

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Dan G. Blair, Chairman;  
Dawn A. Tisdale, Vice Chairman;  
Mark Acton; Ruth Y. Goldway; and  
Tony L. Hammond

Rate and Service Changes to Implement  
Functionally Equivalent Negotiated Service  
Agreement With The Bradford Group

Docket No. MC2007-4

ORDER REGARDING LIMITATION OF ISSUES AND  
ESTABLISHING PROCEDURAL SCHEDULE

(Issued September 7, 2007)

*Prehearing conference.* The following procedural issues were discussed at the August 28, 2007 prehearing conference. Agreement was reached that September 10, 2007 would be the date for closing initial discovery. Agreement was also reached that September 28, 2007 should be the date for participants to file statements as to whether a hearing would be necessary, they intend to file testimony, or they intend to conduct oral cross-examination of the co-proponents' witnesses. The settlement coordinator expressed the belief that settlement of this case would be unlikely. The consensus was that setting a complete procedural schedule is not appropriate at this time since the next procedural developments would largely depend on what is filed on September 28, 2007.

*Procedural schedule.* The Commission's rules require the Commission to make decisions as to the procedural path that this docket will follow at the conclusion of the prehearing conference. The first issue is whether to apply the more expedited evidentiary rules for functionally equivalent negotiated service agreements, rule 196, or

whether to consider the Postal Service's request as a new baseline negotiated service agreement, rule 195. The Postal Service briefly addressed this issue in its initial filing. No participant expressed a specific objection to treating the Postal Service's request as a request for a functionally equivalent negotiated service agreement (NSA). Nonetheless, as an important procedural issue, the Commission must ensure that its rules are properly applied.

For the evidentiary procedures of rule 196 to be applicable, the proposed agreement must primarily rest on the same substantive functional elements as the identified baseline agreement, and must provide a comparable benefit to the Postal Service. Docket No. RM2003-5, PRC Order No. 1391 (February 11, 2004) at 49-51. For the reasons discussed below, the Commission can not treat The Bradford Group NSA as functionally equivalent to the Bookspan NSA. Nonetheless, the Commission notes that even though it is unable to treat this agreement as functionally equivalent to the Bookspan NSA for procedural purposes, it should be able to treat this case with an expedited procedural schedule due to the limited issues identified by the participants in the prehearing conference.

A Commission finding that The Bradford Group NSA is functionally equivalent to the Bookspan NSA must rest on the distinct substantive functional elements and benefits provided to the Postal Service. The cornerstone of the Commission's recommendation to adopt the Bookspan NSA was based upon weighing all the following factors: "Bookspan's special multiplier effect, the probable positive effect of volumes shifting from flats to letters, the contractual protective mechanisms, and the potential positive outcomes under the analysis first suggested by Professor Panzar...." PRC Op. MC2005-3, ¶ 1002. The first two factors raise issues here. With respect to the multiplier effects of both NSA partners, it appears that the co-proponents may be reading DMCS § 620.12 too narrowly. In the Bookspan NSA, the Commission noted that "[t]he main goal of DMCS language relating to the multiplier effect is to 'allow potential NSA partners to know in advance and have a better idea at the outset whether they might qualify for a functionally equivalent NSA... .' It is not to set sufficient

conditions for functional equivalency.” PRC Op. MC2005-3, ¶ 4039. (Footnotes omitted.)

First, the Bookspan NSA only gives discounts on pieces that are sent “for the purpose of soliciting book club membership.” PRC Op. MC2005-3, Appendix Two, at 2. The proposed Bradford Group NSA, however, does not appear to limit discounts to only the portion of its business that seeks a similar “club membership.” The Bradford Group NSA proposed DMCS language seems to provide discounts for any solicitations, regardless of whether membership in a club is sought or customers are agreeing to purchase some stipulated minimum number of items on a more or less regular basis. See proposed DMCS § 621.11.

Second, the Bookspan NSA sought to encourage the NSA partner to shift flat-shaped Standard mailpieces to letter-shaped Standard mailpieces. The proposed NSA with The Bradford Group does not appear to contain any provisions to encourage shifting flats to letters, and the Postal Service acknowledges as much in its testimony. This is despite the fact that the Commission explicitly stated that the “probable positive effect of volumes shifting from flats to letters” was an important factor in recommending adoption of the Bookspan NSA. PRC Op. MC2005-3, ¶ 1002.

Third, The Bookspan NSA did not give discounts to flat-shaped Standard mailpieces. The Bradford Group’s NSA gives discounts to The Bradford Group’s Standard Mail flat-shaped mailings.

Fourth, it is unclear from the testimony the extent to which the conditions in DMCS § 620.12 are satisfied with respect to The Bradford Group’s proposed NSA. The Bookspan NSA DMCS requires that the mailer “send[s] products to a list of people who have agreed to purchase some stipulated minimum number of items on a more or less regular basis[.]” PRC Op. MC2005-3, Appendix Two, at 2. Bookspan’s business and the NSA predicated on that business rested entirely on this “club membership.” In witness Gustafson discussion of The Bradford Group’s multiplier effect, he does quantify the portion of The Bradford Group mail that satisfies this requirement. Indeed, while some of The Bradford Group’s mailings send products to people who have agreed

to purchase a minimum number of items, others portions of The Bradford Group's mailings seem to be advertising mailings without any minimum purchase requirements or club membership. See BG-LR-1.

Fifth, an issue exists with respect to the similarities between discounts that are paid on mailpieces that are counted as part of the multiplier effect. In the Bookspan NSA, none of the mailpieces that were part of the multiplier effect were eligible for a discount. Under The Bradford Group NSA, all Standard Mail seems to be eligible for receiving a discount according to witness Gustafson. BG-T-1 at 4. Some Standard mailpieces may be counted as providing two distinct benefits to the Postal Service for the same activity — first, as part of the after-rates volumes and second, as part of The Bradford Group's multiplier effect.

Finally, the conditions in DMCS § 620.11 apparently are not satisfied with respect to The Bradford Group's proposed NSA. The Bookspan NSA's DMCS language was carefully crafted to ensure that discounts would only be given on solicitations to new or expiring memberships. It specifically states that periodic current member club mailings as well as other club selections and offerings are not eligible for a discount under the Bookspan NSA. PRC Op. MC2005-3, Appendix Two, at 2. The co-proponents' testimony in this case does not discuss or recognize this distinction. Instead, the proposed DMCS specifically states that "advertising to existing Bradford Group clients" are eligible for discounts under this agreement. See Proposed DMCS § 621.11.

Accordingly, for these reasons the Commission does not find that The Bradford Group NSA is to be treated as functionally equivalent to the Bookspan NSA under these circumstances. This docket will proceed under Commission rule 195. The Commission reminds participants that this decision on which path to follow in this case is purely procedural, and does not indicate a judgment on merits of The Bradford Group NSA.

Due to the unique circumstances of this case, the Commission will be liberal in granting participant requests to supplement their direct cases or designate materials from other dockets deemed necessary as a result of this order.

The Commission notes that even though it is not able to treat this agreement as functionally equivalent to the Bookspan NSA for procedural purposes, it should still be able to give the participants significant expedition in resolving this case. The Commission therefore adopts the procedural deadlines requested and agreed to by the participants. September 10, 2007 will be the last date for filing initial discovery. September 28, 2007 will be the deadline for participants to file statements as to whether a hearing is necessary, whether they intend to file testimony, or whether they intend to conduct oral cross-examination of the co-proponents' witnesses. A further procedural schedule will be issued after a review of the pleadings filed on September 28, 2007.

*Motion to limit issues.* The Postal Service filed a proposal to limit the issues open for litigation in this proceeding.<sup>1</sup> The Proposal essentially requests precluding the issues of “(1) the finding that cost savings are not required for volume-based discount NSAs; and (2) that the core elements shared by both the Bookspan NSA and the Bradford Group NSA constitute a lawful and appropriate basis for an NSA....” *Id.* at 2. No participant filed a response to the Postal Service's Proposal. The Commission agrees that the first legal issue, that cost savings are not required for volume-based discount NSAs, was clearly decided in the Bookspan case and should not be relitigated here. However, for the reasons stated above in the discussion on functional equivalence, the Commission can not preclude the second issue from litigation in this case.

The Postal Service's Proposal indicates that “the issues in this proceeding should be limited to those unique questions presented by the Bradford Group NSA.” *Id.* The Commission agrees that exploring the unique questions presented by The Bradford Group NSA should be the main focus of the litigation in this proceeding.

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<sup>1</sup> United States Postal Service Proposal for Limitation of Issues, August 3, 2007 (Proposal).

*It is ordered:*

1. This docket will proceed under Commission rule 195.
2. The Postal Service's Proposal for Limitation of Issues, filed August 3, 2007, is granted, in part, and denied, in part, as discussed in the body of this Order.
3. Initial discovery requests should be filed no later than September 10, 2007.
4. Participants requesting oral cross-examination of a witness in this proceeding shall do so no later than September 28, 2007.
5. Participants seeking a hearing in this proceeding are directed to file a statement to that effect no later than September 28, 2007, along with supporting reasons.
6. Participants wishing to file testimony in this proceeding shall do so no later than September 28, 2007.

By the Commission, Commissioner Hammond dissenting.

Steven W. Williams  
Secretary