

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

Rate and Service Changes to Implement )  
Functionally Equivalent Negotiated Service ) Docket No. MC2004-3  
Agreement With Bank One Corporation )

**COMMENTS OF J.P. MORGAN CHASE & CO.  
IN RESPONSE TO NOTICE OF INQUIRY NO. 1  
(October 14, 2005)**

J.P. Morgan Chase & Co. ("Chase") respectfully submits these comments and responses to Questions 1-9 of the "Notice of Inquiry No. 1 Regarding Status of Settlement Agreement" ("NOI"), issued by the Commission on September 27, 2005.

**INTRODUCTION AND SUMMARY**

The Commission has responded expeditiously to Chase's September 14 Petition for Reconsideration, and Questions 1-4 of the NOI reflect an encouraging focus on the issues of concern to Chase. Chase responds below to those questions, and hopes that its answers, and those of the Postal Service, will assist the Commission in resolving this case expeditiously.

Questions 5-9 of the NOI and Order No 1444, *Notice to Participants and Other Interested Persons of Petition to Reopen Record*, however, raise quite different issues. The Commission asks here: (1) whether the NSA co-proponents' continued efforts to gain approval of discounts without the cost-savings cap imposed by the Commission require expanding this proceeding to consider the much broader question of "pure volume-based discounts" (i.e., discounts offered without any associated cost

savings at all); (2) whether new parties should be allowed to participate in this case; and (3) whether, and to what extent, the signatories to the Modified Stipulation and Agreement in this case could participate if the record were reopened.

These lines of inquiry concern Chase in several respects. First, Questions 5-9 and Order No. 1444 suggest that the Commission intends to import into this docket an unspecified but potentially far-reaching array of issues that “potentially may be considered related to” NSAs “based solely on *pure volume-based* discounts”—a species of NSA that Chase and the Postal Service have not proposed, and do not seek to propose, in this docket. NOI at 9-10 (Questions 6 & 7) (emphasis added); Order No. 1444 at 1-3. In addition, although the deadline for intervention established by the Commission expired more than a year ago, the Commission has invited “interested persons” to file comments, regardless of whether those persons have intervened. “Because several questions encompass issues that exceed the scope of the Bank One case, comments and reply comments also will be entertained from interested persons who have chosen not to intervene in the Bank One docket.” NOI at 11.<sup>1</sup>

Chase respectfully urges the Commission to confine this proceeding to its original, and properly narrow, scope. First, this case does not, and should not, address the separate issue of “pure volume-based discounts.” As explained in response to Question 7, *infra*, the proper focus of the case is narrow. This is a remand of one aspect of a recommended decision concerning a single NSA with a single mailer, accounting for a small fraction of total USPS revenue and volume. Moreover, the

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<sup>1</sup> Compare Order No. 1409, 69 Fed. Reg. 39520, 39522 (June 30, 2004) (“The deadline for filing notices of intervention is July 12, 2004”); Order No. 1444 at 2 & 4.

additional evidence proffered by Chase (and the Postal Service) on reopening of the record is narrow: (1) the supplemental testimony of USPS witness Michael Plunkett, previously offered by the Postal Service on May 13, 2005, explaining how the Postal Service independently verified the reasonableness of the Before Rates volume projections offered by Chase; and (2) more information on actual Chase mail volumes (including volumes of heritage-Chase and heritage-Bank One) through October 2004, the month in which the Presiding Officer closed the record.

The issues raised by the Governors' request for reconsideration, like the supplemental evidence proffered here, are important but relatively narrow in focus: (1) whether the Commission, in assessing the financial risks of the uncapped discounts proposed here, should balance those risks against the likely financial benefits of uncapped discounts (as the Commission did in Docket No. MC2002-2 and, by analogy, in Docket No. MC2004-3); (2) whether the evidence on the financial impact of uncapped discounts previously submitted by the NSA proponents on the financial impact of uncapped discounts satisfies the relevant proof requirements; and (3) whether the additional evidence that Chase and the Postal Service now proffer, combined with the previously submitted evidence, satisfies the relevant proof requirements. All three issues are logically encompassed within the general proposition recognized by the Commission in its Concurring Opinion: that the Commission should recommend NSAs with hybrid cost savings/volume incentive discounts without imposing a "stop-loss cap" if the factual circumstances of the case indicate that the Before Rates volume estimates are sufficiently reliable. Op. & Rec. Decis. (Dec. 17, 2004), Concurring Opinion at 3.

Resolving these issues clearly does not requires the Commission to consider the separate issue of whether (and, if so, under what circumstances) the

Commission should recommend NSAs with “pure volume-based discounts.” The Commission will have ample opportunity to address the latter issue, with the benefit of an adequate factual record, in the Bookspan NSA case or another case that actually involves a pure volume-based discount.

By contrast, importing the issue into the present docket would require the Commission to resolve the issue in a factual vacuum—or impose on itself and the participants the costly task of building a large additional record merely to render an advisory opinion. This course would be particularly unfair to Chase, which has invested time and resources in pursuit of this NSA for three years—a period as long as the term of the NSA itself.

Confining this case to the issues actually raised by the Chase/Postal Service NSA proposal would also dispel the Commission’s concerns about the due process rights of non-intervenors (Question 6) and participants that signed the Modified Stipulation and Agreement of October 2005 (Question 5). Potential intervenors have been repeatedly on notice, from the outset of this case, that Chase and the Postal Service were proposing a hybrid NSA with uncapped rate discounts.<sup>2</sup> The rate and classification changes that Chase and the Postal Service continue to advocate herein are the *same* rate and classification changes that Chase and the Postal Service proposed in the initial phase of this case. Neither of the co-proponents have ever

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<sup>2</sup> A “hybrid” NSA with both a cost-savings component and an incentive volume component raises distinctly different issues from an NSA with “pure volume-based discounts” (i.e., without any cost-savings component at all). The cost savings that the Postal Service will receive in the hybrid NSA acts as a further cushion against risk that the Before Rates estimates are inaccurate. The Bank One NSA is such a hybrid NSA, similar to the Cap One NSA, Discover NSA, and HSBC NSA. The Bookspan NSA has no such cushion, although it has other risk mitigation provisions.

sought approval of pure volume-based discounts in this docket. None of the other participants have given any indication that they regard the merits of “pure volume-based discounts” as an issue raised by the Chase-Postal Service NSA proposal, and no participant has sought to raise the issue on its own initiative. Accordingly, due process does not require increasing the cost of this litigation by inviting participation by additional persons more than a year after the expiration of the period for intervention.

For the reasons set forth in this pleading, Chase thus respectfully requests that the Commission:

- (1) reopen the record for the limited purpose of accepting (a) the supplemental Plunkett declaration proffered by the Postal Service earlier this year, and (b) data on historical Bank One and Chase mail volumes through October 2004, the month in which the record closed; and
- (2) limit the scope of Reconsideration to the issues raised by the Governors, and not expand the scope of this docket to include the separate issue of “pure volume-based discounts.”

## QUESTION 1

1. Chase proposes to sponsor new Chase, heritage-Chase, and heritage-Bank One volume estimates to be entered into the record. Please fully describe the proposed new volume data to be provided, including applicable time frames, and levels of disaggregation. Does Chase contemplate sponsoring additional testimony, for example testimony to explain the volume data? Because this information will be used to supplement the co-proponents' direct case, rule 192(b) requires the Postal Service to affirm that it has reviewed such testimony (and supplemental volume data) and that such testimony may be relied upon in presentation of the Postal Service's direct case. What is the status of the Postal Service's review?

## ANSWER TO QUESTION 1

Chase proposes to submit the following data on historical volumes for First-Class Mail:

For heritage-Chase, Chase proposes to submit data on volumes through October 2004, the month in which the record closed. For heritage-Bank One, Chase proposes to submit data on volumes for the period through October 2004, the month in which the record closed.<sup>3</sup>

The above volumes will be provided by month and disaggregated to First-Class solicitation letters, First-Class solicitation flats, and First-Class operational mail. Chase will offer a sponsoring witness for these volume data.

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<sup>3</sup> Presiding Officer's Ruling No. MC2004-3/7 (Oct. 21, 2004) (closing record as of October 21, 2004).

## QUESTION 2

2. A timeline demonstrating when this volume information for the Chase, heritage-Bank One, and heritage-Chase entities became available is necessary to analyze due process arguments made by Chase. Please provide a timeline that sets forth dates for the following events: (1) the first public notice of the intent to merge Bank One and J.P. Morgan Chase & Co.; (2) the final regulatory approval of the proposed merger (which hindered disclosure of information as referred to by Chase); (3) consummation of the merger; (4) removal of legal impediments hindering disclosure of information as referred to by Chase; (5) actual availability of volume information that could be disclosed (this may require multiple dates for various information, or provision of preliminary versus final information, etc.); (6) knowledge that the Postal Service would independently evaluate Bank One and/or Chase volume estimates; (7) Chase knowledge of the existence of the Plunkett declaration; and (8) any other dates that might be important for the Commission to consider.

## ANSWER TO QUESTION 2

- (1) January 15, 2004.
- (2) The Federal Reserve Board approved the merger on June 14, 2004.
- (3) The merger was consummated on July 1, 2004.
- (4) While regulatory approval was pending, the flow of information between Bank One and Chase was limited for antitrust related reasons. This impediment was removed upon consummation of the merger, although specific volume information was not fully available, as a practical matter, immediately following the merger.

(5) Despite the reassignment, relocation, and voluntary and involuntary termination of the employees responsible for maintaining the records of heritage-Chase volume, the merged company submitted this information for the record in early August 2004, approximately six weeks after the filing of the June 21, 2004 Request. See Answer of Bank One Witness Brad Rappaport to OCA Interrogatory OCA/BOC-T1-19 (filed August 9, 2004) (reproduced at 2 Tr. 151-152).

(6) During NSA negotiations, Bank One assumed that the Postal Service was independently verifying its volume estimates. Bank One did not have actual knowledge that this verification had been performed until approximately March 17, 2005.

(7) Chase became aware of the existence of the information contained in the Plunkett declaration after March 17, 2005.

(8) The record in the proceeding closed on October 21, 2004. On December 17, 2004, the Commission issued its Opinion and Recommended Decision, which first set forth several key decisional standards relating to the cost-savings cap.

### **QUESTION 3**

3. Chase has indicated that it desires to reopen the record to incorporate various materials that are under the control of the Postal Service. Chase first refers only to the Plunkett declaration, and then it refers to the supplemental material submitted by the Postal Service on May 16, 2005. Does the Postal Service intend to sponsor any of this material as testimony? Does the Postal Service intend on sponsoring any further testimony; for example, an analysis of the new Chase volume data?

### **ANSWER TO QUESTION 3**

The Postal Service is answering this question.

#### QUESTION 4

4. Chase is proposing to provide new volume data. At the same time the Commission is being asked to reevaluate the necessity of a stop-loss cap. To reevaluate the necessity for a stop-loss cap in light of new volume data, it is necessary to have current information on any adjustments to the volume thresholds that have been made or that are planned, but yet to be implemented. For this question, "Chase" refers to Chase, heritage-Bank One, and heritage-Chase.
- a. Please provide a copy of all documentation specifying the estimated volume allocation by quarter, as referenced in the Negotiated Service Agreement contract paragraph III.E, provided to the Postal Service by Chase. At what levels by quarter (provide applicable dates) has the Postal Service set volume thresholds in response to this information?
  - b. Has the Postal Service made, or does it possess information indicating that it will need to make, an annual threshold adjustment as referenced in the Negotiated Service Agreement contract paragraph III.F. If applicable, please provide the proposed or adjusted threshold levels, the proposed or actual implementation dates, and all supporting volume figures and calculations used to determine the proposed or adjusted threshold levels.
  - c. Has Chase notified the Postal Service of a merger, acquisition, or purchase of portfolio triggering the requirements of Negotiated Service Agreement contract paragraph IV.A? If applicable, please provide all Chase notices demonstrating compliance with the requirements of Negotiated Service Agreement contract paragraph IV.A.2. If applicable, please provide the proposed or adjusted threshold levels, the proposed or actual implementation dates, and all supporting volume figures and calculations used to determine the proposed or adjusted threshold levels.
  - d. Has Chase notified the Postal Service of a merger or acquisition triggering the requirements of Negotiated Service Agreement contract paragraph IV.B? If applicable, please provide all Chase notices demonstrating compliance with the requirements of Negotiated Service Agreement contract paragraph IV.B.1. If applicable, please provide the proposed or adjusted threshold levels, the proposed or actual

implementation dates, the proposed or actual integration dates, and all supporting volume figures and calculations used to determine the proposed or adjusted threshold levels.

- e. Has Chase notified the Postal Service of a loss or sale of a portfolio triggering the requirements of Negotiated Service Agreement contract paragraph IV.C? If applicable, please provide all Chase notices demonstrating compliance with the requirements of Negotiated Service Agreement contract paragraph IV.C.2. Please provide the proposed or adjusted threshold levels, the proposed or actual implementation dates, and all supporting volume figures and calculations used to determine the proposed or adjusted threshold levels, if applicable.

#### **ANSWER TO QUESTION 4**

- a-e. The Postal Service is answering these questions.

**QUESTION 5**  
**(Rights of Participants That Signed Stipulation and Agreement)**

5. The Postal Service filed its Memorandum and the attached material with an intent to formulate guidance for Bank One and future Negotiated Service Agreements, i.e., effectively establishing a precedent for review of volume-based Negotiated Service Agreements. The Postal Service has anticipated the need to solicit comments on this material. The Chase position is that the signators of the settlement agreement should be inhibited from commenting on this material if it is accepted into the record.

The participants that have signed the Modified Stipulation and Agreement have agreed: “to the extent that matters presented in the Postal Service/Bank One Request, in any Commission Recommended Decision on that Request, or in any decision of the Governors of the Postal Service in this docket, have not actually been litigated, the resolution of such matters will not be entitled to precedential effect in any other proceeding.” Agreement at para. 14. Because the Commission believes that similarly situated mailers should be allowed an opportunity to participate in Negotiated Service Agreements under similar terms and conditions, whatever recommendations the Commission makes in one case has precedential value in the next case.

- a. How do the participants who signed the settlement agreement view the status of the settlement agreement in light of (1) the Chase petition to reopen the record, (2) the issues outlined above, including the potential for establishing precedent, and (3) paragraphs 9 and 10 of the settlement agreement which specify the record upon which the agreement is based, and the limitations on filing further pleadings or testimony?
- b. How should the Commission balance any due process rights available to the settlement participants to subject new testimony to adversarial testing, and the commitments made by the settlement participants in the settlement agreement?

## ANSWER TO QUESTION 5

Signers of the Modified Stipulation and Agreement of October 5, 2004 (“Stipulation”), are free, in any future NSA case or NSA-related rulemaking proceeding, to advocate any position without regard to its consistency with the terms of the signatory’s commitment in present case. *Id.* at ¶¶ 9, 12-13 (quoted in Op. & Rec. Decis. ¶¶ 5020-5021). For *this* proceeding, however, paragraph 9 of the Stipulation provides in relevant part that:

The undersigned parties agree that the direct testimony and designated written cross-examination of the Postal Service, Bank One, and their witnesses provide *substantial evidence supporting and justifying a Recommended Decision recommending the rate and classification changes proposed by the Postal Service and Bank One in this docket*, as reflected in the proposed DMCS language and rate schedule attached hereto as Attachments A and B, respectively. On the basis of this record, for this proceeding only, the undersigned participants stipulate and agree that the experimental DMCS and Rate Schedule changes set forth in Attachments A and B to this Stipulation and Agreement *comply with the policies of Title 39, United States Code, and in particular, the criteria and factors of 39 U.S.C. §§ 3622 and 3623*. The undersigned parties also agree that the Bank One NSA is *functionally equivalent to the NSA in Docket No. MC2002-2 (Capital One NSA)*.

*Id.* ¶ 9 (emphasis added). The Stipulation also states, *inter alia*, that it constitutes “total and final settlement of this proceeding,” *id.* ¶ 10, that the signatories reserved the right to withdraw from the Stipulation only in certain enumerated circumstances, all of which have lapsed, *id.* ¶ 11, and that the Stipulation shall bind the participants in any further “proceedings involving the honoring, enforcement, or construction of” the Stipulation, *id.* ¶ 13.

The submission of additional *evidence* in support of the *same* rate and classification changes embodied in the Stipulation does not constitute a change of relevant circumstances, let alone a change sufficient to warrant reopening the

settlement. If the “direct testimony and designated cross-examination” submitted last year in this case were sufficient to “provide substantial” evidence for approval of the NSA terms under the Act, *a fortiori* a record that contains the same evidence and more supports the same outcome. Moreover, the possibility that the NSA proponents might submit additional testimony or argument in support of the NSA terms was clearly contemplated by the Stipulation. Paragraph 10(c) states that any signatory may file further “pleadings, testimony, or comments in support of this Stipulation and Agreement.” Stipulation ¶ 10(c). This is what Chase and the Postal Service seek to accomplish with their proffered supplemental testimony.

Finally, in determining whether the settling participants should be relieved from their commitment to support the proposed rate and classification changes, the Commission should consider the effect of such action on its own pro-settlement policies. In Order No. 1443, the Commission reemphasized its longstanding policy of encouraging voluntary settlement of rate and classification cases:

The Commission has a longstanding policy favoring the settlement of important issues through negotiations among participants, independent of Commission action. The settlement process allows participants to formulate proposals that represent a consensus as to the optimum approach to resolve contested issues. The settlement proposals that are generated facilitate the Commission’s independent decision making process by informing the Commission of approaches to resolving contested issues that have been thoroughly considered and have the support of the participants agreeing to the settlement.

The settlement of contested issues facilitates the Commission’s review of Postal Service requests because of its inherent efficiency and cost effectiveness. If settlement resolves all factual issues, whole portions of the hearing process may be eliminated. Settlements may obviate the need for rebuttal and surrebuttal testimony and the related discovery process, providing a substantial cost benefit to the participants. This also will preserve the Commission’s resources and allow the Commission to

make decisions in a more timely fashion as the procedural schedule will not have to accommodate the eliminated tasks.

Order No. 1443 (Aug. 23, 2005) at 14-15. To obtain the support of other participants for the Modified Stipulation and Agreement, Chase and the Postal Service made a variety of concessions, including participation in informal discovery, responses to formal discovery requests to which the NSA proponents otherwise might have objected, and consent to a variety of substantive changes in the proposed DMCS language itself. If the commitments that the NSA co-proponents thereby obtained were now treated lightly, the willingness of litigants to make similar concessions in future cases in reliance on the Commission's settlement policy would be greatly diminished.

**QUESTION 6**  
**(Adequacy of Notice to Non-Intervenors)**

6. The Commission has noted, in PRC Order No. 1443, that adequacy of notice is an extremely important issue especially where a request has been filed under expedited rules for functionally equivalent agreements. The functionally equivalent rules are meant to send a clear signal that no new major issues are present in the request. Reopening the record opens the possibility for consideration of novel issues related to pure volume-based discount Negotiated Service Agreements. Interested persons who have not intervened in this docket potentially may allege that inadequate notice has been provided to alert them to the existence of novel and precedent setting issues. How should the Commission view this potential problem, and what possible steps can the Commission take to alleviate this situation?

**ANSWER TO QUESTION 6**

The request of Chase and the Postal Service for permission to submit additional evidence in support of their unchanged NSA proposal—which includes the same uncapped discounts that Chase and the Postal Service proposed at the outset of this case—raises no issues of due process for nonparticipants in the case. Interested persons have been on notice from the beginning that the Postal Service and Bank One were proposing uncapped discounts.

The very notice and order instituting this case stated that “The agreement *does not establish a limit on the maximum cumulative discount* available to Bank One.” Order No. 409 (June 24, 2004) at 6 (first full sentence) (emphasis added). Eighteen days before the deadline for intervention specified by the Commission in Order No. 1409, interested parties thus were fully on notice that this case might produce an uncapped NSA. *Cf. id.* at 9 n.6 (“The deadline for intervention is July 12, 2004.”).

Order No. 1409 was published in the Federal Register six days later—i.e., twelve days before the July 12 deadline for intervention. The statement that “The agreement does not establish a limit on the maximum cumulative discount available to Bank One” appears at 69 Fed. Reg. 39520, 39521 (June 30, 2004). Publication of Order No. 1409 in the Federal Register constituted legally sufficient notice of the contents of the Order to all the world. “Publication in the Federal Register is legally sufficient notice to all interest or affected persons regardless of actual knowledge or hardship resulting from ignorance.” *Jones v. U.S.*, 121 F.3d 1327, 1329 (9<sup>th</sup> Cir. 1997) (quoting *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667-68 (9<sup>th</sup> Cir. 1989)).<sup>4</sup>

Anyone seeking further details about the NSA proposal could find them on the Commission’s website as well. The precise rate and classification changes proposed by the Postal Service and Bank One—including the uncapped discount terms—were also included in the Postal Service Request itself. Filed simultaneously with the Request was the direct testimony of the Postal Service’s witness, Michael Plunkett. A separate section of Mr. Plunkett’s testimony, entitled “DISCOUNT CAP,” explained that the conditions cited by the Commission to support a cap on discounts in the Capital One case “do not apply here”; and that a cap “could actually cause harm

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<sup>4</sup> See also *International Trading Co. v. U.S.*, 412 F.3d 1303, 1309-1310 (Fed. Cir. 2005) (publication in Federal Register of final results of administrative review in the application of an anti-dumping statute which removed a suspension over a specific shipment of imported goods held to be “sufficient to give notice” to Customs Service that the suspension had been removed, requiring the Customs Service to pay the importer the rate that applied on the date the suspension was removed); *LaBaron v. U.S.*, 989 F.2d 425, 428 (10<sup>th</sup> Cir. 1993) (recipients of services from a health service clinic were held to have sufficient notice that such services would be terminated because of publication of the termination in the Federal Register); *Ed Taylor Construction Co. v. OSHA*, 938 F.2d 1265, 1272 (11<sup>th</sup> Cir. 1991) (employers are charged with the knowledge OSHA safety requirements regardless of whether they are actually aware of them through the publication of such requirements in the Federal Register).

because it would limit the upside potential of the NSA.” Plunkett Direct (USPS-T-1) at 15-17. Both the Request and Mr. Plunkett’s testimony were posted on the Commission’s website on June 21, 2004.

The direct testimony of Bank One witness Lawrence G. Buc was filed and posted on the Commission’s website seven days later. Buc Direct (BOC-T-2) (filed June 28, 2004). The entire thrust of his testimony was that leaving the NSA discounts uncapped would encourage Bank One to enter a massive additional volume of First-Class Mail, and thus generate a large additional positive contribution to the Postal Service. *Id.* To alert the public to this testimony, and to allay any “due process concerns” that assertedly might arise from the seven-day delay between the filing of the NSA Request and the filing of this testimony, the Commission took the extraordinary step of issuing a separate public notice of the testimony. Order No. 1411 (July 2, 2004). Order No. 1411 was posted on the Commission’s website on July 2, 2004—still ten days before the deadline for intervention—and published in the Federal Register on July 8—still four days before the deadline. *Id.*, 69 Fed. Reg. 41311 (2004).

The Federal Register and the Commission’s website were not the only sources of public information about the uncapped discount proposal. Most mailers and other entities with enough interest in postal affairs to consider intervening in individual rate and classification cases keep abreast of current postal news through trade publications such as *Business Mailer’s Review*. The July 5, 2004, issue of *Business Mailer’s Review* reported that the proposed Bank One NSA would have “*No cap on cumulative discounts over life of agreement.*” *Id.* (July 5, 2004) (emphasis added).

The Commission's concern that the NSA proponents' request for classification of their proposal as "functionally equivalent" to the Capital One NSA nonetheless might have lulled interested parties into not participating, by "send[ing] a clear signal that no new major issues [were] present in the request" (NOI ¶ 6), is allayed by the Commission's NSA rules as well as the record here. Nothing in Rule 196, or the Commission decisions that promulgated it, states that a Commission finding of functional equivalence—let alone a *request* for a Commission finding of functional equivalence—may be relied on by potential intervenors as a determination that the NSA proposal lacks novel or controversial elements.

The stated purpose of Rule 196 was to streamline the process for gaining approval of "functionally equivalent" NSAs by allowing the parties to avoid relitigation of particular issues resolved by the adjudication of the corresponding baseline NSA. Nothing in Rule 196 states or implies, however, that a functionally equivalent NSA must be completely devoid of novel or disputed issues. See MC2002-2 Op. & Rec. Decis. ¶¶ 7003-7023; Order No 1383 at 16. Moreover, Rule 196(c) makes clear that the NSA proponents' request to proceed under Rule 196 is not self-executing; an NSA proposal is not entitled to review under Rule 196 unless the Commission finds that the proposal is in fact functionally equivalent.

Consistent with this rule, the Commission order instituting the present case specifically stated that a "final determination regarding the appropriateness of characterizing the [NSA] as functionally equivalent to the Capital One [NSA], and the application of the expedited rules for functionally equivalent [NSAs], *will not be made until after the prehearing conference.*" Order No. 1409 at 6 (emphasis added) (reprinted at 69 Fed. Reg. 39521). Order 1409 also specified that the prehearing conference was

not scheduled until July 15, 2004—three days *after* the close of the period for intervention. *Id.* at 9 (ordering paragraphs 6 and 7) (reprinted at 69 Fed. Reg. 39522). Interested parties thus were clearly on notice that they needed to base their intervention decisions on the particulars of the NSA proposal itself, not on the label attached to it by its proponents.

Further, the Postal Service made clear at the outset that interested persons would be entitled to challenge the merits of uncapped discounts *regardless of* whether the Commission ultimately chose to hear the proposal under Rule 196. The Postal Service's Proposal for Limitation of Issues, filed and posted on the Commission's website on June 21, 2004, the same day as the original NSA Request, specifically stated that "financial impact of the Bank One Corporation NSA on the Postal Service over the duration of the agreement" was an issue that would remain open for litigation *even if* the Commission found that the proceeding was functionally equivalent to the Capital One NSA. *Id.* at 2-3.

The pleadings of the other participants made clear that the uncapped discounts and their financial impact were live issues regardless of whether the Commission treated the NSA proposal as functionally equivalent to the Capital One NSA:

The issues that concern the OCA at this point relate to the financial effect of the proposed NSA on the Postal Service. . . . The co-proponents have not incorporated into their proposed DMCS language a cap comparable to that imposed by the Commission in the Capital One baseline NSA. In Docket No. MC2002-2, the Commission recommended DMCS §610.35 – a discount limit defined as the "maximum cumulative discount available . . . over the duration of th[e] NSA." Such a discount limit is not part of the Postal Service's Bank One NSA Request.

OCA Request for Hearing (July 23, 2004) at 1-2; *accord*, Valpak Request for Hearing (July 23, 2004) at 4 (requesting a hearing on the issue of whether “the absence of any cap in the Bank One NSA violate[s] the principles established by the Commission with its Capital One stop-loss provision”); *accord*, Valpak Comments on USPS Proposal For Limitation of Issues (July 29, 2004) at 1 (stating this issue is “always relevant in a proceeding to consider a functionally equivalent Negotiated Service Agreement (‘NSA’)” under Rule 196(a)(6)).

The absence of any additional requests for intervention in response to Presiding Officer’s Ruling No. MC2004-3/2 (issued Aug. 13, 2004) provides further evidence that potential intervenors were well aware of the nature of the Bank One NSA proposal. The Ruling, issued in response to the requests of various parties for limitation of the issues in the case, specifically stated that the proposed NSA “does not include a stop-loss cap” (*id.* at 3)—and that issues involving the financial impact of the NSA “will *always* be under consideration in any request predicated on [a functionally equivalent NSA under] Rule 196(a)(6).” *Id.* at 6 (emphasis added). If these pronouncements were at odds with the expectations of the mailing community, one would have expected the Ruling to trigger a flurry of motions for late intervention in the case. None were filed.

Finally, the hypothesis that other potential participants may have been lulled into inaction by the NSA proponents’ designation of their proposal as “functionally equivalent” is dispelled by the level of intervention in the current Bookspan case. The Bookspan NSA proposal is well known as a pure volume discount NSA, and has proceeded from the outset as a baseline NSA proposal under Rule 195, not a functionally equivalent proposal under Rule 196. The total number of intervenors in the Bookspan case, however, is only two higher than in the present case: 15 vs. 13.

Moreover, the participants in the present case have included *every participant* in the Bookspan case that has expressed hostility to or skepticism about the Bookspan NSA (i.e., APWU, NAA, NNA, OCA and Valpak).

In short, the plain language of Order No. 1409 and later Commission decisions and orders, the texts of the NSA Request and supporting testimony and pleadings by Chase and the Postal Service, and the conduct of potential intervenors in this case and the Bookspan case all should allay the Commission's concern that potential intervenors may have lacked adequate notice that this case involves an uncapped discount proposal.

**QUESTION 7**  
**(Relationship of this docket to NSAs**  
**“based solely on pure volume-based discounts”)**

7. The Bank One Negotiated Service Agreement is based on a declining block rate volume discount element and an address correction cost savings element. The Bank One Negotiated Service Agreement request was filed as an agreement functionally equivalent to the Capital One Negotiated Service Agreement, which also included volume discount and cost savings elements. The Bank One record was developed considering both elements. Reopening the Bank One record potentially will lead to the consideration of issues directly related to Negotiated Service Agreements based solely on pure volume-based discounts. Given this potential, both participants and interested persons who have not intervened in this docket are invited to comment on the use of the Bank One docket to potentially decide issues related to Negotiated Service Agreements based solely on pure volume-based discounts.

**ANSWER TO QUESTION 7**

This proceeding does not involve pure volume discounts, and the Commission need not (and should not) expand this proceeding on reopening to consider the merits of such discounts.

First, expanding this proceeding to consider the merits of pure volume discounts is unnecessary. The NSA discounts proposed by Bank One and the Postal Service are not pure volume discounts, but a hybrid of both cost savings and volume incentive discounts. The Commission has already indicated that hybrid discounts of this kind may be recommended without a cost-savings cap in certain circumstances:

The addition of a stop-loss cap in this case should not be construed as establishing a precedent that all NSAs, or even all NSAs functionally equivalent to the Capital One agreement must include a stop-loss cap. That is not the Commission's view. The reliability of before rates volume

estimates is a factual issue that must be evaluated by the Commission, but *this does not bar an NSA without a stop-loss cap*.

Op. & Rec. Decis. (Dec. 17, 2004), Concurring Opinion at 3 (emphasis added).

The additional evidence that Chase would offer on reopening of the record does not require the Commission to go beyond this issue. The proffered evidence would have two components: (1) the proposed supplemental testimony of USPS witness Michael Plunkett, offered by the Postal Service on May 13, 2005; and (2) more information on actual Chase mail volumes (including volumes from heritage-Chase and heritage-Bank One) for the period through October 2004, the month in which the Presiding Officer closed the record.<sup>5</sup> Chase understands that the supplemental evidence proffered by the Postal Service is equally narrow.

The issues raised by the Governors' request for reconsideration, and by the supplemental evidence proffered here, are important but relatively narrow. In essence, the Commission needs to answer three subsidiary questions:

- (1) Whether the Commission, in assessing the financial risks of the uncapped discounts proposed here, should balance those risks against the likely financial benefits of uncapped discounts (as the Commission did in Docket No. MC2002-2 and, by analogy, in Docket No. MC2004-3). See Chase Petition to Reopen (filed Sept. 14, 2005) at 15-16 & n. 10.
- (2) Whether the evidence on the financial impact of uncapped discounts previously submitted by the NSA proponents on the

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<sup>5</sup> Presiding Officer's Ruling No. MC2004-3/7 (Oct. 21, 2004) (closing record as of October 21, 2004).

financial impact of uncapped discounts satisfies the relevant proof requirements. See Chase Petition to Reopen (filed Sept. 14, 2005) at 12-15.

- (3) If the answer to (2) is negative, whether the additional evidence that Chase and the Postal Service now proffer, combined with the previously submitted evidence, satisfies the relevant proof requirements. See *id.* at 18-21.

Resolving these issues does not require the Commission to consider the separate issue of whether (and, if so, under what circumstances) to recommend NSAs with “pure volume-based discounts.”

Second, the Commission will have ample opportunity to address the merits of pure volume discounts in other dockets. The issue is squarely presented in the current Bookspan case (Docket No. MC2005-3), and is likely to arise in other cases if the Commission recommends the Bookspan proposal.

Third, addressing extraneous issue of pure volume discounts in this case would be unwise. Because Chase and the Postal Service have not proposed pure volume discounts, the participants have not built a record on the merits of such discounts. Adjudicating the latter issue would require the Commission to decide the issue essentially in a vacuum, without an adequate factual record, or would require the Commission and interested persons to undertake the costly and time-consuming process of building such a record simply for an advisory opinion.

Fourth, importing the issue of pure volume discounts into reconsideration of this case would be burdensome and unfair to Chase. Chase is not a regulated utility with a statutory monopoly franchise. The costs of participating in this case are not recoverable elements of a regulated revenue requirement for the company. They are costs of doing business that come out of its shareholders' pockets.

Those costs are rapidly becoming disproportionate to the potential benefit of this NSA. Chase has already spent three years of management time—and paid substantial fees to outside legal counsel and consultants—to negotiate and defend a supply contract that at most has a term of only three years. Transforming this proceeding into a *de facto* industry wide rulemaking on the separate question of NSAs with “pure volume-based discounts” for *other* mailers would multiply these costs, without any offsetting benefit for Chase.

For all of these reasons, Chase respectfully requests that the Commission defer the issue of pure volume discounts to the Bookspan case, or to other cases with an actual pure volume discount proposal. In the present case, the issue of pure volume discounts would be both extraneous and speculative.

## **QUESTION 8**

### **(Participants' plans for discovery and/or rebuttal testimony)**

8. The Commission realizes that until the Postal Service and Chase actually present new data and/or testimony it may not be possible for a participant to evaluate whether it will conduct discovery or file rebuttal testimony. Given this limitation, participants are invited to comment on any plans or considerations for discovery and/or rebuttal testimony.

### **ANSWER TO QUESTION 8**

Chase does not seek to conduct discovery or file testimony rebutting its own supplemental testimony, or that of the Postal Service. Chase reserves the right to conduct discovery or submit rebuttal testimony if another participant should file substantial evidence adverse to Chase.

## **QUESTION 9**

### **(Comments on procedural framework generally)**

9. The Commission invites comments on possible improvements and/or changes to the procedural framework detailed in PRC Order No. 1443. Comments will be considered that either include the reopening of the record, or base the reconsideration on the existing record.

## **ANSWER TO QUESTION 9**

Chase incorporates by reference its Petition to Reopen Record (filed September 14, 2005).

## CONCLUSION

For the reasons stated above, J.P. Morgan Chase & Co. respectfully urges the Commission to grant its September 14 petition to reopen the record; admit the supplemental evidence proffered herein; grant the request for reconsideration of the Governors of the Postal Service; and modify the Recommended Decision by recommending the NSA without any cap on discounts.

Respectfully submitted,

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