

single case. There is simply no way to know whether that case turns out to be typical of future "baseline" cases, whether there is a meaningful difference between "baseline" cases and "functionally equivalent" cases, or whether the term "functionally equivalent" is a fair characterization of an NSA that is modeled on an earlier one. To the extent that procedural rules simplify and expedite the submission, consideration and decision on particular NSAs, they are, obviously, desirable. To the extent, however, that the rules – particularly rules devised in response to a single proceeding – establish specific evidentiary standards and substantive tests for consideration of NSAs, the rules themselves threaten to stifle the very flexibility and innovation in the provision and pricing of postal services that constitute the core justification for the NSA concept itself.

It is noteworthy that in its endorsement of Negotiated Service Agreements the President's Commission on the United States Postal Service urged that the regulatory review process would be based on "general criteria" established by the regulatory agency.¹ In several critical respects, these proposed rules go well beyond general procedural criteria and require revision. We do not undertake a comprehensive review, but rather, focus on what appear to be the most troubling aspects of the proposed rules:

1. PostCom strongly takes issue with the recitation (at page 5 of the NSA Rulemaking) that "Negotiated Service Agreements by their nature have features that are discriminatory, and have the potential to cause harm to the marketplace" (footnote omitted). There is no meaningful prospect for

¹ Embracing the Future: Making The Tough Choices to Preserve Universal Mail Service, at 174 (July 31, 2003).

discrimination in any legally meaningful sense of that word. With or without procedural rules, mailers who are similarly situated to an NSA participant can apply for their own "functionally equivalent" NSA based on the similarity of their mailing practices to those of the NSA participant; there are several channels of recourse if, in fact, the Postal Service seeks to violate the statutory prohibitions against unreasonable or undue discrimination. See 39 USC §403 (c). It is unclear exactly what is meant by "harm to the marketplace," but here, too, there is only one legally valid test – if an NSA does not entail cross-subsidies in the legal sense of that term, there can be no finding of "harm." The Commission must not be so diffident about assessing and granting NSA's as the language quoted above might suggest.

The assertion that NSAs are, by their nature, "discriminatory," posing some special "harm" to an undefined "marketplace" leaves open the possibility of a standard for NSAs that is broader -- that is to say, more stringent -- than the established and legally recognized standards for measuring "cross subsidies" and "undue" or "unreasonable" discrimination. In particular, the Commission's stance invites the argument – if not the conclusion – that to pass muster under the Proposed Rules, it must be shown that the net contribution per piece under the proposed NSA will be greater than the contribution made by the mailer under its pre-NSA mailing practices. The "impact analysis" specified in the proposed rules (Section 193(f)) can be read to re-enforce this notion that NSAs are to be judged by more rigorous standards than general or even niche classifications.

This approach is simply wrong as a matter of law and policy. The question is not whether non-participating mailers and competitors are "worse off" as a result of an NSA (Proposed Rulemaking at 13). The questions are whether the proposal grants the NSA participant an "undue" preference or is an "unreasonable" discrimination against competitors. Whatever else it does in the further process of this rulemaking, the Commission surely should – and legally must – disavow any elevated test of discrimination or cross-subsidy in application to NSAs.

2. The commentary directs that the NSA's to be filed should not be signed. We submit that this is a mistake. It is true enough that the parties to an agreement will not initiate the NSA approval process unless they are in accord about the goodness of the deal that they have struck, but that consensus might evolve and even evaporate in the course of securing the necessary Commission approval. A signed agreement should be required to avoid the expenditure of public and private energies on the approval process when either side of the NSA is at liberty to walk away from the deal before it is executed and made binding. The statutes of fraud in at least some jurisdictions would, if applicable, require a signed writing to make agreements like NSA's legally binding. The agreements should, of course, be constructed to have legal effect only following Commission Decision, vitiating any fear that the parties to the agreement might bind themselves to a contract impossible to perform because of the absence of Commission approval.

There is a corollary reason for requiring – or at least certainly permitting – NSAs to be signed before submission to the Commission. That reason has to do with the role of the Commission, intervenors and statutory parties to the regulatory review process. As PostCom and others repeatedly emphasize during the course of the Capitol One proceeding, the litmus test of whether an NSA should be approved is not whether it is the "best" possible "deal" the Postal Service could have struck. The test is whether the bilateral agreement reached between the two parties meets the statutory criteria. If the Commission is to adopt procedural rules, it must make absolutely clear that neither it, nor statutory parties or intervenors, are participant in the negotiation process. It is no accident that the President's Commission seeks "after the fact reviews."² A process which effectively permits any interested party -- or the regulator -- to independently judge whether the deal struck between the Postal Service and an individual party could be improved vitiates the essential underpinnings of NSAs. Requiring, or at the very least, permitting, NSA contracts to be executed by both parties and therefore legally binding (subject to the condition subsequent for regulatory approval) would bring the process as close to the after-the-fact review as the current statute permits.

3. Subsection 193(e)(5) talks about "an analysis which sets forth actual and estimated mailer-specific [information]." At the minimum, PostCom suggest the deletion of the words "actual and" in that formulation. There may be elements of a NSA as to which there is "actual" information, but much more commonly the costs and volume data will be estimates. To the extent that actual

² Embracing the Future, supra, at 174.

data are available they certainly qualify as very well supported estimates. The requirement of "actual" data is likely to be fatal to the vast preponderance of NSA's.

This subsection poses a further difficulty in its emphasis upon "mailer-specific" data. To the extent that such data is, in fact, available or can, as we have suggested, be estimated, it certainly should be submitted as a part of the regulatory review process to the extent it is relevant. But the structure of the proposed rule seems to contemplate that, in the absence of "mailer-specific" information, an NSA cannot be approved. That is the imposition of a substantive standard which is utterly unacceptable because it goes far beyond the question of whether the particular agreement is discriminatory in any legally meaningful sense. The simple fact is that few, if any, mailers, collect or retain mailer-specific information at the level of detail that the Postal Service does on a systemwide basis. Mailers, after all, are not rate regulated.

In the Capitol One case, the Postal Service used what limited mailer-specific information was available to adjust its estimations based on its own subclass and system average data. It is not clear whether the proposed rule is intended to foreclose that solution in future NSAs. Certainly, there is no reason to do so. The Commission itself has used proxies for actual costs in countless of its decisions over the years; and the adaptation that the Postal Service performed in the Capitol One proceeding is nothing more or less than a proxy for otherwise unavailable mailer-specific data.

Accordingly, we believe that Proposed Rule 193(c)(5) should read as follows:

Include an analysis which sets forth, to the extent practical, estimated mailer-specific costs to the Postal Service and the estimated volumes and revenues which will result from implementation of the Negotiated Service Agreement;

It is important that the focus on costs is costs to the Postal Service. This formulation makes that relationship clear.

As a corollary, we suggest that what is now proposed in Proposed Rule 193(e)(7) be divided into two sub-paragraphs to be inserted immediately following (e)(5) as follows:

(6) provide the basis used to determine such costs and volumes (including elasticity factors);

(7) include a discussion of material variances between mailer-specific estimates and system-wide average data.

This follows logically from our position on (e)(5) and rests on the same concerns and considerations.

Proposed Rule 193(e)(8) is redundant with the clarifications suggested above. PostCom suggests its deletion and also the deletion of the remaining text of Section 193 following what is now (e)(6). This language too is redundant as the explanation for estimated costs and volumes will already provide this information. As noted in our discussion of 193(e)(5) if there are actual mailer-specific data, the explanation of the data employed will provide a basis for understanding the proxies employed.

4. PostCom believes that 195(a)(3) should be deleted. Having just negotiated an NSA, the parties are exceedingly unlikely to have helpful views or information on "the possibility of cancellation or re-negotiation" of that agreement or the "potential for renewal". Even if reasonably reliable views on these topics were available, it would be plainly wrong for the Commission to take such information into account in determining whether to approve the proposed NSA. This rule poses the problem noted earlier of regulatory and third-party intrusion in the negotiation process. NSAs are, by definition, bi-lateral and they must be allowed to remain so.

CONCLUSION

As these comments are meant to suggest, procedural clarity is one thing; the establishment of evidentiary standards which have substantive consequences – whether or not intended – is quite another. If these rules are to be adopted, they must be carefully confined to the former.

Respectfully submitted,

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