

But this is not a rate case, and this is not a case where almost \$70 billion is at stake. This is a process whereby a regulatory body will (hopefully) approve a negotiated service agreement between a private company and the Postal Service that is functionally equivalent to one a competitor has been granted. *Time and money are of the essence*. The subject matter is not worth \$70 billion dollars, not even \$70 million, but much much much less.

The litigation costs of participating in major rates cases are measured in the hundreds of thousands of dollars. If the NSA process is to work, the key will be the success of the functionally equivalent process. In order to make the functionally equivalent process work, the Commission is going to have to bring the costs of participating in functionally equivalent NSAs down to tens of thousands of dollars, or less. That means that this Commission must take a very strict approach to limiting issues, limiting discovery, and limiting hearings. If the Commission does not do this, then all one need do to stymie the evolution of the NSA process is run up transaction costs in functionally equivalent proceedings by litigating extensively.

DFS understands that taking a very strict approach flies in the face of the culture of the traditional PRC hearing. But that culture, if it is to permit the successful evolution of the functionally equivalent NSA process, is going to have to change. Now is the time to do so, not later.

The postal community has to know that the functionally equivalent NSA process will be marked by speed, thrift and efficiency—and not by the squabbling of lawyers and economists over econometric models. If the costs of the first couple of functionally equivalent NSAs are high, the message of speed, thrift, and efficiency will never get out.

If that message doesn't get out, then the functionally equivalent NSA process will not evolve as it should.

Today, companies fear negotiating NSAs with the Postal Service, because of the litigation costs at the Commission. That must also change, and the change needs to start now. Smaller companies must be free to approach the Postal Service, unafraid that parties will force them into spending more than they can afford. The only way to do that is to limit hearings in functionally equivalent proceedings.

WHEN A HEARINGS IS NECESSARY

Hearings are necessary only to resolve a disputed question of fact, as the leading authority on administrative law has repeatedly stated:

Even when an agency is required by statute or by the Constitution to provide an oral evidentiary hearing, it need do so only if there exists a dispute concerning a material fact. An oral evidentiary hearing is never required if the only disputes involve issues of law or policy.

RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §8.3 AT 542 (4TH ed. 2002).

It is important to make the distinction between a situation where there is a disputed fact and a situation where there is a disputed factual issue. They are not the same. An adjudicative hearing is not necessary to resolve disputed factual issues, where the real question is a policy or legal issue of balancing one set of facts against another, or whether facts should be considered or ignored. Those issues may be briefed.

In the instant case, the question should be what disputed question of fact requires oral cross examination and a hearing. To date, no party has identified any disputed question of fact requiring a hearing. This is not a complex case, and it has

been *five weeks* since it was filed. It is time to cut to the chase and clearly identify any disputed facts.

Finally, and this is absolutely critical, should any party identify a fact in dispute, then the proper remedy is to set a hearing to resolve that disputed fact, and only that disputed fact. If two disputed facts are identified, then the hearing should be limited only to resolving those two disputed facts. This approach is the only way to control litigation costs, and create a quick, thrifty, and efficient process.

Respectfully submitted,

/S/

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July 29, 2004

Certificate of Service

I hereby certify that I have this date caused to be served the foregoing document in accordance with Section 12 of the Commission's Rules of Practice.

/S/

Robert J. Brinkmann
July 29, 2004