Postal Rate Commission
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Before The
UNITED STATES POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Rules applicable to Baseline and Functionally Equivalent Negotiated Service Agreements	)))	Docket No. RM 2003-5

Comments of Discover Financial Services, Inc.
September 30, 2003

Discover Financial Services, Inc. ("Discover"), an affiliate of Discover Bank which is the primary issuer of the Discover® Card, files these comments pursuant to the above-entitled Notice of Proposed Rulemaking that appeared in the Federal Register of September 4, 2003 at page 52546. 68 Fed. Reg. 52546 (Sept. 4, 2003).

Discover would like to make three points.

First, we would like to commend the Commission and its staff for recognizing that NSAs can have a serious impact on the competitive marketplace and that a highly streamlined process for competitors to obtain "follow-up" NSAs is critical. In this vein, Discover believes that the proposed 60 day and 120 day time frames in Section 196, for considering functionally equivalent NSAs, are too long and should be reduced by 30 days each.

Second, Discover applauds the Commission for understanding that a broad view of a "follow-up" or functionally equivalent NSA is necessary for the NSA process to function successfully. Moreover, Discover believes that whether a subsequent NSA is a "functional equivalent" to a baseline NSA should be viewed from the business

perspective of the party whose proposal is under review. Discover submits that the Commission's role in reviewing functionally-equivalent NSAs should be to ensure that the negotiated bargain meets the requirements of the statute, and that the proposal is reviewed in the shortest time possible. Under no circumstances should the Commission rewrite the contract terms, or second-guess the balance of the benefits and the assumptions of the risks that both parties have made. To do so would be to upset the delicate mechanics of the contracting process and artificially distort the bargain the parties have reached.

Third, Discover raises a concern about the treatment of confidential business information in NSA proceedings. Private-sector firms must not be expected to reveal sensitive or confidential business information in order to equally enjoy a business opportunity given to their competition by the federal government. These rules seem to come perilously close to doing just that, and have a certain cavalier emphasis on customer-specific data. That emphasis demonstrates a disturbing lack of understanding of the importance of confidential business information in the private sector. In this area, the proposed rules need be reconsidered. Proper resolution of this issue will be one of the keys to success of the NSA pricing mechanism.[1]

[1] Discover notes that Proposed Section 196 does not provide a deadline for the PRC to determine whether to proceed under the functionally equivalent rules. There should be some limit, and Discover recommends a limit of five business days from the date of the pre-hearing conference.

I.

Clearly, the Commission recognizes that NSAs can have a serious impact on the competitive marketplace and that a distinctly expedited process for competitors to obtain “follow-up” NSAs is critical. There are two reasons for this. First, any delay in approving a functionally-equivalent NSA will disadvantage the party to the NSA. Second, the Commission, as a regulator of a monopoly held by a federal governmental entity, has a special obligation to prevent competitive disadvantages, caused by delay, to competitors of a party to a baseline NSA. Any regulatory approach that results in such a competitive disadvantage would offend basic notions of government fairness and violate our government’s time-honored role of noninterference in the competitive marketplace. The Postal Service is, after all, an independent establishment of the federal government and not a private-sector entity.

While the governmental interest in short and speedy regulatory review is present in all NSA proceedings, this interest is stronger and more significant when dealing with functionally-equivalent NSAs, particularly if it is negotiated with a competitor of a party to a baseline NSA. In this vein, the proposed rules provide for a deadline by which the Commission must issue a recommendation on an NSA proposal. Under the proposed rules, that deadline is 60 days from the Section 196 determination by the Commission that the NSA is functionally equivalent if the Commission does not hold a hearing, and 120 days from the Section 196 determination if a hearing is held. See Proposed Section196(d).

Discover believes that the time periods in Section 196 of the proposal are far too long and will result in prejudice to the party whose proposal is under consideration.

Discover recommends that the Commission reduce the time periods of 60 and 120 days, to 30 and 90 days, respectively. These periods should be sufficient to allow the Commission to address the limited issues raised by a functionally equivalent NSA.

II.

The Commission's proposed rules introduce the concept of a functionally-equivalent NSA into the postal rate-making arena. Discover believes that this is an appropriate response to the situation, and commends the Commission for its ingenuity. Notably, the Commission did not attempt to limit "follow-up" NSAs to what might be considered a "mirror" NSA.[2] To have done so would have eliminated the NSA as a viable regulatory device. Again, the Commission is to be commended for not taking this fatally narrow approach.

In considering whether a NSA is functionally equivalent, Discover believes that the Commission must ask the question "functionally equivalent to what, and from whose perspective?" In answering that question, the Commission should use the following approach: a NSA should be functionally equivalent to the baseline NSA from the business perspective of the mailer seeking a functionally equivalent NSA . This means that the mailer should be provided with a proportionally equivalent business opportunity in the same areas as the baseline contractee. For example, a functionally equivalent NSA to Capital One would provide a proportionately equivalent business opportunity in the address correction and volume discount areas.

[2] A mirror NSA would be a follow-up NSA that is not only functionally equivalent, but virtually identical to a baseline NSA.

Importantly, the Commission's review in a proceeding dealing with a functionally equivalent NSA should not be to ensure that the Postal Service has made the best deal possible, nor that it done so in the manner that the Commission believes best, or most appropriate. The terms of the NSA are up to the Postal Service and the mailer to negotiate. If the contracting process has functioned correctly—and absent any indication to the contrary, that is what the Commission must assume—then the bargain that the parties have struck reflects their view of the best deal they believe they could have made, and in the best way they believe possible.

Consequently, the Commission's role in considering a functionally equivalent NSA should be to ensure that the NSA passes the mandates of the Postal Reorganization Act, and that it is approved in the shortest time possible.

The Commission should reemphasize in the explanation accompanying its final rules, that neither it nor any of the interveners are to be considered "participants" in the negotiation process. The final rules should clearly state that the Commission will not attempt to redraw the contract, or rebalance the benefits and risks of the NSA. The parties are in an equal bargaining position and have based the contract terms on numerous hours of negotiations. They have each assessed their ability and the other party's ability to perform. Those assessments must not be disturbed by the Commission, much less rebalanced, if the principles of contracting and negotiations are to be maintained and the NSA process proved successful. [3]

[3] This is not to suggest that the Commission's duty in reviewing a baseline NSA should be to ensure that the Postal Service has obtained the "best deal possible." Here too, the Commission has no business inserting itself into the sanctity of the bargaining process and post-judging the balance that the contracting parties have drawn between the benefits and risks of the particular contract.

III.

Finally, Discover would like to commend the Commission for its attempt to make clear at the outset exactly what the Postal Service and a NSA mailer must file with the Commission and the procedures for filing NSAs. Clear and specific procedures, specifically tailored to the NSA process, are plainly desirable.

The Commission proposal, however, seems to establish specific evidentiary standards. That is going too far, too fast, given the Commission's level of experience with NSAs, and the critically important confidentiality concerns that customer-specific data issue raises with mailers. Discover believes that the Commission should reconsider its position on this matter, and defer questions of rigid evidentiary standards for all NSA cases until it has gained more experience.

While Discover does not read the rules to suggest that "mailer-specific" data will be required for all NSAs if they are to be approved, the language is strikingly broad. The Commission's proposed rules seem to reflect a cavalier position that if mailer-specific data exists, it should be supplied regardless of whether it is proprietary or confidential. That view shows a disturbing lack of understanding of the dynamics of the business world, of the sensitivity of business data, and the consequences to a private-sector firm of disclosing sensitive and confidential business data.

The plain fact is that the "mailer-specific" data that the Commission appears to be discussing is going to be, in almost all cases, confidential business information that companies will be most reluctant to disclose. In some cases—where a mailer is alleging that it deserves a lower rate because of its lower cost basis—some credible

substantive showing will be required but the Commission and parties will then have to address the confidentiality concerns.

The Commission has experience with only one baseline NSA and no functionally equivalent NSAs. In light of the multitude of NSAs that might exist, baseline or functionally equivalent, DFS does not believe that setting evidentiary standards into regulatory stone is appropriate at this time. Rather, the Commission and the postal community should gain more experience with NSAs and allow the appropriate evidentiary standards to evolve with that experience.

Thank you for considering our views.

Respectfully submitted,

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