

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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

**COMMENTS OF THE DIRECT MARKETING ASSOCIATION, INC.,
IN RESPONSE TO NOTICE OF INQUIRY NO. 1**

The Direct Marketing Association, Inc. (“The DMA”) respectfully submits these comments in response to the “Notice of Inquiry No. 1 Regarding Status of Settlement Agreement” (“NOI”) issued by the Commission on September 27, 2005. The DMA has not intervened in this case as a participant. The Commission, however, has invited comments on Questions 6 through 9 of the NOI from non-participants. *Id.* at 11; *accord*, Order No. 1444 at 4. The DMA responds in turn to each of these questions.

QUESTION 6

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?

The renewed request of J.P. Morgan Chase and the Postal Service for approval of NSA discounts without a cost savings cap raises no issues of due process for current nonparticipants in the case. Interested parties have been on notice from the outset that the Postal Service and Bank One were proposing an NSA with uncapped discounts.

Order No. 1409, the Commission notice and order instituting this case, specifically stated that “The agreement *does not establish a limit on the maximum cumulative discount* available to Bank One.” *Id.* at 6 (first full sentence) (emphasis added). The Order gave no indication that the Commission was likely to impose such a limit, or that functional equivalence required such a limit. Hence, as early as June 24, 2004—18 days before the deadline for intervention specified by Order No. 1409, interested parties and the public at large were fully on notice that this case might produce an uncapped NSA. *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., 12 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).

The Commission’s official pronouncement was not the only source 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 DMA, like many other interested parties, followed these developments on the Commission's web site and in the press. We were quite aware that the NSA proposal included uncapped discounts. The DMA chose not to intervene in this case for several reasons, but not because our professional staff and members were ignorant of the substance of the proposal.

Finally, The DMA notes that, contrary to the implication of this question, this case does not involve a pure volume-based discount, an issue that is discussed in further detail in response to Question 7.

QUESTION 7

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.

The record in this case should be reopened for the limited purpose of accepting evidence related to the issue on the basis of which this case was returned to the Commission by the Governors: the relative merits of eliminating the cost savings cap.

Contrary to the thrust of this question, this proceeding has never involved pure volume discounts. The NSA discounts proposed by Bank One and the Postal Service are a hybrid of both cost savings and volume incentive discounts, and the record was developed on this basis.

On reopening, the Commission need not, should not, and should staunchly resist any pressure to, expand the initial scope of this proceeding by considering pure volume discounts on the merits.

The Commission has already held that discounts may be recommended without a cost-savings cap, if the uncapped discounts are sufficiently likely to make money for the Postal Service:

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. Thus, the issue on reopening is simply whether a cap is appropriate in this case.

The issue of pure volume discounts 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. The Commission should deal with pure volume discounts in the Bookspan case and any other case that is filed involving a pure-volume-discount proposal. In the present case, the issue of pure volume discounts would be both extraneous and speculative.

QUESTION 8

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.

At the present time, The DMA does not intend to intervene, conduct discovery, or file rebuttal testimony in this case, although it reserves its right to do so.

QUESTION 9

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.

For the reasons outlined in our response to questions 7 and 8 above, the DMA favors reopening the record for additional evidence or testimony on the specific issue, and only on the specific issue, for which the Governors have sought reconsideration—whether removing the cap on the discounts available to J.P. Morgan Chase is reasonably likely to have positive financial impact on the Postal Service. The Commission should not consider the merits of pure volume discounts, an issue extraneous to this case, but squarely raised in the Bookspan case.

CONCLUSION

For the reasons stated above, the DMA respectfully urges the Commission to grant the September 14 petition of J.P. Morgan Chase & Co. to reopen the record; 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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