

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rate and Service Changes to Implement)
Baseline Negotiated Service Agreement) Docket No. MC2007-1
With Bank of America Corporation)

**RESPONSE OF BANK OF AMERICA CORPORATION
TO REPLY COMMENTS OF
AMERICAN POSTAL WORKERS UNION, AFL-CIO
(May 3, 2007)**

Bank of America Corporation (“BAC”) respectfully responds to the April 24 “Reply of American Postal Workers Union To Comments Filed In Response To Notice Of Inquiry No. 1.” Like the OCA and Valpak, APWU accepts as self-evident the economic logic of rewriting the economic terms negotiated by the parties to an NSA: Mailers enter into NSAs not to create mutual gains with the Postal Service, but to chisel it. The Postal Service is incompetent to protect itself, even when its knowledge of the relevant data is equal to or better than its customer’s. Using system-average data to set rates is grossly improper; and the extensive Commission precedent upholding the use of such data in NSA and omnibus cases can simply be ignored. That BAC would agree to a read/accept performance baseline based on system-average data is proof that BAC’s actual Before Rates performance is already better than average, not that BAC expects its performance to improve under the contract. Reducing the portion of cost savings shared with BAC will have no effect on its willingness to incur the costs needed to achieve those savings. Third parties like APWU, the OCA and Valpak know better than the Postal Service what is good for it. And the enactment of the Postal Accountability and Enhancement Act (“PAEA”) has no effect on this paternalistic logic.

BAC and the Postal Service have explained at length in their initial and reply comments why these assumptions are an inversion of reality. APWU's Reply, however, adds a few new wrinkles. Specifically, APWU argues that the NSA terms proposed by BAC and the Postal Service contravene the policies of 39 U.S.C. §§ 101(d), 403(c) and 404(c), and the supposed holding of the Commission in Docket No. R2006-1 that "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." APWU Reply at 1-3.

APWU concedes that costs savings to the Postal Service from the NSA, if found large enough by the Commission, "theoretically" could outweigh these policy considerations. *Id.* at 3. In fact, the statutory provisions and purported Commission holding cited by APWU are irrelevant to the proposed NSA, and provide no justification whatsoever for modifying the discount terms of the NSA by requiring the use of performance baselines based on customer-specific data. We discuss each point in turn.¹

A. 39 U.S.C. § 404(c)

APWU first contends that former 39 U.S.C. § 3623(d), recodified as 39 U.S.C. § 404(c) by Section 1010(e) of the Postal Accountability and Enhancement Act ("PAEA"), 120 Stat. 3262, establishes a "fundamental policy" that there be "one uniform rate for First-Class letters." APWU Reply at 1-2. This policy, APWU adds, is "of critical importance to the validity of" the proposed NSA. *Id.* APWU misapprehends both the nature of the uniformity requirement and its relevance to the proposed NSA.

¹ We do not respond here to APWU's arguments for discovery relief relating to interrogatory APWU/USPS-T1-1. [explain how issue has been resolved.]

39 U.S.C. § 404(c), like former 39 U.S.C. § 3623(d), states in relevant part:

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.

The uniformity required by this provision is merely geographic: “rates for letters sealed against inspection” must “be available on the same terms *nationwide*.” PRC MC76-1 Op. (July 15, 1977) at 6 (emphasis added). Nothing in the Act forbids nonuniformity among First-Class rates with respect to *any other* physical or cost characteristic of the mail, including the quality of its addresses and barcodes. As the Commission noted in MC76-1:

No one can seriously contend that Congress intended the uniformity clause of section 3623(d) to end all rate distinctions applicable for first-class mail or to prohibit new distinctions from being used when appropriate under section 3622. Our construction gives effect to the plain meaning of the language of section 3623(d) by maintaining the requirement that rates be uniform throughout the nation.

Id. at 7-8.²

First-Class rates have varied with weight since the inception of First-Class Mail. Moreover, the Commission has recommended non-uniform First-Class rates to reflect cost differences caused by presorting, shape and other non-weight cost drivers since the 1970s. In MC73-1, for example, the non-uniformity included “both a new first-class rate differential based on mailer preparation, and prospective surcharges for first-class mail with difficult to process shapes.” PRC Op. MC76-1, *supra*, at 7. Rate deaveraging has proliferated since then, and its variations have become an integral part of the First-

² Even with respect to geographic uniformity, the Commission has held that the uniformity requirement of Section 3623(d) allows geographic rate deaveraging of First-Class Mail as long as the deaveraged rates (e.g., “local” rates) are “available on the same terms nationwide.” PRC MC76-1 Op., *supra*, at 7.

Class rate structure. If APWU's extravagant reading of 39 U.S.C. § 404(c) were correct, all of these forms of rate nonuniformity, including any weight-related charges, would have to be eliminated.³

Moreover, PAEA also enacted 39 U.S.C. § 3622(c)(10), which authorizes the Postal Service to enter into NSAs and other non-uniform "special classifications," and 39 U.S.C. § 3622(e), which establishes limits on certain specified "workshare discounts." Neither the language or legislative history of these provisions suggest that Congress intended PAEA to expand the uniformity requirement of 39 U.S.C. § 404(c) beyond the scope of former 39 U.S.C. § 3623(d).

B. 39 U.S.C. §§ 101(d) and 403(c)

APWU next offers as "pertinent" the "policy requirement" of 39 U.S.C. § 101(d) 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," and the prohibition of 39 U.S.C. § 403(c) against "undue or unreasonable preferences" in rates. APWU Reply at 2 (quoting 39 U.S.C. §§ 101(d) and 403(c)). Neither provision, however, forbids the Commission from recommending an NSA with discount thresholds based on system-average data.

Before the enactment of PAEA, proposed NSAs could be challenged under the "fair and equitable" standard of 39 U.S.C. § 101(d) and the undue preference standard

³ APWU gains nothing from MC95-1 PRC Op. & Rec. Decis. ¶¶ 2048 and 3005 (APWU Reply at 2). Paragraph 2048 is merely a summary of general trends in postal policy from colonial America to the present. Paragraph 3005 merely states that the "sealed against inspection" and uniformity requirements imposed by former 39 U.S.C. § 3623(d) provide an adequate basis for establishing First-Class Mail as a separate class. Neither paragraph discusses, let alone supports, the expansive notion of uniformity relied on by APWU here.

of 39 U.S.C. § 403(c) by showing that a proposed “special low rate for one mailer” was “likely to result in higher rates for other mailers.” *Capital One NSA*, MC2002-2 PRC Op. & Rec. Decis. ¶¶ 8012, 8043 The Commission reasoned that the “burden of recovering” any loss in “contribution” resulting from unnecessary or needlessly large NSA discounts “would fall largely on captive monopoly mailers not party to the agreement.”⁴ Even under pre-PAEA standards, however, the issue of whether a discount is needlessly large has been treated by the Commission a question of fact to be resolved by the best available evidence of record. When (as here) mailer-specific data are unavailable, the Commission typically has accepted system-average data as the best available evidence. BAC Comments at 8-18.

In any event, as BAC has previously explained, PAEA has eliminated the risk that needlessly deep discounts for an NSA partner could “result in higher rates for other mailers” by breaking the link between the contribution from NSAs and the regulatory ceiling on other postal rates. Regardless of the profitability of any individual NSA (or all NSAs in the aggregate), 39 U.S.C. § 3622(d) caps overall increases on other rates to the levels justified by the CPI. If the Postal Service needlessly sacrifices contribution through discounts to an NSA partner, the Postal Service alone will bear the financial consequences. BAC Comments (April 17, 2007) at 5-7; BAC Reply Comments (April 24, 2007) at 10-11.⁵ Consistent with this fact, PAEA provides that NSA discounts that

⁴ *Capital One NSA*, MC2002-2 PRC Op. & Rec. Decis. ¶¶ 1008 (if an NSA reduced the net contribution to the Postal Service from the mailer, “other mailers’ rates would have to increase to make up the difference”), 3023-31, 3062-63, 5061, 5084-85, 8036-37, 8043; *Bank One NSA*, MC2004-3 PRC Op. and Further Rec. Decis. ¶ 1004 (April 21, 2006); *accord, id.*, PRC Op. & Rec. Decis. ¶¶ 1010, 6066 (Dec. 17, 2004).

⁵ Although the Commission has not yet issued rules implementing Section 201 of PAEA, which deals with rates for market dominant products, such rules are almost certain to take effect before the Postal Service releases data on the actual performance of the

“enhance the performance of mail preparation, processing, transportation, or other functions” need not provide a positive contribution to the Postal Service at all. 39 U.S.C. § 3622(c)(10(A)(ii). Hence, the precise amount of the gain to the Postal Service from the performance of those functions, and the subordinate question of whether customer-specific or system-average data provide the best estimate of the gain, are no longer material questions.

Under pre-PAEA law, NSA rate discounts also could be challenged, at least in theory, under 39 U.S.C. § 403(c) on the ground that the discounts would injure similarly situated competitors of the NSA co-proponent who were not offered comparable discounts. *Capital One NSA*, MC2002-2 PRC Op. & Rec. Decis. ¶¶ 7003-7006. The Commission and the Postal Service have disposed of this issue, however, by making functionally equivalent NSA terms available to similarly situated mailers.⁶ Unsurprisingly, no competitor of BAC is challenging the NSA on this ground. Indeed, no competitor of *any* NSA co-proponent has ever challenged *any* proposed NSA on this ground.⁷ To the contrary, other members of the financial services industry, both individually and through their trade associations, have argued *in support of* NSAs

proposed NSA. See 39 U.S.C. § 3622(a) (requiring the Commission to implement Section 201 within 180 days after enactment of PAEA).

⁶ See *Capital One NSA*, MC2002-2 PRC Op. & Rec. Decis. ¶ 7021; *Bank One NSA*, MC2004-3 PRC Op. & Rec. Decis. ¶ 6114.

⁷ See *Capital One NSA*, MC2002-2 PRC Op. & Rec. Decis. ¶ 5048 (noting absence of objection to NSA from competitors); *Discover Financial Services NSA*, MC2004-4 PRC Op. & Rec. Decis. at 44 (same); *Bank One NSA*, MC2004-3 PRC Op. & Rec. Decis. (Dec. 17, 2004) at ¶¶ 6113, 6115-16 (same); *HSBC NSA*, MC2005-2 PRC Op. & Rec. Decis. at 39-40 (same).

proposed by other banks and credit card issuers, and *against* restrictions akin to those proposed by APWU here.⁸

C. Section V.B. of the Commission’s Recommended Decision in Docket No. R2006-1

Finally, APWU invokes an unspecified portion of the lengthy discussion of First-Class rate design in the Commission’s Opinion and Recommended Decision in Docket No. R2006-1 for the proposition that “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.” APWU Reply at 3 (“generally” citing R2006-1 PRC Op. & Rec. Decis. ¶¶ 5022-5346). Why APWU believes that this section of the decision helps APWU’s position is obscure. First, BAC and the Postal Service are proposing an NSA, not a “general workshare discount.” Second, 39 U.S.C. §§ 3622(c)(5) and (10), like former 39 U.S.C. § 3622(b)(6), make clear that the Postal Service may establish separate rates to reflect “the degree of preparation of mail . . . performed by the mailer and its effect upon reducing costs to the Postal Service,” as well as the contractual commitment by an individual mailer to “enhance the performance of mail preparation, processing, transportation, or other functions.” Third, in Docket No. R2006-1—as in R2000-1, R2001-1 and R2005-1—the Commission accepted the *very same* read/accept performance data that BAC and the Postal Service have relied on here to estimate cost avoidances for First-Class and Standard Regular Mail letters.⁹

⁸ See *Bank One NSA*, Order No. 1450 at 8 & nn. 20-22 (citing comments of American Bankers Association, Association for Postal Commerce, Direct Marketing Association, Discover Financial Services and National Postal Policy Council).

⁹ See BAC Comments (April 17, 2007) at 13 (citing answers of USPS witness Ayub to APWU/USPS-T1-2, OCA/USPS-T1-6, and OCA/USPS-T1-7).

APWU asserts that Rule 193(a)(1) of the Commission's rules, while allowing the use of systemwide cost data when "establishing generic rates," forbid reliance on such data to set NSA discounts. APWU Reply at 6. BAC noted in its initial comments, however, that Rule 193(e) creates an exception to this general rule by allowing the use of more aggregate data when mailer-specific data are unavailable. BAC Comments at 10 (quoting Rule 193(e)). And the Commission has allowed the use of a variety of system-average data in NSA cases on precisely this ground, *even when there was reason to believe that system average data overstated the actual likely savings to the Postal Service from the NSA co-proponent*. BAC Comments at 10-11 (quoting *Capital One NSA*, MC2002-2 PRC Op. & Rec. Decis. ¶¶ 6011-19, 8031, and *Discover Financial Services NSA*, MC2004-4 Op. & Rec. Decis. at 29). APWU offers no response whatsoever to Rule 193(a)(1) or the two NSA decisions.

CONCLUSION

For the foregoing reasons, and those set forth in the previous comments on BAC and the Postal Service, the Commission should recommend the terms of the NSA as negotiated by its two proponents.

Respectfully submitted,

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