CONCURRING OPINION OF COMMISSIONER GOLDWAY

I fully agree with my colleagues that the Commission arrived at the appropriate recommendation in the Bank One case, including the recommendation of a stop-loss cap to provide a level of protection to the Postal Service and mailers not party to the agreement. While I do not find justification based on the existing record for providing the relief requested by the Governors, I continue to support Negotiated Service Agreements that are beneficial to the Postal Service and the mailing community, and am hopeful that the alternate model for negotiating volume-based discounts will foster the development of additional win-win-win agreements.

I, however, am concerned that the actual implementation of the Bank One Negotiated Service Agreement does not appear to be unfolding as predicted in the Request, but appears more in line with the predictions made in the subsequently filed omnibus rate case. I question whether the personnel involved with Negotiated Service Agreements had the benefit of the institutional knowledge incorporated into the rate case testimony. What may be the absence of the mailing of flats evident in the most recent data report further raises concerns that the Postal Service might not be fully realizing the cost savings anticipated from the agreement.

These concerns have come to light well after closing the Bank One record, and suffer from the limited available information. The Chase and Postal Service pleadings and the first data report actually raise more questions on the current status of the agreement than they answer. This adds to my concern that the Commission might not have a thorough understanding of the current status of the Bank One Negotiated Service Agreement, which might hinder the Commission’s ability to expeditiously consider future requests to modify or extend the Bank One agreement. The Postal Service should take these concerns into consideration in its future requests.

Although the Bank One / J.P. Morgan Chase merger added uncertainty to the analysis of the Bank One Negotiated Service Agreement, it also appears to have provided the Postal Service with an opportunity to study the effects of volume-based discounts. Heritage-Bank One and heritage-Chase may have been separately soliciting a similar, if not identical, product line through First-Class Mail for the first several months of the agreement. Heritage-Bank One had the benefit of the declining block rate discounts, and heritage-Chase did not. Because of this, it may be possible to isolate the effects of the declining block rate discounts from the other factors that influence volumes. A thorough understanding of this issue will aid the development of future agreements, and can be used by the Commission to make more informed recommendations. The Postal Service should not pass up the opportunity to study this important issue.

A. Docket No. R2005-1 Rate Case Testimony

The Postal Service sponsored testimony for the recent omnibus rate case, Docket No. R2005-1, which discusses mailing trends in the credit card industry. *See* Direct Testimony of Peter Bernstein on Behalf of the United States Postal Service (USPS-T-8); Docket No. R2005-1, Tr. 8A at 3168-71.[1] Witness Bernstein discusses recent "tremendous growth in the amount of direct mail solicitation undertaken by the credit card industry." At Tr. 8A/3170 he states: "Synovate reported that credit card solicitations for the first three quarters of 2004 were up more than 20 percent from the first three quarters of 2003. …More recently, Comperemedia reported that mailings in October 2004 were up 20 percent from October 2003[;]" and "Capital One reported that its marketing expenses increased more than 60 percent in the fourth quarter of 2004 compared with the third quarter of 2004." He reports on the positive effect of an October 2004 Supreme Court decision which opened the way for more banks and financial companies to begin issuing American Express cards. He discusses a probable lift to credit card solicitation as a result of the "Do Not Call" restrictions on telemarketing. Although he acknowledges that the saturation point may be approaching, he concludes: "Looking to the future, it is reasonable to expect the credit card industry to continue to expand its marketing activity as it has for at least the last decade." *Id.* at 3171.

[1] The Postal Service presented a similar discussion in regard to credit card mailing trends in Docket No. R2001-1. *See* Direct Testimony of George S. Tolley on Behalf of the United States Postal Service (USPS-T-7).

Witness Bernstein's testimony leaves an impression of significant non-price exogenous factors influencing mailing trends in the credit card industry. Non-price exogenous factors as described also might be responsible for Bank One's increasing mail volumes. Conceivably, these non-price factors could quickly overwhelm the effect of any price incentive. If these factors are not accounted for in the Postal Service's analysis, the Postal Service could be paying incentives on mail that would have been mailed "anyhow" without a price incentive.

The Postal Service did not indicate on the Bank One record the extent to which it relied on this institutional analysis of the credit card industry. The analysis appears relevant to the Bank One request as Bank One contends it was the third largest credit card issuer in the United States. As such, its volume trends and those of the industry potentially could coincide.

An analysis of Bank One's assertion that without a discount it would experience flat to declining future mail volumes in light of the Postal Service's institutional analysis indicating that the credit card industry as a whole is experiencing increasing mail volumes might have further enlightened the Commission's recommendation. The implications of non-price exogenous factors also could have been contrasted with witness Buc's testimony describing the potential effects of price incentives. The Postal Service should consider undertaking such analysis in evaluating future requests, where applicable.

B. Mailing of Flats

The Commission estimated the Postal Service would realize a cost savings of $7.6 million attributed to the Address Correction Service (ACS) element of the agreement. The majority of this savings, $6.1 million, is related to the mailing of flats. Decision at 78.

The Postal Service filed its first data collection report in Docket No. MC2004-3 on February 7, 2006. The Postal Service reports the following First-Class Mail volumes in eligible Bank One permit accounts:

• Solicitations Non-automated Presort Letters:	17,736
• Solicitations Automation Presort Letters:	23,495,547
• Customer Mail Non-automated Presort Letters:	6,425,641
• Customer Mail Automation Presort Letters:	216,417,072
• Customer Mail Automation Carrier Route Presort Letters:	9,141,645

The data report does not mention the mailing of flats. If in fact flats are not being mailed, the Postal Service could be saving substantially less than estimated. It could also indicate that the stop-loss cap, which is calculated based upon the saving element, was set substantially higher than justified by actual cost savings.

I request that the Postal Service verify the accuracy of the first data collection report as to the mailing of flats. If accurate, the Postal Service should consider developing additional mechanisms to address the potential for unrealized savings if similar conditions are a part of future Negotiated Service Agreements.

C. Opportunity to Study Effects of Non-Price Exogenous Factors

Witness Rappaport presents record testimony projecting that in the first year of the Negotiated Service Agreement, Bank One's First-Class volume would increase as a result of the discount from 571 to 590 million pieces, an increase of 19 million pieces. Based on his estimates, the stop-loss cap limit established by the Commission should not be reached over the duration of the agreement.

Chase recently asserted that "[a]t current and projected volume trends, Chase could exhaust the aggregate volume cap imposed by the Commission as early as May 2006—

barely a year into the three-year scheduled life of the NSA."[2] To reach the stop-loss cap limit in the first year of the Negotiated Service Agreement (approximately May 2006), Bank One's First-Class volume would have to increase from 571 to 805 million pieces, an increase of 234 million pieces.[3]

In PRC Order No. 1450, the Commission stressed the importance of adhering to the contract provisions and of holding heritage-Bank One volumes separate from heritage-Chase volumes until formal integration occurs. The Postal Service has reassured the Commission that its concerns are being addressed.

> The Postal Service has carefully analyzed Chase's volume trends to date and has tracked Chase's compliance with the terms of the agreement. Chase is in full compliance with the terms of the NSA; and the merger has not prevented the Postal Service from verifying this fact.

USPS Reply Comments at 2.

Chase assures the Commission that heritage-Bank One volumes are being held separate from heritage-Chase volumes.

> The growth in heritage-Bank One Actual Rates volume was not accompanied by a collapse of First-Class Mail volume entered under heritage-Chase permits. In 2005, the last year before integration of Chase and Bank One permits, approximately 574 million pieces of First-Class Mail were

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[2] Petition at 22-23 (footnote omitted). Chase has since revised this assertion to indicate that the stop-loss cap limit appears more likely to be reached near the end of 2006. Chase Comments at 18, n.10. However, it remains that actual volumes are vastly exceeding estimated volumes. Whether the volume surge is the result of the discount incentive or the result of other factors is a question that has direct bearing on the need for a stop-loss cap.

[3] *See* PRC Order No 1450 at 12-13.

> entered under heritage-Chase permits, *more* than the 419 million pieces projected by Mr. Rappaport in his testimony.

Chase Comments at 19-20. (Emphasis in original.)[4]

Chase further contends that the testimony representing that post-merger-Chase marketing philosophy would be akin to the pre-merger-Bank One marketing philosophy was within Rappaport's competence as a fact witness. Chase Comments at 15-16. Chase had announced that the pre-merger-Bank One and pre-merger-Chase consumer and commercial banking businesses, which include their credit card businesses, would operate under the Chase brand after completion of the merger.[5] Every indication is that the heritage-Bank One credit card portfolio has converted to the Chase brand.[6]

It seems plausible from the limited information available to the Commission that heritage-Bank One and heritage-Chase are soliciting similar if not identical product lines. The solicitations are being mailed under separate identifiable and traceable mailing permits. Both mailings share the pre-merger-Bank One marketing philosophy. The heritage-Bank One mailings received the benefit of the Negotiated Service Agreement's declining block rate discounts. The heritage-Chase mailings are entered without the benefit of declining block rate discounts.

While data necessary to perform a detailed analysis have not been presented to the Commission, certain trends are indicated. Assuming the accuracy of Chase's first assertion that the stop-loss limit may be reached by May 2006, Bank One's First-Class

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[4] Witness Rappaport apparently underestimated heritage-Chase First-Class Mail volumes by 155 million pieces (574 million minus 419 million). The Commission did not rely on heritage-Chase First-Class Mail volumes in its Opinion. However, this again demonstrates the difficulty of obtaining accurate volume estimates, even for the near future.

[5] J.P. Morgan Chase Press Release dated June 8, 2004.

[6] Chase argues that the rebranding effort was a matter of public record, and that Chase did not conceal this fact. *Id*. at 16. While Chase may not have concealed this significant material fact, Chase did not disclose the nature of the rebranding effort on the record. The Commission became aware of this effort well after the record was closed.

volume would have had to increase from 571 to 805 million pieces, an increase of 41 percent.

Chase asserts that approximately 574 million pieces of First-Class Mail were entered under heritage-Chase permits compared with the 419 million pieces projected by Mr. Rappaport in his testimony, an increase of 37 percent. This surge in volume could only be due to other exogenous factors, because heritage-Chase mail was not subject to the benefit of the declining block rate discounts.

More meaningful comparisons can be made with the benefit of refined data. Negating the effect of growth in customer mail and isolating just solicitation mail could be an important comparison. Properly aligning time periods and using actual volumes to replace the Chase estimate of when the stop-loss cap will be reached is also necessary. Even though only limited information is available, it appears factors other than volume discounts may have had substantial impact on both the heritage-Bank One and heritage-Chase mailings.

The coincident mailing of heritage-Bank One and heritage-Chase mail has created an excellent opportunity for the Postal Service to study the impact of volume-based discounts. If the Postal Service can gather and preserve this information, and complete an appropriate analysis, the results could support future volume-based discounts. The assertions made by witness Buc concerning the effects of declining block rate discounts on volume also might be enhanced using witness Bernstein's rate case analysis of volume trends. It would be very helpful for the Postal Service to undertake such efforts and share the analysis and results with the Commission.

Ruth Y. Goldway, Commissioner