

UNITED STATES OF AMERICA  
Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

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

Docket No. MC2007-1

OFFICE OF THE CONSUMER ADVOCATE  
INITIAL BRIEF  
(August 2, 2007)

This proceeding is the first involving a pay-for-performance Negotiated Service Agreement (NSA). This proceeding is also likely be the last in which the Commission makes a recommended decision on a baseline NSA. Given current Commission rules and precedent, the Commission should cap total discounts at total return and forwarding cost savings—\$8,339,991. Such a cap would prevent payment of discounts for “anyhow” behavior, ensure that the value of the NSA to the Postal Service would be non-negative, and protect mailers not party to the agreement.

The Postal Service has requested<sup>1</sup> a recommendation pursuant to section 3622(f) of amended title 39, which specifies, for the mail categories which are the subject of this proceeding, that: “[p]roceedings initiated to consider a request for a recommended decision filed by the Postal Service during that 1-year [transition period] shall be completed in accordance with Subchapter H of chapter 36 of this title and *implementing regulations* as in effect before the date of enactment of this section.”

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<sup>1</sup> “Request of United States Postal Service for a Recommended Decision on Classifications, Rates and Fees to Implement a Baseline Negotiated Service Agreement with Bank of America Corporation” (hereinafter “BAC”), February 7, 2007, at n.1.

[Emphasis added.] Thus, the Commission's rules regarding baseline NSAs (39 C.F.R. §§ 3001.190-.195) apply to this proceeding. Rules that may be promulgated at some future time by the Postal Service or the Commission do not apply. Appeals to hypothetical rules<sup>2</sup> implementing policies of the Postal Accountability and Enhancement Act (PAEA) have no legal force in Docket No. MC2007-1.

I. THE BAC NSA DOES NOT CONFORM TO COMMISSION POLICY OR PRECEDENT

The Commission's policy with respect to NSAs is set forth in its Rule 190(b). "[I]t shall be the policy of the Commission to recommend Negotiated Service Agreements that are consistent with statutory criteria, and *benefit the Postal Service*, without causing unreasonable harm to the marketplace." As proponents of the NSA at issue here, BAC and the Postal Service bear the burden of proving that their agreement conforms to Commission policy.<sup>3</sup> This they have not proved—and by their own admissions cannot prove.<sup>4</sup>

Postal Service witness Ayub has presented an analysis that purports to derive the financial benefit of the NSA to the Postal Service.<sup>5</sup> Unfortunately, the analysis depends on an assumption (the truth of which will never be known) and fails to include

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<sup>2</sup> *E.g.*, "Reply Comments of BAC in Response to Notice of Inquiry No. 1," April 27, 2007, at 2.

<sup>3</sup> "[T]he proponent of a rule or order bears the burden of proof." 5 U.S.C. § 556(d).

<sup>4</sup> Tr. 2/364 (Witness Ayub): "Q Okay. So you're saying, as you've said many times in response to interrogatories and in your testimony, that you don't know what BAC's read rate is at this time; correct?" "A That is correct."

<sup>5</sup> USPS-T-1, Appendix A.

unquantified “direct and immediate financial benefits . . . .”<sup>6</sup> Witness Ayub assumes that it currently costs the Postal Service the same to process a BAC piece as it did to process an average piece in 1999.<sup>7</sup> Yet the preponderance of evidence in the record of this proceeding demonstrates that BAC is anything but an average mailer, and it fails to demonstrate that processing costs have remained unchanged since 1999.

Furthermore, Rule 193(e)(1) requires the Postal Service to use “the estimated *mailer-specific* costs, volumes, and revenues of the Postal Service” when estimating financial benefit to the Postal Service. [Emphasis added.]

#### A. BAC Is Not an Average Mailer

Although witness Ayub uses system average costs to estimate the financial benefit of the NSA to the Postal Service, BAC is not average. “BAC is one of the largest financial institutions in the United States and the world.”<sup>8</sup> BAC mailed almost 3.3 billion pieces of First-Class and Standard Mail in 2006<sup>9</sup> and expects to mail 3.3 billion pieces each year over the course of the NSA.<sup>10</sup> BAC also receives about 450 million pieces of First-Class Mail from its customers.<sup>11</sup> BAC is one of the Postal Service’s largest

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<sup>6</sup> “Opposition of BAC to Motion of APWU for Leave to File Reply to USPS Opposition to APWU Motion to Compel,” July 2, 2007, at 10. The so-called unquantified benefits are actually nothing of the sort. The obligations undertaken by BAC were a quid pro quo for the discounts it obtained. Tr. 2/383. Thus, the unquantified benefits are offset by unquantified compensation from the Postal Service to BAC.

<sup>7</sup> Tr. 2/365 (witness Ayub).

<sup>8</sup> BAC-T-1 at 3.

<sup>9</sup> Tr. 2/482 (Answer of BAC witness Jones to OCA/BAC-T1-5 Revised June 12, 2007). See also NSA at § I.A.

<sup>10</sup> BAC-T-1 at 8.

<sup>11</sup> *Id.* at 7.

customers. In terms of volume sent and received, BAC is at least Six Sigma above average.<sup>12</sup>

B. The Co-Proponents Have Failed to Comply with Rules 193(a)(2) and (3)

The current rules for baseline NSAs require the Postal Service to use mailer-specific costs when estimating the value of an NSA.<sup>13</sup> In the context of the BAC NSA, this means using BAC-specific read rates to estimate mail processing and delivery cost savings. The rules also require that the Postal Service request and receive a waiver of any filing requirement that it believes cannot or need not be met.<sup>14</sup> No such waiver has ever been requested.<sup>15</sup>

Rule 193(e)(1) states,

If mailer specific costs . . . are not available, the bases of the costs . . . that are proposed shall be provided, including a discussion of the suitability of the proposed costs . . . as a proxy for mailer-specific costs . . . .

The testimony of witness Ayub contains cursory and conclusory statements that might be construed as an attempt to comply with this requirement.<sup>16</sup> Unfortunately, the crucial portion of the testimony—“There is no reason to believe that any individual mailer’s read and accept rates vary significantly from the system-wide average . . .”—

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<sup>12</sup> Tr.2/386 (witness Ayub): BAC “would definitely be one of the top 20 mailers.”

<sup>13</sup> 39 C.F.R. § 3001.193(e)(1).

<sup>14</sup> *Id.* at 193(a)(2)-(3).

<sup>15</sup> See Request at 6 and Attachment E-1.

<sup>16</sup> USPS-T-1 at 15: “In the absence of BAC-specific data on read and accept rates, I used the system wide averages for these baseline values. There is no reason to believe that any individual mailer’s read and accept rates vary significantly from the system-wide average, since read and accept rates are likely to depend primarily on the generation of barcoding protocol used by the mailer and the scanning

has been thoroughly discredited through discovery and cross-examination. Worse, the so-called “system-wide average” used by witness Ayub dates to 1999. Much more recent data were available,<sup>17</sup> or could have been created.<sup>18</sup> Witness Ayub’s refusal to use or obtain such data is based on speculation.<sup>19</sup> Speculation is not evidence—much less the substantial evidence required to support the discounts requested by the Postal Service.<sup>20</sup>

With respect to tests of read rates conducted in 2006-07,<sup>21</sup> (which tests included print shops used by BAC<sup>22</sup>) witness Ayub stated,<sup>23</sup>

[T]he test results are likely to overstate the read/accept rates that mailer-generated barcodes are likely to achieve in the ordinary course of business. High profile pilot studies of this kind are often viewed by the participants as a chance to showcase both the new technology and the skill of the study participants at mastering it. For this reason, participants in studies of this kind often devote more resources to maintenance, alignment, cleaning and calibration than might be expected with a mature technology used in the ordinary course of business. Needless to say, special efforts of this kind can hardly be regarded as good proxies for Before Rates performance in an NSA.

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equipment used by the Postal Service—factors that are unlikely to generate wide mailer-to-mailer variations.”

<sup>17</sup> Tr. 2/140.

<sup>18</sup> *Id.* at 366-67.

<sup>19</sup> See discussion below.

<sup>20</sup> “While substantial evidence may consist of inferences, such inferences must be ‘a product of logic and reason’ and ‘must rest on the evidence’; inferences that are the result of mere speculation or conjecture cannot support a finding.” *Kuhn v. Department of General Services*, 22 Cal.App.4th 1627, 1633 (1994).

<sup>21</sup> Tr. 2/140.

<sup>22</sup> *Id.* at 486.

<sup>23</sup> *Id.* at 141-42.

Witness Ayub does not claim that participants in this test actually went to extraordinary lengths (“special efforts”) to improve their read rates. He merely speculates that they “might.” Such speculation is not evidence.

With respect to the possibility that a reliable direct test of BAC’s mail is impossible, witness Ayub makes two points. First, it is not possible to isolate BAC’s mail from that of other mailers using the same print shops.<sup>24</sup> Second, if it were possible to test BAC’s mail directly, BAC would supply essentially bogus mail—mail with deliberately manufactured low read rates.<sup>25</sup> Neither point withstands scrutiny.

Even witness Ayub acknowledges that the second point is far-fetched. When asked whether he thought BAC would actually manipulate tests of its mail, witness Ayub said, “I, personally, wouldn’t be concerned.”<sup>26</sup> Rather, witness Ayub was worried that some other party might raise the issue during litigation. This amounts to double speculation—speculation as to the speculation of some unknown party—and does not justify the failure to measure BAC’s current read rates.

With respect to the claimed need to isolate BAC’s mail from that of other mailers who use the same print shops, witness Ayub’s testimony that system-wide average read rates apply to all mailers contradicts the point.<sup>27</sup> In any event, if a 1999 system-wide average accurately represents BAC’s accept rate, then a 2007 average of printers used

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<sup>24</sup> *Id.* at 370.

<sup>25</sup> *Id.* at 383-84.

<sup>26</sup> Tr. 2/385.

<sup>27</sup> USPS-T-1 at 15.

by BAC should be at least as accurate. The refusal of BAC and the Postal Service to estimate such an average justifies the adverse inference<sup>28</sup> that they expected such an average to be higher than the 1999 average.

## II. THE RISK ASSOCIATED WITH THE READ-RATE PORTION OF THE PROPOSED NSA SHOULD BE MITIGATED

When promulgating the rules for NSAs, the Commission stated,

The Commission has no intent of acting as a bargaining party, or is its interest in renegotiating the terms and conditions of a Negotiated Service Agreement. However, the Commission's role is not so limited as to only providing either a positive or negative recommendation. For example, if the initial request does not support an agreement that complies with the requirements of the Act, the Commission might, if possible, recommend modifications to the agreement to bring it into compliance.<sup>29</sup>

In the first NSA, the Commission conditioned its recommendation on the inclusion of a stop-loss cap on discounts paid.<sup>30</sup> The Commission included a similar condition in another NSA.<sup>31</sup> The BAC NSA presents risks analogous to those in these two prior NSAs. In the two prior NSAs, the relationship between Before- and After-Rates volumes was unknown. In the BAC NSA, the relationship between Before- and After-Rates read rates is unknown.<sup>32</sup> And there is substantial evidence suggesting that

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<sup>28</sup> "Black's Law Dictionary defines an 'adverse inference' as being a 'detrimental conclusion drawn by the fact-finder from a party's failure to produce evidence that is within the party's control.'" [http://www.law-europe.com/articles/art\\_21.pdf](http://www.law-europe.com/articles/art_21.pdf) (as viewed August 2, 2007).

<sup>29</sup> Order No. 1391, February 11, 2004, at 21.

<sup>30</sup> PRC Op. MC2002-2 at 86. This NSA was filed before the rules for NSAs had been promulgated.

<sup>31</sup> PRC Op. MC2004-3 at 68. This NSA was filed after the rules for NSAs had been promulgated.

<sup>32</sup> See, e.g., Tr. 2/373.

BAC's Before-Rates read rate is higher than the threshold read rate incorporated in the NSA.

The BAC NSA provides that discounts are earned if the read rate for BAC's letter-shaped mail exceeds 97.8 or 96.9 percent for First Class and Standard, respectively.<sup>33</sup> These read rates were the system-wide average in July 1999.<sup>34</sup> The Postal Service does not know what BAC's read rate is in 2007.<sup>35</sup>

BAC states that it has not begun to investigate how it might improve the quality of barcodes on its pieces.<sup>36</sup> Given that BAC does not print its own barcodes,<sup>37</sup> and given

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<sup>33</sup> NSA at §§ IV.C.2, IV.F.2.

<sup>34</sup> Tr. 2/312.

<sup>35</sup> Tr. 2/366-67 (witness Ayub):

Q Okay. You critique my question as making a presumption that the steps that BAC would be required to make would result in a 99 percent read accept rate. And I want to take that out of the hypothetical. I'm not assuming anything. I mean, for example, it's possible, is it not, that if you had a method to measure BAC's read accept rate today it could be 99 percent? Could be?

A It could be 99, it could be 90 percent, I mean.

Q Could be 90?

A I mean I'm just --

Q Could be 99; correct?

A Could be 99.

Q Either one?

A It could be either. I mean the probability of it being 90 percent is very low. Ninety-nine, we don't have a probability. I believe we use the proxy for that reason because we don't have specific mailer information for the read and accept rates.

<sup>36</sup> "Comments of BAC in Response to Notice of Inquiry No. 1," April 17, 2007 (hereinafter "BAC Comments"), at 12, n.10.

<sup>37</sup> "Bank of America . . . sends most of its mail through third-party vendors . . ." Tr.2/20. BAC Comments at 4, 12.

that read/accept rates depend primarily on print quality and Postal Service equipment,<sup>38</sup> it is questionable that BAC can actually take actions to improve read/accept rates. If read/accept rates are beyond BAC's control, incentives in the NSA for improving them should be worthless—being beyond BAC's ability to obtain. The only way for BAC to obtain discounts from improved read/accept rates is if printers or the Postal Service make *or have already made* changes that improve read rates.

The Postal Service has tested letters bearing Intelligent Bar Codes (IBCs). The results of those tests suggest that improvements in read rates have, in fact, occurred since 1999.<sup>39</sup> Thus, using 1999 read rates as the threshold for “performance-based” discounts guarantees the payment of “anyhow” discounts. At least a portion of read-rate discounts paid to BAC will be for performance improvements that have already occurred. And these improvements have resulted from the efforts of entities other than BAC. Discounts for BAC are thus doubly undeserved: cost savings are already accruing to the Postal Service, and BAC had nothing to do with generating them.

Total discounts paid under this NSA should be capped at \$8,339,991. This is the total three-year savings from forwarding and returns.<sup>40</sup> This compares with the total

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<sup>38</sup> USPS-T-1 at 15:

[R]ead and accept rates are likely to depend primarily on the generation of barcoding protocol used by the mailer and the scanning equipment used by the Postal Service—factors that are unlikely to generate wide mailer-to-mailer variations.

See *also* Tr. 2/257-58 (Response to Interrogatory VP/USPS-T1-9a, April 12, 2007).

<sup>39</sup> Tr. 2/145-47.

<sup>40</sup>  $\$769,450 + \$1,487,557 + \$738,207 + \$5,344,777 = \$8,339,991$ . USPS-T-1, Appendix A at 1. All other cost savings are associated with improved read rates. *E.g.*, USPS-T-1 at 17 (First Class).

discounts of \$23,608,000 shown on the same page. The value of the NSA to the Postal Service would come from any improvements in read rates over current (unknown) read rates. At worst, this value would be zero, which would occur if there were no improvements in BAC's read rates. If BAC's read rates did improve from its current read rates, the Postal Service would earn some positive (unknown) profit.

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