

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 CORP. TO
VALPAK MOTION FOR RECONSIDERATION OF
PRESIDING OFFICER'S RULING NO. MC2007-1/9
(June 15, 2007)**

Pursuant to the order of the Presiding Officer at the hearing yesterday, Bank of America Corporation ("BAC") respectfully responds in opposition to the June 14 motion of Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. ("Valpak") to strike the May 25 answer of BAC to Valpak interrogatory VP/USPS-T1-32(b). Valpak's motion essentially asks the Commission to reconsider and vacate Presiding Officer's Ruling No. MC2007-1/9 (June 12, 2007) to the extent that it admitted BAC's answer into the record.

Valpak's motion should be denied on two grounds. First, BAC's answer was responsive to the interrogatory. Second, and in any event, the Presiding Officer had the inherent power to designate the answer into evidence, whether or not responsive to the interrogatory, on the ground that the answer would provide the Commission with a more complete record. In light of the opportunities available to Valpak for challenging the contents of the answer, Valpak cannot claim that any denial of due process has resulted.

I. BAC'S ANSWER WAS RESPONSIVE TO THE INTERROGATORY.

The gist of Valpak's position is that VP/USPS-T1-32(b)(i) asked only for a description of the additional investments that BAC must make "for the Postal Service to be able to develop mailer-specific accept rates for BAC's bulk letter mail," and that BAC's answer instead provided a description of its NSA-related investments generally. Valpak Motion at 2 ¶ 2. In fact, the answer was clearly responsive to the question.

First, the major share of BAC's NSA-related investments are necessary for the Postal Service to develop mailer-specific accept rates for BAC's bulk letter mail. All of BAC's Standard Mail, and approximately 71 percent of its First-Class Mail, is entered by presort service bureaus and third-party vendors. See BAC responses to APWU/BAC-T1-1 and APWU/USPS-T1-8. Accordingly, determining BAC-specific accept rates for BAC's letter mail is a far more complex and difficult exercise than simply spraying Four-State barcodes on the mail.¹ In particular:

- To allow the Postal Service to track BAC mail, the bank will need to directly apply an Intelligent Mail Barcode to the mail pieces at the point of production. This will require significant systems development, as BAC lacks the basic capability even to generate a POSTNET barcode today on approximately 18 percent of the bank's volume.
- Each Intelligent Mail Barcode that BAC applies must have a mailpiece identifier that remains unduplicated on any other mailpiece for one year. Avoiding duplication of the barcode content on mail entered during a 12-month period, whether generated and entered internally or by third-party vendors, will require additional system controls.

¹ As USPS witness Ayub noted during the hearing on June 14, determining read/accept rates for the subset of mail entered by BAC directly, or by a subset of BAC's third-party vendors, would not produce reliably representative results, given the diversity of BAC lines of business that generate BAC mail and the diversity of the third-party vendors that enter it.

- Implementing the NSA so that the Postal Service can track BAC mail will require BAC to develop and implement major new systems for information and data, including systems needed to generate Mail.dat files for all mailings, an output which BAC does not generate in its current internal production environment. All BAC suppliers who enter mailings will also have to produce Mail.dat files. The bank will have to coordinate the generation, validation and capture of the Mail.dat files between the internal and supplier environments.
- The requirement to use Confirm to track BAC's mailpieces will require additional investments to support the management of the CONFIRM data and the capacity to perform analyses of the data.

Answer of BAC to VP/USPS-T1-32(b) at 2-3.

The remaining expenditures by BAC are required to participate in Seamless Acceptance, the *FAST* automated scheduling system, and the other cutting-edge programs for which BAC has agreed to serve as a large-scale pilot test. These commitments cannot be fairly regarded as separate from the read/accept discounts: BAC's commitment to serve as a large-scale pilot test for the Postal Service's new Intelligent Mail functionalities was part of the consideration demanded by the Postal Service during the negotiations as a *quid pro quo* for the pay-for-performance discounts offered by the Postal Service for improved read rates and reduced UAA rates. BAC could not have obtained the latter without also making the costly additional commitments needed for the former. See Answer of BAC to VP/USPS-T1-32(b); Comments of BAC In Response to Notice of Inquiry No. 1 (April 17, 2007) at 17; USPS-T-1 (Ayub Direct) at 7-12. Valpak's continued insistence that these commitments are severable, and may be analyzed in isolation from one another, reveals a fundamental misunderstanding of the terms of the proposed NSA, and the business model followed by the Postal Service to protect its financial interests in NSA negotiations.

II. THE COMMISSION IS INDEPENDENTLY ENTITLED TO INCLUDE THE INTERROGATORY ANSWER IN THE RECORD ON THE GROUND THAT THIS WOULD PROVIDE A MORE COMPLETE RECORD.

The Commission's inclusion of the interrogatory answer in the record is independently justified by the relevance of the answer to issues that Valpak and other participants have raised in this case—particularly, whether it would be appropriate for the Commission to modify the bargain negotiated by BAC and the Postal Service by changing the baseline values for the proposed discounts for improved read and accept rates. Valpak has offered no legitimate procedural or due process objection to the Presiding Officer's decision to admit the interrogatory answer on this independent ground.

First, to the extent that Valpak's asserted grievance is that BAC's answer was *insufficiently* responsive—i.e., that it failed to answer the question posed by Valpak—Valpak's remedy was to file a motion to compel a more responsive answer under Rule 26(d). Rule 26(d), however, directs that motions of this kind be filed “within 14 days of the answer . . . to the discovery request.” *Id.* The 14-day period for filing such a motion expired on June 8. Valpak failed to file such a motion to compel within the 14 day period—or even to make an informal request to BAC counsel for clarification of BAC's answer.

Second, to the extent that Valpak's asserted grievance is that BAC's answer was *overly* responsive—i.e., that it answered a question not posed by Valpak—Valpak overlooks the Commission's independent power to develop the record on its own initiative. It is well settled that the Commission, like many other administrative agencies,

“has a more active role than that of ‘an umpire blandly calling balls and strikes.’”² The Commission has held repeatedly that it has an “affirmative duty to develop facts and make recommendations which further the goals and objectives of the Act . . .”³ To this end, the Commission routinely designates into the record discovery responses not designated by any participant. In Presiding Officer’s Ruling No. MC2007-1/9, for example, BAC’s answer to Valpak/USPS-T1-32(b) at issue was only one of ten discovery responses by BAC and the Postal Service, designated by none of the participants, that the Presiding Officer designated into the record on his own initiative.

Moreover, the Commission is not limited to the discovery responses obtained by the participants, but routinely pursues discovery on its own initiative. These Commission-initiated discovery requests are customarily entitled “Presiding Officer’s Information Requests” and “Notices of Inquiry.”⁴ In this case, the Commission has propounded both.

Given the Commission’s inherent power to develop the record on its own initiative, Valpak can hardly claim injury from inclusion of BAC’s answer to Valpak/USPS-T1-32(b). The Commission could have elicited BAC’s answer by filing a POIR *even if Valpak had never filed the interrogatory at all*. (Indeed, the Commission

² See, e.g., Docket No. MC96-3, Order No. 1143 (Dec. 12, 1996) (quoting *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2nd Cir. 1965)).

³ Docket No. MC78-1, Op. & Rec. Decis. on Reconsideration (March 24, 1980) at 13 (quoted in Docket No. MC96-3, Nashua Photo Inc. & Mystic Color Lab Reply Memorandum Regarding Their Motion To Enlarge Scope of Proceeding For Consideration Of Classification Modification With Respect To Business Reply Mail (July 31, 1996) at 10 n. 9).

⁴ In Docket No. R2006-1, for example, the Commission propounded 24 POIRs (most with multiple subparts) and three Notices of Inquiry (also with multiple subparts).

could still do so now.) Given the clear relevance of the answer to the issues raised by Valpak and other participants in this case, the notion that the Presiding Officer should have refrained from designating the answer on the theory that it went beyond Valpak's question would elevate form over substance.

The due process rights of participants to timely notice and opportunity to respond to evidentiary material developed by the Commission obviously impose limits on the Commission's power to develop the record on its own initiative. See Docket No. R2006-1, Order No. 1482 (Nov. 8, 2006). But those limits have not been approached, much less reached, here. Valpak could have propounded follow-up discovery requests concerning BAC's answer to VP/USPS-T1-32(b), but did not do so. Valpak also could have cross-examined the BAC witness sponsoring the response at the hearing yesterday (but again did not do so). Valpak still can, if it chooses, file testimony of its own responding to this evidence. Given these procedural options, Valpak cannot claim that admission of BAC's interrogatory answer into the record has denied Valpak (or any other participant) an adequate opportunity to respond to BAC's claims.

CONCLUSION

For the foregoing reasons, Valpak's motion to request for reconsideration of the Presiding Officer's Ruling No. MC2007-1/9 should be denied.

Respectfully submitted,

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