

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rate and Service Changes to Implement
Baseline Negotiated Service Agreement
With Bank of America Corporation

Docket No. MC2007-1

REPLY OF AMERICAN POSTAL WORKERS UNION
TO COMMENTS FILED IN RESPONSE TO
NOTICE OF INQUIRY NO. 1
(April 24, 2007)

The American Postal Workers Union, AFL-CIO (APWU) hereby respectfully submits its Reply to Comments filed in response to the Commission's Notice of Inquiry No. 1 (NOI1) in the above-referenced matter. For the reasons stated below, we conclude that the proposed NSA cannot be approved on the basis of the record before the Commission and that this would be so even if the reasonable expedients suggested in NOI1 were to be adopted by the parties to the Agreement. For this reason, as explained more fully below, we are urging the Commission to compel disclosure by the Postal Service of information that might permit approval, or require disapproval, of the NSA.

1. Four months ago, Congress enacted the Postal Accountability and Enhancement Act (PAEA) in part to provide the Postal Service greater flexibility to increase its prices "in the manner that they deem most appropriate to meet their needs and the needs of the mailing public," as long as the rate increase in question "is within the Consumer Price Index cap."¹ Rates, however adjusted, still must comply with the other policies of the Act. Of critical importance to the

¹ Docket No. RM2007-1, Letter from the Hon. Susan M. Collins and Thomas R. Carper to the Hon. Dan C. Blair (April 6, 2007) at 2.

validity of the proposed Baseline Negotiated Service Agreement under consideration in this proceeding is the fact that the PAEA reconfirmed the fundamental policy of the Act that there must be one uniform rate for First Class letters. Section 3623 of the Postal Reorganization Act has been restated verbatim as a new subsection (c) to Section 404 of Title 39. It provides:

(c) The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions.

As the Commission observed in MC95-1, at II-16, ¶ 2048, "...the first and most enduring objective of postal policy has been to bind the nation together. " Central to this purpose is the requirement of uniform First Class rates to serve every area of the country. "A class such as First Class is necessary to comply with the statutory command [of Section 3623(d), now Section 404(c)] that ...[t]he rate for [First Class] shall be uniform throughout the United States, its territories, and possessions." Id., at III-3 ¶ 3005.

Another pertinent policy requirement of the Act provides that "[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." 39 U.S.C. § 101(d). And the law expressly requires that:

In providing services and in establishing classifications, rates and fees under this title, the Postal Service shall not, except as specifically authorized in this title, ... grant any undue or unreasonable preferences to any such user [of the mail].

39 U.S.C. § 403(C).

In this case, the Postal Service proposes to provide BAC a preferred rate based on improvements in mail read rates that will, because of their greater efficiency, provide a benefit to the Postal Service that might justify the discount provided to BAC. As the Commission has repeatedly held, most recently in R2006-1, the sort of mail preparation, address hygiene or barcode improvement efforts by BAC that will help improve read rates cannot support a general workshare discount rate. See Generally , Opinion and Recommended Decision, Docket No. R2006-1, Volume I, Part V.B. Rate Design for First Class Letters. Workshare discounts may only be justified on the basis of work that is being performed by mailers that would otherwise be performed by the Postal Service, with a measurable cost savings to the Postal Service that equals or exceeds the workshare discount.

We are, nevertheless, not objecting to this proposed NSA in principle, because the proposed discount is intended to incent behavior by one mailer, BAC that theoretically could save the Postal Service costs, due to the additional efforts by BAC, sufficient to justify the discount. In this case, though, that possibility is purely theoretical because the Postal Service and BAC have utterly failed to justify the proposed discount. Even with the adjustments suggested by NOI1 or those similar adjustments suggested by the OCA (OCA Comments at 2), the proposed NSA is not justified and cannot be approved.

2. We submit that there is no doubt that system-wide read rates have improved significantly since July 1999.² BAC asserts (Comments at 13, n. 12) that “[n]o participant has submitted evidence that current read/accept rates differ significantly from those estimates [made in R2000-1 based on 1999 data].” On March 27, 2007, APWU submitted APWU/USPS-T1-1, which is designed to provide that evidence. However, despite the fact that the Postal Service’s answer to that Interrogatory was due April 10, 2007, no answer has been provided.

Given that the Postal Service bears the burden of justifying the NSA it has proposed, the Commission would be justified in simply rejecting the proposed NSA as unsupported by the evidence. The Commission should draw an inference adverse to the Postal Service, which has the requested information, that if the information were provided it would be adverse to the proposed NSA.

We respectfully request that the Commission not be content simply with drawing an adverse inference against the proposed NSA. Instead, the Commission should exercise its new charter from Congress to be the Postal Regulatory Commission. It should do this in several ways. First, it should grant the Motion filed by the APWU to stay these proceedings, pursuant to Rule 194 of the Commission’s rules, until the Postal Service complies with the requirement that it provide the requested information.

Second, the Commission should grant the Motion of the APWU to compel responses pursuant to Rule 26(d).

² The Postal Service and BAC propose to measure “improvements” by comparing BAC’s read rated system-wide read rates derived in July 1999. See OCA/USPS-T1-6-7 (March 9, 2007); and OCA/USPS-T1-36(a) (April 2, 2007)

Third, the Commission should grant the Motion of the APWU for permission to file supplemental discovery – requests for admissions by the Postal Service addressed to the facts that would be disclosed by the Postal Service if it were to answer the APWU’s pending interrogatory. In accordance with Rule 28(b) the facts for which confirmation is sought will be admitted if the Postal Service does not respond prior to the Commission’s hearing set for May 8, 2007.

Finally, and most helpfully, the Commission should issue the subpoena separately sought by the APWU in this matter, to compel the deposition testimony of Walter O’Tormey, who is Vice President, Engineering, of the Postal Service. As Mr. O’Tormey’s official biography shows, he is eminently qualified to answer the interrogatory answers posed by the APWU and will provide much valuable information to the Commission concerning changes in Postal Service acceptance rates.³ Fortunately, the Commission does not need to remain at the mercy of the Postal Service once the Commission is aware of a potential witness who will provide substantial evidence. PAEA Section 602; 39 U.S.C. § 504(f)(2).

3. Likewise, there is no basis for speculation, much less reason, that BAC read rates might be below the systemwide average. Suggestions to the contrary merely serve to accentuate the unreality of the proposed “savings” against which the reduced rates are to be offset. As a consequence, the proposed NSA would provide BAC a windfall to the detriment of the Postal Service and other mailers.

It is no response to this point to argue, as BAC attempts to do (Comments at 9), that generic rates applicable to subclasses of mailers may be based on

³ http://www.usps.com/communications/newsroom/leadership/bios/otormey_walter.htm

system-wide rates, with the result that contributions to overhead vary between mailers with differing cost profiles. When establishing generic rates, it is necessary and appropriate to use systemwide averages. When the issue is the correct rate to set for a particular mailer, the issue is quite different. In this setting, the Commission's regulations [require that the information and data submitted] "fully ... inform the Commission and the parties of the nature, scope, significance, and impact of the proposed" NSA. Rule 193(a)(1). Here, the information and data submitted do not meet this requirement.

4. For the reasons stated above, the proposed NSA cannot be approved even if modified by the reasonable expedients suggested in NOI1 or by the OCA. The Commission should compel the Postal Service to disclose information in its possession about improvements in read rates since 1999, through responses to pending Interrogatories, through responses to newly-filed Requests for Admission, and through the Deposition testimony of Walter O'Tormey.

Respectfully submitted,

Darryl J. Anderson
Jennifer L. Wood
Counsel for American Postal Workers Union, AFL-CIO