERED BY THE OCA WOULD MAKE A SHAMBLES OF THE COMMISSION'S NSA PROCEDURES.

Reopening the record for consideration of the accuracy and implications of the cost data recently filed by the Postal Service in Docket No. R2005-1 would be equally inappropriate. No participant has asked for such relief; as noted above, OCA has specifically *disavowed* such a request. More fundamentally, reopening the record for this purpose would be utterly at odds with the Commission's NSA rules and their underlying policies.

The Commission has held that requests for approval of functionally equivalent NSAs will, to the extent "consistent with procedural fairness," be "subject to accelerated review." 39 U.S.C. § 3001.196(d). In particular, when a proposed NSA is functionally equivalent to an existing baseline NSA, the Commission's rules require the issuance of a recommended decision within 120 days of a finding of functional equivalence, even when a hearing is held. 39 C.F.R. § 3001.196(d)(1). When (as here) no party has requested a hearing, the deadline for a recommended decision is 60 days. *Id.*,

§ 3001.196(d)(2). These “timelines are not targets, but maximums.” Docket No. RM2003-5, *Negotiated Services Agreements*, Order No. 1391, 69 Fed. Reg. 7574, 7592 (2004).

Nothing in the Commission’s rules suggests that the filing of an omnibus rate case during the pendency of a functionally equivalent NSA case requires (or even permits) a suspension or tolling of these deadlines. To the contrary, the Commission’s rules clearly contemplate that NSA proponents will rely on the Commission’s cost findings in the most recent omnibus rate case until those findings are superseded by the findings in the Commission’s recommended decision in the next omnibus case. See Order No. 1381, *supra*, 68 Fed. Reg. at 52547 (stating expectation that cost data in an NSA may be several years old). Submitting fully updated cost data in every NSA case, regardless of the resulting litigation expense, is nowhere required in the rules.

The procedural deadlines in NSA cases serves important public policies. The mailer co-proponents of NSAs are private firms, and are typically unprotected by any statutory monopoly franchise in their own product markets. For these businesses, the costs of rate litigation are not part of a regulated rate base or revenue requirement that can be recovered from the mailer’s downstream customers, but a cost of doing business that typically must be absorbed by the mailer’s own shareholders. Litigation costs and delay become a major deterrent to the use of NSAs unless the Commission establishes—and maintains a credible record of enforcing—tight limits on the duration of NSA cases.

Furthermore, expeditious approval of functionally equivalent NSAs serves important competitive goals. “The purpose of proposing rules that expedite procedures for considering functionally equivalent [NSAs] is to assure that similarly situated mailers

are given timely consideration and not placed at an undue disadvantage when seeking to secure [an NSA] with the Postal Service.” Order No. 1383, *Negotiated Service Agreements*, 68 Fed. Reg. 52546, 52551 (2003). In the present case, three of HSBC’s largest competitors are already operating with the benefit of the baseline NSA (Capital One) or a functional equivalent of the baseline NSA (Discover and Bank One).

Reopening the record to determine the net effect of the updated cost inputs recently submitted by the Postal Service for the current omnibus rate case would frustrate these policies. As the Commission is aware, the cost studies submitted by the Postal Service in an omnibus case are massive, comprising tens of thousands of pages of hard-copy exhibits and electronic workpapers. Determining the net effect of the updated cost data submitted in an omnibus rate case is a Herculean effort, typically involving months of work by dozens of lawyers and experts on behalf of the intervenors. Injecting the same issues into an individual NSA case could delay its resolution by months, and increase the costs of litigating it by an order of magnitude. Moreover, it is entirely possible that yet *another* omnibus rate case, with yet another set of cost studies, could be underway by the end of this regulatory marathon, depending on the outcome of pending postal reform legislation.

The folly of allowing NSA cases to be commandeered as forums for relitigating (or, as here, prelitigating) the cost data submitted in a contemporaneous omnibus case is underscored by the mismatch between the costs and potential benefits of requiring more up-to-date data. The revenue at stake in even the largest NSA cases is only a fraction of the aggregate revenue of the Postal Service. The \$9 million in aggregate rate discounts proposed over the three-year term of this NSA, for example, amount to only about 1/100 of one percent of the Postal Service’s aggregate regulated revenues in

a *single* year. The benefits of more current data, at least in this context, clearly do not justify the costs.

Finally, and for the reasons noted above, holding approval of HSBC's functionally equivalent NSA hostage to the litigation of costing issues arising from the omnibus rate case would be anticompetitive, discriminatory, and fundamentally unfair. The NSA proponents in the Capital One, Discover and Bank One cases were allowed to rely on cost findings from Docket No. R2001-1, the most recent omnibus case actually resolved by the Commission. In the absence of updated cost determinations by the Commission itself in a more recent omnibus case, the HSBC NSA should be allowed to proceed to a final decision on the same basis.

CONCLUSION

For the foregoing reasons, HSBC respectfully requests that the Commission recommend the proposed NSA as proposed, and without any additional modifications or conditions.

Respectfully submitted,

/s/

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April 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have today caused the foregoing document to be served in accordance with Section 12 of the Commission's Rules of Practice

/s/

David M. Levy

April 29, 2005