

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

**REPLY BRIEF OF THE UNITED STATES POSTAL SERVICE**

UNITED STATES POSTAL SERVICE

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## I. INTRODUCTION

The Postal Service respectfully submits this reply brief, which responds to arguments made by American Postal Workers Union, AFL-CIO (“APWU”), Office of the Consumer Advocate (“OCA”), and Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. (collectively “Valpak”) in their initial briefs in this proceeding. For the reasons indicated in the Postal Service’s initial brief and in this reply brief, the Postal Regulatory Commission (“Commission”) should recommend the proposed classification language and rates set forth in Attachments A and B of the Postal Service’s Request to allow implementation of the Negotiated Service Agreement (“NSA”) with Bank of America Corporation (“BAC”).

Three comments to arguments made in the initial briefs are apropos here, and these comments also provide a backdrop to the specific reply brief comments that follow this introduction.

This NSA should be evaluated by examining the agreement in its entirety, rather than focusing on certain of its elements in isolation.<sup>1</sup> APWU, OCA and Valpak draw conclusions about the overall impact of this NSA with no examination whatsoever of the agreement in its entirety. APWU alleges that this NSA will cause the Postal Service financial harm, but does not point to any review of the NSA in its entirety in support of its allegation.<sup>2</sup> The OCA advocates a cap on total discounts based on savings from forwarding and return, without analysis of the entire agreement, focusing only on read

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<sup>1</sup> See Postal Service Initial Brief, at 24, 26, 28, and 35-36.

<sup>2</sup> See APWU Initial Brief, at 1 and 3-5.

and accept rates.<sup>3</sup> Valpak claims “that one could see this NSA as opening the floodgates to a revenue hemorrhage of substantial proportions.”<sup>4</sup> There are no citations anywhere in Valpak’s 22 pages that point to a review of the NSA in its entirety to evaluate its overall financial impact.

Rather than evaluate the entire agreement, APWU, OCA, and Valpak focus on only one aspect of the NSA, the read and accept rates that determine certain incentives. Record evidence on other aspects of the NSA is provided only by the proponents’ witnesses, and stands unrebutted on the record. APWU, OCA and Valpak did not sponsor any affirmative cases and did not provide any direct evidence in this proceeding to support their positions.

Finally, regarding the one element of the agreement on which APWU, OCA and Valpak do focus, the significance of the various data on read and accept rates supplied by the Postal Service, the three NSA opponents cite no testimony by qualified experts for their conclusions. APWU alleges that incented improvements in read and accept rates already have occurred, providing a windfall to BAC.<sup>5</sup> APWU provides no citations to the evidentiary record for these allegations. Rather, they merely are conclusions by counsel on brief, unsupported by expert testimony.<sup>6</sup> Similarly, OCA notes that the record “fails to demonstrate that processing costs have remained unchanged since 1999”<sup>7</sup> and that the NSA read and accept rates have “been thoroughly discredited

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<sup>3</sup> See OCA Initial Brief, at 7-8.

<sup>4</sup> Valpak Initial Brief, at 18.

<sup>5</sup> See APWU Initial Brief, at 2 and 4.

<sup>6</sup> Record evidence evaluating the various read and accept rate information is provided by witnesses Ayub and Raney, and contradicts APWU’s conclusions.

<sup>7</sup> OCA Initial Brief, at 3.

through discovery and cross-examination.”<sup>8</sup> OCA provides no citations to the evidentiary record for these conclusions, and the Postal Service believes a fair reading of the record will find none. Valpak alleges that the NSA’s proxies to reflect BAC’s read and accept rates are flawed, and in the following five pages of its brief devoted to these issues, Valpak fails to provide citations to the evidentiary record for its conclusions.<sup>9</sup>

APWU, OCA, and Valpak did not avail themselves of the opportunity to develop the record in this proceeding to support the positions against the NSA they are taking in their initial briefs. In contrast, the NSA co-proponents, the Postal Service and BAC, have presented substantial testimony in support of the NSA, unrebutted on the record. The Commission, therefore, should issue a recommended decision supporting the NSA as agreed to by its proponents.

## **II. THE OPPONENTS’ CHALLENGES TO THE BASELINE VALUES USED IN THIS NSA FOR DETERMINING BAC’S AFTER-RATES MAIL PROCESSING PERFORMANCE MAY BE EASILY DISMISSED.**

The NSA proponents reasonably relied on the systemwide average data on read and accept rates to develop the baseline values that the proponents would use to measure BAC mail processing improvements under the NSA. Opponents challenge the proponents’ reliance on these data by (a) claiming that increases in the systemwide average have led to increases in BAC’s specific read and accept rates, (b) assuming that because BAC’s mail volume is larger than the average mailer, its read and accept rates must be higher than average, and (c) alleging that the Postal Service unnecessarily delayed or withheld data on read and accept rates during the proceeding.

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<sup>8</sup> *Id.* at 5.

<sup>9</sup> See Valpak Initial Brief, at 8-13.

A fair reading of the record will show that these challenges are unfounded and that the NSA's use of the negotiated baseline values is warranted.

**A. Contrary To The Opponents' Assertions, Any Increases In The Systemwide Average Read And Accept Rates Do Not Present A Barrier To A Favorable Recommended Decision.**

The NSA baseline values, which were derived from systemwide average data on read and accept rates used in the most recent omnibus rate proceeding (Docket No. R2006-1), are suitable proxies for BAC's before-rates mail processing performance.<sup>10</sup> Opponents argue that these data are outdated and that more recent evidence on the record show, or at least suggest, that the systemwide average read and accept rates have increased.<sup>11</sup> Opponents thereby imply that BAC's specific read and accept rates have experienced similar increases. They conclude that the systemwide average data endorsed by the NSA proponents is not a suitable proxy for BAC's current read and accept rates.<sup>12</sup>

Having chosen not to submit direct evidence in this proceeding, the opponents base their challenges on read and accept rate data provided by the Postal Service in response to discovery requests, and on anecdotal statements on the record.<sup>13</sup> The opponents' reliance on these data and statements is fatal to their argument. There is no record evidence to support the proposition that increases in the systemwide average read and accept rates have necessarily lead to comparable increases in BAC's specific read and accept rates.

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<sup>10</sup> See Postal Service Initial Brief, Section VI.

<sup>11</sup> APWU Initial Brief, at 2; OCA Initial Brief, at 3; Valpak Initial Brief, at 9.

<sup>12</sup> APWU Initial Brief, at 3-4; OCA Initial Brief, at 5; Valpak Initial Brief, at 9.

<sup>13</sup> See APWU Initial Brief at 3-5; OCA Initial Brief at 4-7; Valpak Initial Brief at 8-13.

- As explained in the Postal Service’s initial brief, average read and accept rates derived from the aggregated End-of-Run (“EOR”) data provided in Library Reference USPS-LR-4 (“LR-4”) likely overstate BAC’s before-rates mail processing performance.<sup>14</sup>
- The Postal Service also explained that the results of the competitive test of the Wide Field of View (“WFOV”) Camera, provided in Library Reference USPS-LR-3 (“LR-3”), cannot be presumed to reflect the current read and accept rates of BAC’s mail.<sup>15</sup> These results reflect both the uniqueness of the WFOV competitive test environment and the fact that the test data were not collected for the purpose of making decisions regarding classifications or rates.<sup>16</sup>
- Additionally, the Postal Service explained that results of the Seamless Acceptance pilot test likely overstate the read and accept rates that mailers similar to BAC are likely to achieve through the use of mailer-generated barcodes.<sup>17</sup>
- Valpak contends that programs such as MERLIN, the Postal Service’s investments in automation equipment, and its efforts to educate mailers on mail quality issues should have lead to increases in the systemwide average read and

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<sup>14</sup> Postal Service Initial Brief, at 29-30 (“Average accept rates in operations where mail is predominantly processed for the first time (i.e., ‘upstream operations’) tend to be lower than in operations where mail has already been run multiple times on postal automated equipment (i.e., ‘downstream operations’). Because BAC’s automation mail is likely to receive its first pass in downstream operations, its mail is more likely to experience lower than average accept rates as compared to mail that has been previously processed and accepted in upstream operations.”) (citations omitted).

<sup>15</sup> *Id.* at 31.

<sup>16</sup> *Id.* at 30-32.

<sup>17</sup> *Id.* at 32.

accept rate.<sup>18</sup> Even if Valpak's contention is true, it cannot provide the Commission with a basis for concluding that BAC's read and accept rates have similarly increased, and that therefore the NSA baseline values do not represent BAC's read and accept rates.

Moreover, except for the systemwide average data embodied in the NSA baselines, none of the read and accept rate data submitted in this docket were subject to the detailed examination on the record provided in omnibus rate proceedings. In contrast, the systemwide average data endorsed by the NSA proponents are derived from the data used to establish billions of dollars in worksharing discounts in Docket No. R2006-1.<sup>19</sup> Because the NSA baseline values reflect the same basic approach accepted by the Commission in recommending worksharing discounts for automation mail in the recent omnibus rate proceeding, and because the other read and accept rate data provided on the record do not support the conclusion that the NSA baseline values are not a fair representation of BAC's read and accept rates, the NSA baseline values were reasonably incorporated into this NSA as a basis for measuring BAC's after-rates mail processing performance.

**B. Nothing In The Record Supports OCA And Valpak's Allegations That BAC's Read And Accept Rates Are Better Than Average.**

OCA devotes an entire section in its brief to attempting to establish a fact that does not appear to be in dispute. It is manifest that BAC is not an "average" mailer in

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<sup>18</sup> Valpak Initial Brief, at 10, 11.

<sup>19</sup> Postal Service Initial Brief, Section VI.A; Reply Comments of United States Postal Service to Notice of Inquiry No. 1 ("Postal Service NOI 1 Reply Comments"), filed on April 24, 2007, at 4.

terms of volume.<sup>20</sup> OCA apparently believes that because BAC is not “average” in this sense, it logically follows that BAC’s read and accept rates must not be “average” and, in fact, must be higher than average. Valpak also implies that BAC’s mail has a higher than average read and accept rate.<sup>21</sup> These arguments evidently are intended to cast doubt on the systemwide average read and accept rates used as the baseline values in this case and to provide further support for opponents’ arguments that the NSA will lead to revenue loss for the Postal Service, discussed in more detail in Section III below.

These claims are fatally flawed because there is not a scintilla of evidence on the record to support them. No record evidence has been produced that demonstrates that BAC’s read and accept rates are above the baseline values used. In fact, there are a variety of factors that influence read and accept rates, including mailpiece design as well as the “quality, consistency and accuracy of the barcode” which “may vary from customer to customer.”<sup>22</sup> There is nothing in the record which gives any indication that just because BAC is a large mailer, its mailpiece design and barcode quality are superior to those of other mailers, whether large or small.

The very reason that proxies were used in this NSA was because BAC-specific read and accept rate data were not available. The reasonableness of those proxies is discussed in detail in Section II.A, above. The record is devoid of any evidence from which one could conclude that BAC has higher than average read and accept rates.

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<sup>20</sup> See OCA Initial Brief, at 3-4.

<sup>21</sup> See Valpak Initial Brief, at 10.

<sup>22</sup> Tr. 2/116.

**C. The Commission Should Not Be Distracted By APWU's Complaints Regarding The Postal Service's Production Of Data Pertaining To Read And Accept Rates.**

The Postal Service filed complete responses to APWU's discovery requests concerning read and accept rates throughout the proceeding, and in so doing, provided APWU with sufficient time to evaluate and respond to the Postal Service's filings. APWU's allegations that the Postal Service was unwilling to provide data on read and accept rates to the Commission or that it delayed the production of these data are without merit.<sup>23</sup> On April 24, 2007, APWU filed a motion to compel a response to APWU interrogatory APWU/USPS-T1-1, which in part sought "documentation that measures or reports on any improvements in the efficiency of barcode sorters with [certain] enhancements compared to barcode sorters prior to the installation of [those] enhancements."<sup>24</sup> The Postal Service filed its partial response to this interrogatory on May 1, 2007, and stated that it would produce the documents responsive to subpart (a) of the interrogatory under protective conditions.<sup>25</sup> The responsive documents were filed on May 4, 2007, as library reference USPS-LR-3.<sup>26</sup> Because the Postal Service did not oppose APWU's May 1, 2007 motion to postpone the hearings on the Postal Service's direct case, the Commission rescheduled the hearings for June 14, 2007, thereby

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<sup>23</sup> See APWU Initial Brief, at 2.

<sup>24</sup> Tr. 2/407.

<sup>25</sup> Postal Service Initial Brief, at 8. The Postal Service also offered to produce Brent Raney, Manager, Technology Development/Apps, Engineering, for cross-examination during hearings on the Postal Service's direct case regarding improvements in letter mail read/accept rates since 1999. *Id.* at 7.

<sup>26</sup> *Id.* at 8.

providing APWU with over a month to conduct additional discovery on the Postal Service's response.<sup>27</sup>

After the hearings on June 14, 2007, during which all participants, including APWU, had an opportunity to cross-examine Postal Service and BAC witnesses on issues related to the read and accept rate data used by the NSA proponents,<sup>28</sup> the Presiding Officer issued a ruling directing the Postal Service to indicate whether any reports or documents were submitted to the Board of Governors that discuss the Postal Service's investments in WFOV Cameras.<sup>29</sup> The day after the hearing, the Postal Service filed a response to the Presiding Officer's ruling, stating that although no documents as described in the ruling had yet been identified, the Postal Service had identified certain documents containing information on improvements resulting from a Performance Improvement Plan ("PIP") implemented in connection with the WFOV Cameras.<sup>30</sup> Furthermore, the Postal Service stated that in the interest of reducing further motions practice and preserving Commission resources, it would submit these documents to the Commission under protective conditions.<sup>31</sup> On June 28, the Postal Service filed these documents, documents discussing the Postal Service's investments in WFOV Cameras discovered after June 15, and documents containing aggregated read and accept rate data.<sup>32</sup> In so doing, the Postal Service went above and beyond its obligation to respond to the Presiding Officer's June 14 ruling. Therefore, APWU has

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<sup>27</sup> *Id.* at 9

<sup>28</sup> *Id.* at 11-13.

<sup>29</sup> *Id.* at 12.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 12-13.

<sup>32</sup> *Id.* at 12-15.

no basis for claiming that the Postal Service unnecessarily delayed or withheld the production of this material. APWU's inexplicable motions practice should not distract the Commission from evaluating the merits of the proposed NSA.

**III. RECORD EVIDENCE DIRECTLY CONTRADICTS THE OPPONENTS' CONTENTION THAT THE PROPOSED NSA CREATES A REVENUE RISK.**

The incentives provided to BAC under this NSA are designed to encourage BAC to undertake activities that will lead to quantifiable improvements in its read and accept rates, thereby providing cost savings and operational benefits to the Postal Service. Opponents' concerns regarding revenue loss associated with the discounts for improved mail processing performance are not supported by the record and may be easily dismissed.

**A. The Opponents' Assume Without Support That The Negotiated Benchmarks Will Reward BAC For Any Improvements in Read And Accept Rates Due To Existing Investments In Mail Processing Equipment And Activities.**

Substantial record evidence shows that the NSA incentives for improved mail processing performance will appropriately reward BAC for undertaking activities that result in quantifiable improvements in the read and accept rates of its letter-rated First-Class Mail and Standard Mail relative to the status quo.<sup>33</sup> For the reasons stated in Sections II.A and II.B above, there is no support for the opponents' assertions that the mail processing improvements projected by the Postal Service and BAC already have been achieved by BAC due to any increases in the systemwide average read and

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<sup>33</sup> See APWU Initial Brief, at 2, 4.

accept rates.<sup>34</sup> Therefore, there also is no record evidence to support the argument that BAC will receive discounts under this NSA for increases in the systemwide average read and accept rates that the opponents attribute to Postal Service activities, such as investments in the WFOV Camera. Likewise, there is no support for Valpak's claim that functionally equivalent NSAs would lead to similar revenue losses.<sup>35</sup>

As the NSA proponents have emphasized throughout this proceeding, BAC will have to make substantial investments in technology, labor, and other resources to achieve improvements in its mail processing performance and to implement the processes that will enable the Postal Service to track those improvements (*i.e.*, Intelligent Mail Barcode ("IMB"), Business Entity Identifier ("BEI"), CONFIRM, Seamless Acceptance).<sup>36</sup> As the Postal Service and BAC noted in their responses to interrogatories and to Notice of Inquiry No. 1, BAC will invest in improving address quality only to the extent that the expected incremental benefits exceed the expected incremental costs.<sup>37</sup> Accordingly, the NSA benchmarks are designed to incent BAC to increase its investments in improved mail processing performance over the status quo, not to reward BAC for its existing investments.<sup>38</sup> OCA's suggestion that BAC will be unable to improve its read and accept rates through its own activities and investments<sup>39</sup> ignores witness Ayub's explanation that factors such as barcode quality, consistency, and accuracy may vary from mailer to mailer and that this NSA will encourage BAC to

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<sup>34</sup> See *id.* at 2.

<sup>35</sup> See Valpak Initial Brief, at 18.

<sup>36</sup> Postal Service Initial Brief, at 34.

<sup>37</sup> *Id.* Section VI.D.

<sup>38</sup> Postal Service NOI 1 Reply Comments, at 8.

<sup>39</sup> OCA Initial Brief, at 8-9.

test different combinations that could enable BAC to improve the read and accept rates of its mail volume.<sup>40</sup> It is entirely reasonable, therefore, for the Postal Service to provide BAC with incentives for mail processing improvements over the negotiated benchmarks to encourage BAC to maximize its investments in barcode quality and mail processing performance.

**B. Claims Of Alleged Revenue Loss Fail To Account For The Benefits Provided By The Other Components Of The Agreement Which Will Benefit The Postal Service, BAC, And Mailers.**

As described in the testimonies of witnesses Ayub and Jones, the vast array of contractual obligations imposed on BAC are expected to generate cost savings and operational benefits for the Postal Service for which BAC will receive no direct compensation.<sup>41</sup> Claims by opponents that this NSA will cause financial harm to the Postal Service and to other mailers fail to acknowledge the significant benefits afforded by these mandatory commitments. No opponent has challenged the proposition that BAC's commitment to place IMBs on its Business Reply Mail ("BRM"), Qualified Business Reply Mail ("QBRM"), and Courtesy Reply Mail ("CRM") will generate cost savings, or that BAC's agreement to serve as a test bed for several new and existing postal processes, such as Seamless Acceptance, will lead to further operational benefits.<sup>42</sup> Because these additional benefits will help to mitigate financial risk from any

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<sup>40</sup> Tr. 2/116. Witness Ayub also stated that "[t]he quality of the barcode can be improved by following the guidelines identified in the Domestic Mail Manual," that "[t]he mailer may improve the quality of its barcodes through a higher quality production environment and improved internal controls." *Id.* at 128. *See also id.* at 127.

<sup>41</sup> Postal Service Initial Brief, at 26.

<sup>42</sup> These processes include IMB, OneCode ACS, Seamless Acceptance, CONFIRM, CAPS, PostalOne!, FAST and eDropship. *Id.* at 26-28.

individual component of the NSA, the Commission should disregard opponents' speculative concerns about revenue losses under the NSA.<sup>43</sup>

**C. The Record Is Devoid Of Evidence Supporting Valpak And APWU's Contention That Other Mailers Would Be Adversely Affected By The Alleged Revenue Losses Under This NSA.**

As the NSA proponents have consistently maintained, any financial risk attributable to the discount provisions in this NSA will not impact mailers not party to the agreement or the marketplace in general.<sup>44</sup> The claim that any revenue loss under this NSA will be borne by other mailers not party to the agreement, as APWU and Valpak contend, is contradicted by the unrebutted financial analysis of witness Ayub showing that each component of the agreement is contribution positive.<sup>45</sup> Neither participant provided its own financial analysis of this NSA to rebut the written testimony of witness Ayub, who concludes that "the financial risk to the Postal Service and to rate payers is minimal."<sup>46</sup> As the Postal Service noted in its Initial Brief, the financial incentives provided to BAC under the proposed NSA are relatively small, and the risk that BAC's mail is "above average" (*i.e.*, exhibiting lower cost characteristics) would have an infinitesimal impact, if any, on the rates paid by other mailers under the applicable statutory criteria.<sup>47</sup> Concerns that other mailers will have to shoulder any effects from

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<sup>43</sup> *Id.* at 23.

<sup>44</sup> *Id.* at 26; Response of United States Postal Service to Notice of Inquiry No. 1, filed on April 17, 2007, at unnumbered page 4; Postal Service NOI 1 Reply Comments, at 7.

<sup>45</sup> See Direct Testimony of Ali Ayub on Behalf of United States Postal Service (Revised) ("USPS-T-1"), filed on June 6, 2007, Appendix A.

<sup>46</sup> *Id.* at 32.

<sup>47</sup> Postal Service Initial Brief, at 26.

the NSA are unfounded. Thus, the Commission may confidently recommend the proposed NSA and be assured of its positive financial contribution.

**D. OCA's Proposed Discount Cap Is Unsupported, Would Undermine The Negotiated Outcome, Significantly Weaken The Parties' Incentives To Make Cost-Savings Investments Under The NSA, And Would Jeopardize This First Attempt To Introduce A Performance-Based NSA.**

The OCA urges the Commission to reduce the total discounts available to BAC under this NSA from approximately \$23 million to approximately \$8 million, a value that only accounts for projected cost-savings associated with improved forwarding, return, and undeliverable-as-addressed rates. As a result, the proposed cap would prevent the Postal Service from passing through any cost savings associated with improvements in BAC's read and accept rates. This cap is unnecessary, is not supported by the record, and would disrupt the NSA proponents' efforts to generate cost-savings through incentives for improved mail processing performance.

First, the proposed discount cap is unnecessary, in that it would address a non-existent problem. As discussed in Sections III.A and III.B above, the opponents' fears that the BAC NSA will lead to significant revenue loss are unfounded and, in any event, would be mitigated by the benefits generated from BAC's contractual obligations.<sup>48</sup>

Second, neither the OCA, nor any other participant, has submitted record evidence demonstrating that the proposed cap is suitable for a pay-for-performance agreement such as the BAC NSA. As a result, the Commission's adoption of the proposed cap, without providing the participants an opportunity to examine and test it on the record, would be procedurally defective.

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<sup>48</sup> *Id.* at 23.

Third, OCA's proposed discount cap likely would have an adverse effect on BAC's willingness to invest in technology, labor, and other resources to achieve improvements in its mail processing performance, to the detriment of the NSA. As the Postal Service and BAC have emphasized throughout this proceeding, the discounts for improvements in mail processing performance are intended to compensate BAC for the substantial expenditures it will have to make during the three-year agreement to achieve those improvements.<sup>49</sup> Accordingly, the NSA proponents have stressed that upward adjustments to the benchmarks for measuring BAC's after-rates performance would reduce BAC's incentive to undertake such expenditures, because the expected payoff to BAC would be reduced, thereby reducing the amount that BAC would be willing to spend.<sup>50</sup> Similarly, by substantially reducing the expected payoff to BAC over the term of the agreement, the proposed discount cap likely would subvert BAC's incentives to invest in cost-savings improvements under this NSA.

The proposed discount cap also fails to account for BAC's operational commitments under the NSA, which will generate benefits for which BAC will receive no direct compensation.<sup>51</sup> As a result, the discount cap would undermine the negotiated outcome, thereby jeopardizing the first attempt to introduce a performance-based NSA. For these reasons, OCA's proposed discount cap must be rejected.

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<sup>49</sup> See Section III.A, above.

<sup>50</sup> See *id.*; BAC Initial Brief, Section II.D.

<sup>51</sup> See Section III.B, above.

**IV. RECORD EVIDENCE CLEARLY DEMONSTRATES THAT THE PROPOSED NSA AND THE POSTAL SERVICE'S REQUEST COMPLY WITH ALL APPLICABLE LEGAL STANDARDS; OPPONENTS' ARGUMENTS TO THE CONTRARY ARE GROUNDLESS.**

In their initial briefs, participants in this proceeding raise a variety of arguments, asserting that this NSA violates sections of the Postal Reorganization Act ("Act"), as well as the Commission's Rules of Practice and Procedure. In addition, Valpak questions the availability and terms of functionally equivalent NSAs. All of these points are without merit. The proposed NSA clearly meets all statutory and regulatory requirements and should be recommended by the Commission.

**A. APWU's Argument That The Proposed NSA Is Inconsistent With The Postal Reorganization Act Is Contradicted By Record Evidence And Applicable Legal Precedent.**

APWU suggests that the proposed NSA violates those sections of the Act dealing with fairness and equity as well as unreasonable discrimination.<sup>52</sup> APWU quotes the Commission's Opinion and Recommended Decision in the Capital One case,

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<sup>52</sup> APWU Initial Brief, at 3. APWU seemingly has abandoned its earlier argument, made in its NOI 1 reply comments, that the NSA violates the purported statutory requirement that all First-Class Mail travel at a uniform rate. See Reply of American Postal Workers Union to Comments Filed in Response to Notice of Inquiry No. 1, April 24, 2007, at 1-2. For the reasons discussed in BAC's initial brief, this argument is without merit. See BAC Initial Brief, at 46-48. APWU, however, makes a new point, asserting that recommendation of this NSA "would be contrary to the Commission's recent decision in R2006-1, because it would effectively de-link single piece First-Class letter mail from workshared letter mail that could be mailed by very large mailers." APWU Initial Brief, at 5. While it is true that the Commission rejected the Postal Service's proposal to de-link single-piece First-Class Mail rates from worksharing rates, APWU does not explicitly state how this NSA de-links single-piece and other First-Class Mail. See Opinion and Recommended Decision, Docket No. R2006-1, Vol. 1, at 125. In addition, the Opinion and Recommended Decision in R2006-1 was issued shortly after this NSA case was filed, providing APWU with ample opportunity to pursue this topic through discovery and to produce its own testimony on the matter. APWU's eleventh-hour attempt to raise this issue through its brief should not be given any weight.

where the Commission concluded that several provisions of the Act – §§ 101(d), 3622(b)(1) and 3223(c)(1) – encompass a “basic fairness standard for postal rates.”<sup>53</sup>

Witness Ayub’s testimony directly addressed questions of fairness; no testimony on this point was offered by the intervenors. Witness Ayub indicated that the Postal Service had negotiated directly with BAC to arrive at classifications and prices that were considered to be fair and equitable.<sup>54</sup> He also stated that because the per-unit incentives BAC will receive under the NSA are small, “there is no reason to believe that the customer-specific rates offered to BAC will fail to cover the costs associated with BAC’s mail, thus meeting pricing criterion 1, which concerns fairness and equity . . . .”<sup>55</sup>

In addition, APWU argues that recommending lower rates for one mailer that likely will cause higher rates for other mailers constitutes an unreasonable preference between mailers in contravention of section 403(c) of the Act.<sup>56</sup> The lower rates would result from discounts based on read and accept benchmarks embodied in the NSA. For the reasons discussed in Section II above, use of these benchmarks is fully supported on the record. Furthermore, neither APWU nor the other intervenors have demonstrated that use of these read and accept rates will result in higher rates for other mailers. The terms of the proposed NSA, therefore, do not violate any statutory requirement of fairness. Also, as the Postal Service argued in its initial brief, Commission precedent indicates that there is no issue of unreasonable discrimination, “so long as functionally equivalent NSAs are made available to similarly situated

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<sup>53</sup> Opinion and Recommended Decision, Docket No. MC2002-2, at 148.

<sup>54</sup> USPS-T-1, at 29.

<sup>55</sup> *Id.*

<sup>56</sup> APWU Initial Brief, at 3.

mailers.”<sup>57</sup> Witness Ayub has so testified.<sup>58</sup> Consequently, APWU’s contentions are without merit.

**B. Contrary To Val-Pak’s Beliefs, The Postal Service’s Request, In Conjunction With The Record Evidence In This Proceeding, Make Abundantly Clear That Functionally Equivalent NSAs Will Be Available To Other Mailers.**

Valpak argues that BAC should not be “rewarded” for committing to processes that other mailers will be required to undertake or are already voluntarily undertaking.<sup>59</sup> Valpak’s assertion that it is somehow wrong to “reward” BAC for activities with which mailers will either voluntarily comply or which will be mandated by the Postal Service, misapprehends “the basic concept of the NSA.”<sup>60</sup> BAC is not being directly compensated for undertaking the myriad activities it has agreed to; rather, incentives will only be paid for improvements in read and accept rates and decreases in the percentages of UAA mail.<sup>61</sup> The fact that other mailers qualifying for a functionally equivalent NSA might already have voluntarily undertaken certain of the specified activities or may be required to undertake them in the future<sup>62</sup> would not automatically entitle them to the payment of incentives. Witness Ayub clearly indicated that he would not be concerned if other mailers already voluntarily performing activities required by

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<sup>57</sup> Postal Service Initial Brief, at 40 (citation omitted).

<sup>58</sup> Tr. 2/371.

<sup>59</sup> Based upon this flawed premise, Valpak then expresses concern, on the one hand, that such voluntary adherents *should be entitled* to functionally equivalent NSAs and, on the other hand, that they *might not be entitled* to functionally equivalent NSAs. See Valpak Initial Brief, at 16-18.

<sup>60</sup> *Id.* at 16.

<sup>61</sup> See USPS-T-1, at 5 and 13; Tr. 2/41.

<sup>62</sup> The only activity required by the NSA which is scheduled to become mandatory for other mailers is use of the IMB by 2009. Tr. 2/273.

this NSA were eligible for functionally equivalent NSAs “[b]ecause there is no direct incentive to the mailers for those processes.”<sup>63</sup> Thus, Valpak’s apparent concern that other mailers who have voluntarily adopted the processes in question will be “rewarded” with functionally equivalent NSAs is unfounded. The evidence makes clear that direct incentives for adoption of the processes will not be included as part of a functionally equivalent NSA.

Likewise, Valpak’s evident and opposite concern that mailers who have already voluntarily adopted the required processes will be “penalized” by being disqualified from receiving functionally equivalent NSAs also is without foundation. Witness Ayub clearly indicated that it “would be acceptable” for a mailer already using the processes required under the BAC NSA to qualify for a functionally equivalent NSA.<sup>64</sup> Moreover, to qualify for a functionally equivalent NSA, a mailer would have to commit to use a vast array of the specified processes on the vast majority of its qualifying mail for the full NSA term, as done by BAC. Being “locked in” for a term of several years is qualitatively different from voluntary use, where a mailer can choose to employ the processes selectively, using them on a limited basis or entirely opting out of them at any time.

The Postal Service had made clear, in compliance with Commission requirements, that functionally equivalent NSAs will be made available, and that prior voluntary adoption of the processes to which BAC has committed are neither a bar to eligibility nor a cause for concern. Accordingly, Valpak’s arguments must be rejected.

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<sup>63</sup> *Id.* at 374.

<sup>64</sup> *Id.* at 373.

**C. OCA And Valpak’s Assertions That This NSA Does Not Satisfy The Requirements Of The Commission’s Rules Of Practice And Procedure For Baseline NSAs Are Without Merit.**

Both OCA and Valpak have asserted a variety of ostensible deficiencies in the Postal Service’s compliance with the Commission’s rules on baseline NSA filings. Their contentions find no support in the record and should be given no weight.

**1. An NSA, as opposed to an experimental or niche classification, is the appropriate classification choice, contrary to Valpak’s argument.**

Valpak contends that the Postal Service has failed to comply with Commission rule 195 because it has not “presented any justification or evidence that this NSA is superior to a niche classification . . . .”<sup>65</sup> This plainly is not the case for a number of reasons.

First, Valpak improperly focuses on an alleged lack of justification in witness Ayub’s written testimony for an NSA.<sup>66</sup> Rule 195, however, does not require that justification be provided in the written testimony. The rule states that “[t]he Postal Service *request* shall include . . . .”<sup>67</sup> Here, the Postal Service’s Request fully explained that an NSA as opposed to a more widely available form of classification was the appropriate choice, due to BAC’s unique mail characteristics and the effect of BAC’s mail on postal operations and costs.<sup>68</sup>

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<sup>65</sup> Valpak Initial Brief, at 13.

<sup>66</sup> *See id.*

<sup>67</sup> 39 CFR § 3001.195 (emphasis added).

<sup>68</sup> Request of the 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 (“Request”), filed on February 7, 2007, at 3.

In addition, Valpak attempts to make short shrift of the Postal Service's justification by ignoring record evidence. Valpak asserts that differences in mailing profiles "can be found in every existing classification."<sup>69</sup> While this may be the case, BAC's mailing profile was not the only justification offered by the Postal Service for supporting the classification option of an NSA. As indicated above, the Postal Service's Request pointed not only to BAC's mail characteristics, but also to the impact of BAC's mail on the operations and costs of the Postal Service.

Moreover, witness Ayub provides justification, both in his written testimony and in various interrogatory responses, that Valpak ignores in its discussion. Valpak highlights the portion of the transcript where, during oral cross-examination, witness Ayub could not find, in his written testimony, a discussion of the appropriateness of an NSA versus a niche classification.<sup>70</sup> Yet, witness Ayub's written testimony provided added explanation for the choice of an NSA classification. As discussed in the Postal Service's initial brief, witness Ayub pointed to the potential for novel and innovative ideas flowing from direct discussions between individual customers and the Postal Service, and also stressed the potential for wider applicability of these ideas in the future.<sup>71</sup>

As also indicated in the Postal Service's initial brief, witness Ayub identified the beneficial aspects of an NSA, as opposed to a niche or experimental classification, including allowing the Postal Service to test new operational requirements, limit its risk,

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<sup>69</sup> Valpak Initial Brief, at 15.

<sup>70</sup> *Id.* at 14-15.

<sup>71</sup> Postal Service Initial Brief, at 39.

improve value and address explicit customer needs.<sup>72</sup> Valpak does not assert that this testimony should be disregarded, nor does it make any attempt to refute the offered justifications; instead Valpak simply ignores them.<sup>73</sup>

Finally, Valpak asserts that there is ambiguity regarding the exact parameters of any functionally equivalent NSA, arguing that “a great many variations are possible in subsequent contracts.”<sup>74</sup> Valpak touts this alleged ambiguity as another reason that niche classifications are preferred.<sup>75</sup> The Postal Service finds it odd that one of the advantages of an NSA, variations responsive to a particular mailer’s circumstances, should be considered as justifying a niche classification that would remove from the mailer the advantage offered by an NSA. If anything, Valpak’s argument here supports the choice of an NSA, rather than a niche classification.

In accord, the Commission’s rules acknowledge that functionally equivalent NSAs are not expected to be identical to the baseline NSA. Commission rule 196(a)(2) requires that the Postal Service’s request include “[a] detailed description of how the proposed Negotiated Service Agreement is *different from* the baseline agreement.”<sup>76</sup>

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<sup>72</sup> *Id.* at 40.

<sup>73</sup> If Valpak believed that the Postal Service’s initial filing was deficient, then its remedy was to raise the issue through motions practice shortly thereafter. Fully addressing the issue at the briefing stage is untimely. Moreover, Valpak’s citation to the dissenting opinion of Commissioner Goldway in the Bookspan case is inapposite and untimely. It is inconsistent for Valpak to criticize the Postal Service for allegedly failing to heed Commissioner Goldway’s admonition that the Postal Service should “provide more support for and be more forthcoming in its baseline Negotiated Service Agreement requests,” when Valpak either completely discounts or totally ignores the evidence that was presented. Dissenting Opinion of Commissioner Goldway, Docket No. MC2005-3, at 1.

<sup>74</sup> Valpak Initial Brief, at 21.

<sup>75</sup> *Id.*

<sup>76</sup> 39 CFR § 3001.196(a)(2) (emphasis added).

Furthermore, functionally equivalent NSAs are to be judged on their merits under the Commission's rules and procedures. Those rules and procedures envision that the proponents will justify the NSAs and that the Commission will determine whether the NSAs are, indeed, functionally equivalent. Attempting to address future issues that may not even materialize is not a relevant or instructive exercise, and it certainly does not militate against recommending this particular NSA.

**2. Procedural requirements for the use of negotiated proxies for mailer-specific data have been fully addressed; OCA and Valpak have not demonstrated otherwise.**

Both OCA and Valpak lodge procedural objections against the use of negotiated proxies, rather than BAC-specific data, for the baseline read and accept rate values used in this case. Their arguments suffer from a number of defects and must be rejected.

- a. Contrary to Valpak's view, the Postal Service has complied with procedural requirements concerning use of proxies for mailer-specific costs.*

Although the bulk of Valpak's arguments on the baseline values used in this case center on issues of substance, Valpak also apparently suggests a procedural issue, namely that the Postal Service did not comply with Commission rule 193(e)(1).<sup>77</sup> That rule provides, in pertinent part: "If mailer-specific costs or elasticity factors are not available, the bases of the costs or elasticity factors that are proposed shall be

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<sup>77</sup> Valpak Initial Brief, at 9 ("The Postal Service has failed to demonstrate 'the suitability of the proposed costs . . . as a proxy for mailer-specific costs . . . .' 39 CFR § 3001.193(e)(1).").

provided, including a discussion of the suitability of the proposed costs or elasticity factors as a proxy for mailer-specific costs or elasticity factors.”<sup>78</sup>

As a procedural matter, the Postal Service complied with rule 193(e)(1). Witness Ayub’s testimony explained that BAC-specific data on read and accept rates were not available and further explained the reasons for using the systemwide average baseline values.<sup>79</sup> Valpak certainly is free to disagree with the Postal Service’s selection of proxies and has done so.<sup>80</sup> There is no basis, however, for concluding that the Postal Service failed to comply with the requirements set out in the Commission’s rule.

*b. OCA’s belated complaint that a waiver was required is legally incorrect, procedurally defective, and must be disregarded.*

Like Valpak, the OCA alleges that the Postal Service failed to comply with Commission rule 193(e)(1), although OCA takes the argument one step further. OCA contends that use of mailer-specific data is mandatory under rule 193(e)(1) and that the Postal Service was required to obtain a waiver of the rule if it used proxies for those data.<sup>81</sup> OCA’s contentions are unfounded and must be dismissed.

As explained in Section IV.C.2.i, immediately above, arguments concerning the suitability of proxies are distinct from procedural arguments concerning compliance with the rule. As discussed, the Postal Service offered an explanation concerning the

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<sup>78</sup> 39 CFR § 3001.193(e)(1).

<sup>79</sup> USPS-T-1, at 15-16.

<sup>80</sup> Valpak and other intervenors’ substantive arguments concerning the baseline values are fully addressed in Section II, above.

<sup>81</sup> OCA Initial Brief, at 3 and 4.

unavailability of BAC-specific data and the use of proxy baseline values in the testimony of witness Ayub that justifies the use of a proxy in accord with rule 193(e)(1).

OCA's further argument, that use of mailer-specific data is required by rule 193(e)(1), simply is not supported by the plain meaning of the rule. As quoted above, the rule specifically states that if mailer-specific data are not available, the basis for and suitability of the proxy data must be provided.<sup>82</sup> As the Commission stated in the Bookspan NSA case, "[t]he use of proxies for mailer-specific costs is allowed by the Commission's rules."<sup>83</sup> The rule clearly does not bar use of proxy data; it simply says that their use must be explained.

OCA's argument that the Postal Service was required to obtain a waiver of rule 193(e)(1) likewise is not supported by the plain meaning of the rule. If the rule provides for the use of proxy data when mailer-specific data are not available, then no waiver of the rule is needed when proxy data are used.

Finally, even assuming that obtaining such a waiver were appropriate, OCA's argument on this point is untimely. In its Request, the Postal Service placed parties on notice that "[t]he Postal Service considers its submission to comply with the Commission's filing requirements in Rules 193 and 195 .... If the Commission later concludes that any specific requirement has not, need not, or cannot be met, the Postal Service respectfully reserves the right to move for a waiver of the pertinent filing

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<sup>82</sup> 39 CFR § 3001.193(e)(1).

<sup>83</sup> Opinion and Recommended Decision, Docket No. MC2005-3, at 55. The Commission went on to indicate that the "proxies must be as close as practicable to mailer specific costs and be accompanied by a satisfactory rationale as to why the proxy is a reasonable substitute." *Id.* Again, this highlights the distinction between procedural compliance with the rules and the suitability of the proxies used. A discussion of the suitability of the baseline values used in this NSA is included in Section II, above.

requirements at that time.”<sup>84</sup> OCA’s attempt to raise this issue six months later, after the evidentiary record has closed, is simply too late to be considered by the Commission.

- c. *The OCA’s contention that mailer-specific data could easily be obtained ignores record evidence and cannot form the basis for an adverse inference.*

OCA claims that the Postal Service and BAC should have obtained or created more recent data to derive the baseline values for use in this NSA.<sup>85</sup> OCA goes on to scold the Postal Service and BAC, indicating that “a 2007 average of printers used by BAC” would have been preferable to the baseline values for read and accept rates used in the NSA.<sup>86</sup> OCA ultimately concludes that the appropriate punishment for the alleged transgression of not collecting or creating other data to derive baseline values is to adopt an “adverse inference” that BAC and the Postal Service expected such baseline values to be higher than those actually used in the NSA.<sup>87</sup> The OCA arguments must be rejected, as they are neither supported by the record nor by legal precedent.

First, OCA selectively, and imprecisely, summarizes witness Ayub’s testimony on this point. OCA states that witness Ayub indicated that “it is not possible to isolate BAC’s mail from that of other mailers using the same print shop.”<sup>88</sup> The actual

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<sup>84</sup> Request, at 6.

<sup>85</sup> See OCA Initial Brief, at 5.

<sup>86</sup> *Id.* at 6-7. Of course, use of such a “printer average” would be impermissible under OCA’s interpretation of Commission rule 193(e)(1). OCA claims that rule mandates use of mailer-specific data. The “printer average” espoused by OCA would include data from other mailers using the same printer, thus clearly not consisting exclusively of BAC-specific data.

<sup>87</sup> *Id.* at 7.

<sup>88</sup> *Id.* at 6.

exchange, as follows, occurred during the cross-examination of witness Ayub by counsel for Valpak:

Q Let me ask you this. Is it not possible to test BAC's mail in some way to just run its mail so you wouldn't need to confirm, you wouldn't need the four-state barcode and seamless acceptance. You would be able to do tests of various types of mail that they enter and be able to get a composite, average-read, accept rate for Bank of America?

A I don't think it would be possible. Bank of America uses a *wide variety of mailers*, different print shops, *different entry points*, and getting a representative sample of all of those mail pieces would be very difficult.

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Witness Ayub's concerns over the difficulty of obtaining a representative sample of BAC mail were not limited to print shops, but also extended to use by BAC of different mailers and different entry points. The Postal Service's legitimate reasons for not using mailer-specific data thus have not been refuted by OCA.

The OCA has no basis whatsoever for its assertion that an adverse inference is justified under these circumstances. OCA has not demonstrated on the record, as a factual matter, that mailer-specific data could have been easily or successfully obtained. Moreover, as a matter of law, imputation of an adverse inference is inappropriate. Since there has been no failure here by the Postal Service to produce evidence that is within its possession or control, use of an adverse inference in the instant situation does not fall within the Black's Law Dictionary definition cited by OCA.<sup>90</sup> Witness Ayub

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<sup>89</sup> Tr. 2/370 (emphasis added).

<sup>90</sup> See OCA Initial Brief, at 7, n. 28. See *also* Singh v. Gonzales, 2007 US App. LEXIS 13711 (9th Cir. June 12, 2007), *quoting* Int'l Union, United Automobile, Aerospace and Agric. Implement Workers of Am. v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("When a party has relevant evidence in his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him."); McCormick

explained why a representative sample of BAC-specific data could not be obtained. No adverse inference can objectively be drawn here.

## **V. CONCLUSION**

The uncontroverted record supports the Postal Service's Request and the speculative criticisms of the NSA are neither supported by the record nor of sufficient plausibility to cause hesitation on the Commission's part. In the absence of any substantial reasons to do otherwise, the Commission should defer to the Postal Service's business judgment and recommend the changes in rates and classifications needed to implement the NSA with Bank of America.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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on Evidence, 5<sup>th</sup> Ed., Vol. 2, 1999, at 175. ("Most of the controversy arises with respect to failure to call a witness.").

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

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