

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

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Rules Applicable to Renew or Modify Previously  
Recommended Negotiated Service Agreements

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Docket RM2005-3

Initial Comments of Discover Financial Services, Inc. (DFS)

March 14, 2005

These Comments are submitted in response to Commission Order No. 1430, issued February 10, 2005.

Just over a year ago, the Postal Rate Commission released final rules creating the procedures it would follow in considering requests to approve Negotiated Service Agreements. PRC Order, No. 1391, issued February 11, 2004. Those rules recognized a distinction between “baseline” and “functionally equivalent” NSAs and created different procedural frameworks for each. The rules did not address the situation where a request is filed to extend an existing NSA, nor where a request is filed to modify an existing NSA. The rules released last year did reserve Sections 197 and 198 for future regulations to deal with these matters. This docket proposes rules for both.

**Introduction**

**Time Frames.** Critical to the success of the NSA process as a rate-setting mechanism is timeliness and the related issue of transaction costs. The postal rate-setting process has the reputation of being a venue where the cost of participating is high. Major participants in a general rate case can spend a million dollars in staff,

attorney, and consultants' salaries and fees—a state of affairs caused by the size of the postal revenue at stake in a general rate case (almost \$70 billion) and the resulting complexity of the cases.

In contrast, the NSA process operates on a much smaller scale. For example, the DFS NSA will be worth to DFS—at the *very* most—\$13 million, minus the costs of compliance. The gross yield to Capital One from its NSA was around \$2 million in its first year.<sup>1</sup> While the final results are not yet clear in the Bank One case, the revenue to Bank One will not be that large a sum, relative to a general rate case, no matter what the result.

The size of these figures do not justify a proceeding on the scale of a rate case. Yet despite the differences in size between a rate case and an NSA case, the private sector retains a significant concern about the costs of negotiating and litigating NSAs, and an image that the costs could be open-ended and thus astronomical. That has kept many companies from negotiating mutually beneficial NSAs and improving the postal system for everyone.<sup>2</sup> DFS submits that changing this image should be a matter of major focus for the Commission. This is a case where the image projected may be more important than the reality.

In order for the NSA process to evolve in a dynamic fashion, private companies need assurances that the resources they will invest in negotiating and litigating mutually beneficial NSAs will not be open-ended, and that the Commission will maintain its focus on timeliness and minimizing transactions costs. Private companies need assurances

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<sup>1</sup> See Data Collection Report for the time period September 1, 2003 to September 30, 2004, filed January 31, 2005 in Docket MC2002-2, at page 5.

<sup>2</sup> See the Comments of both the Alliance of Nonprofit Mailers and the National Postal Policy Council in Docket RM2005-2.

that the Commission will enforce a discipline that will narrowly and economically focus all participants on the task at hand—approving that specific NSA. The smaller the company, the larger this concern.

To date, the Rate Commission has clearly sent a message of “not-doing-business-as-usual” in NSA cases through the specific and tough time frames it set in its functionally equivalent NSA rules, as well as through the expeditious fashion in which it has handled functionally equivalent proceedings. DFS commends the Commission for trying—very hard—to change the postal rate-making culture and to ensure that NSAs are a success. Such cultural change is not easy, for it inevitably is resisted by those not comfortable with change, or by those who have not quite grasped why it is necessary.

While the spirit of the February 10 Notice certainly continues in this vein, the specific text of the rules unfortunately does not. Neither Rule 197 nor Rule 198 set forth a specific time frame under which the Commission will release a recommended decision. Both should.

A specific time frame in the rules for the extension and modification of NSAs is vital to ensure that the private sector is certain that the Commission will deal with extensions and modifications in a timely and economical fashion. Specific time frames yield certainty. No time frames prevent certainty. The issue is less what the Commission would actually do when it faces a request for an extension or modification, but more about what message the Commission will send about the certainty of its process. It is important to send a message that will build confidence in the private sector concerning the length and cost of the Commission’s NSA cases, including extensions and modifications.

**Hearings.** On another note, under the proposed rules, it is not clear whether one can request a hearing in a Rule 197 proceeding (or in a Rule 198 proceeding) when there are material questions of fact that need to be resolved. That should be clarified in the final version of the rules.

## **Requests for Extensions**

If one considers a flow chart of Rule 197, see Appendix I to these Comments, one sees that the rule calls for the Commission to make a determination of whether it is appropriate to proceed under Rule 197 or not. If the answer to that question is affirmative, then the rule implies that the Commission will make a rapid decision on the extension. It says nothing about whether there can be a hearing at this point.

If the answer to the question of proceeding under Rule 197 is negative, then the rule calls for a full blown Rule 195 proceeding, with no possibility of a Rule 196 hearing. See Appendix I to these Comments.

DFS does not believe that the rules should operate this way. If the decision is to proceed under Rule 197, then there still should be room for a hearing on one or more a specific disputed facts. On the other hand, if the decision is not to proceed under Rule 197, then a proceeding under Section 196 (as contrasted to Section 195) should still be a possibility.

### **A. If Proceeding Under Rule 197 Is Appropriate.**

Let us assume that DFS would file for a request to extend the DFS NSA in a couple of years, and that the NSA as extended will make the Postal Service a profit. If the request is clearly for a simple extension of the original NSA—with perhaps adjusted

volume forecasts, thresholds, costs, or rates—then one would presume that proceeding under Rule 197 would be appropriate. That determination, however, would not necessarily address the question of whether a hearing would be appropriate, for that would depend on whether there were any material questions of fact presented by the new data that need be adjudicated.

Thus it would seem that the Commission should also, once it decides whether proceeding under Rule 197 is appropriate, make a determination whether a hearing is required. If a hearing is not required, then the rules should call for a decision within a specific and short amount of time. If a hearing is required, then the rules should call for a decision within a specific but longer period of time.

In the Commission's functionally equivalent rules, the time frames for the release of a decision are 60 and 120 days, respectively. DFS submits that time frames of 30 days (no hearing) and 90 days (hearing) would be appropriate under Rule 197 proceedings. See the flowchart in Appendix II to these Comments. DFS suggests that the Commission could reasonably deal with these shorter time frames, given the inherently more limited nature of a request for extension.

#### **B. If Proceeding Under Rule 197 Is Not Appropriate.**

If the Commission determines that proceeding under Rule 197 is not appropriate, then the proposed rule, as drafted, automatically triggers a Rule 195 hearing. This does not seem appropriate. Not passing a "proceeding under Rule 197" test simply means that the Commission is dealing with a "new" NSA. That "new" NSA could just as easily be a "new" functionally equivalent NSA as it could be a "new" baseline NSA. Thus, DFS suggests that even if a determination that a proceeding under Rule 197 is not

appropriate, then different processes and different time frames could be triggered , depending upon the determination of whether this NSA would be a baseline or functionally equivalent NSA. The flowchart in Appendix II to these Comments illustrates how DFS believes Rule 197 should operate.

### **Requests For Modifications**

In a parallel fashion, proposed Rule 198 does not address the question of whether there could be a hearing even if the proceeding under Rule 198 is appropriate, nor what time frames should be operative. See Appendix III to these Comments.

DFS suggests a structure parallel to that it proposes for Rule 197. Thus, a positive determination that proceeding under Rule 198 is appropriate should trigger a subsequent determination of whether there are sufficient questions of fact to justify a hearing. Likewise, the determination that proceeding under rule 198 is not appropriate should not trigger an automatic Rule 195 proceeding, but rather a subsequent determination of whether proceeding under Rule 195 or Rule 196 is appropriate. That would depend, of course, on whether the modified NSA would create a new baseline NSA or a new functionally equivalent NSA. See Appendix IV to these Comments for a flowchart of how DFS believes rule 198 should work.

### **Other Issues**

The Commission, when it issues its final rules, should stress that it is critical that all parties, having engaged in sufficient discovery, come to the prehearing conference prepared to argue whether 1) it is appropriate to proceed under Rule 197 (or 198, as

appropriate) and 2) whether a hearing is necessary, and if so, on the basis of what disputed facts. As DFS noted in its Comments filed in Docket RM2005-2, parties should be able to fulfill this obligation if they promptly start discovery immediately after an NSA is filed and noticed. DFS Comments in Docket RM2005-2 at 5-8.

Finally, although DFS accepts the Commission's creation of two parallel rules for extensions and modifications, one does wonder whether that is truly necessary. Perhaps one section dealing with both extensions and modifications would be simpler.

## **Conclusion**

For the reasons stated above, DFS urges the Commission to change its proposed rules as detailed in these Comments, and to create specific time frames for the issuance of an Opinion and Recommended Decision in Extension and Modification cases.

DFS commends the Commission for its efforts in this rulemaking and looks forward to reviewing and responding to any other comments that are filed.

Respectfully submitted,

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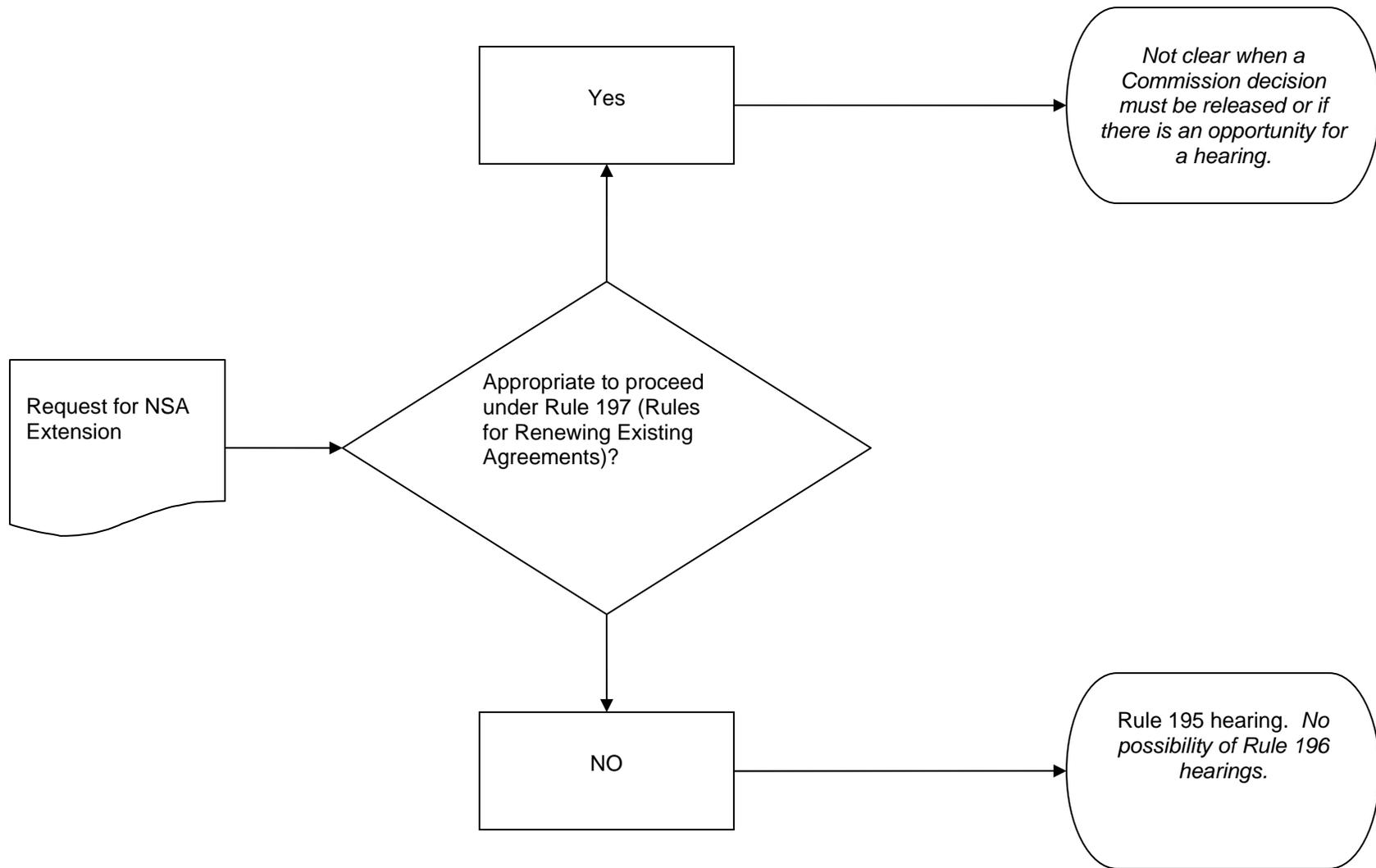
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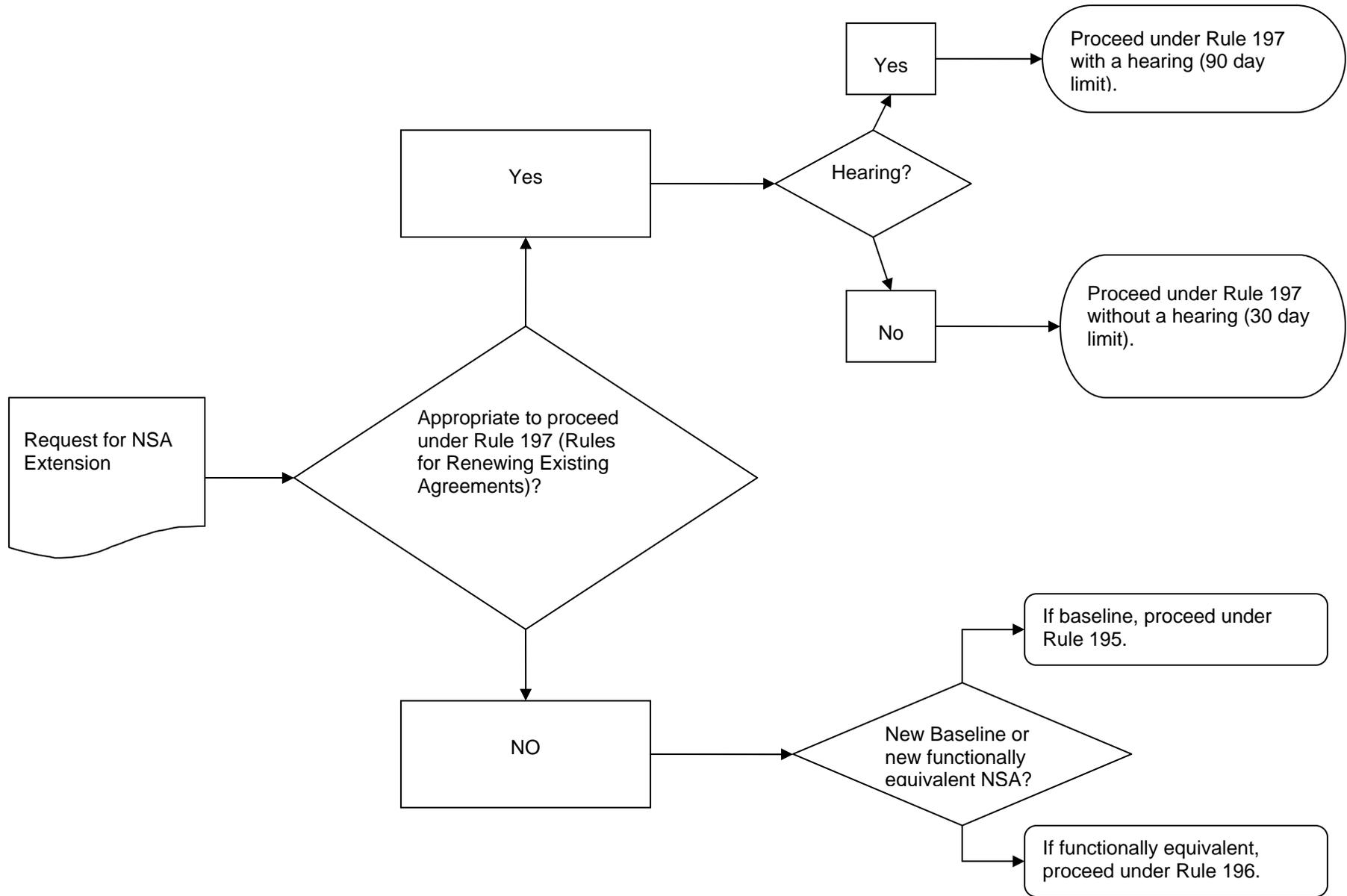
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March 14, 2005

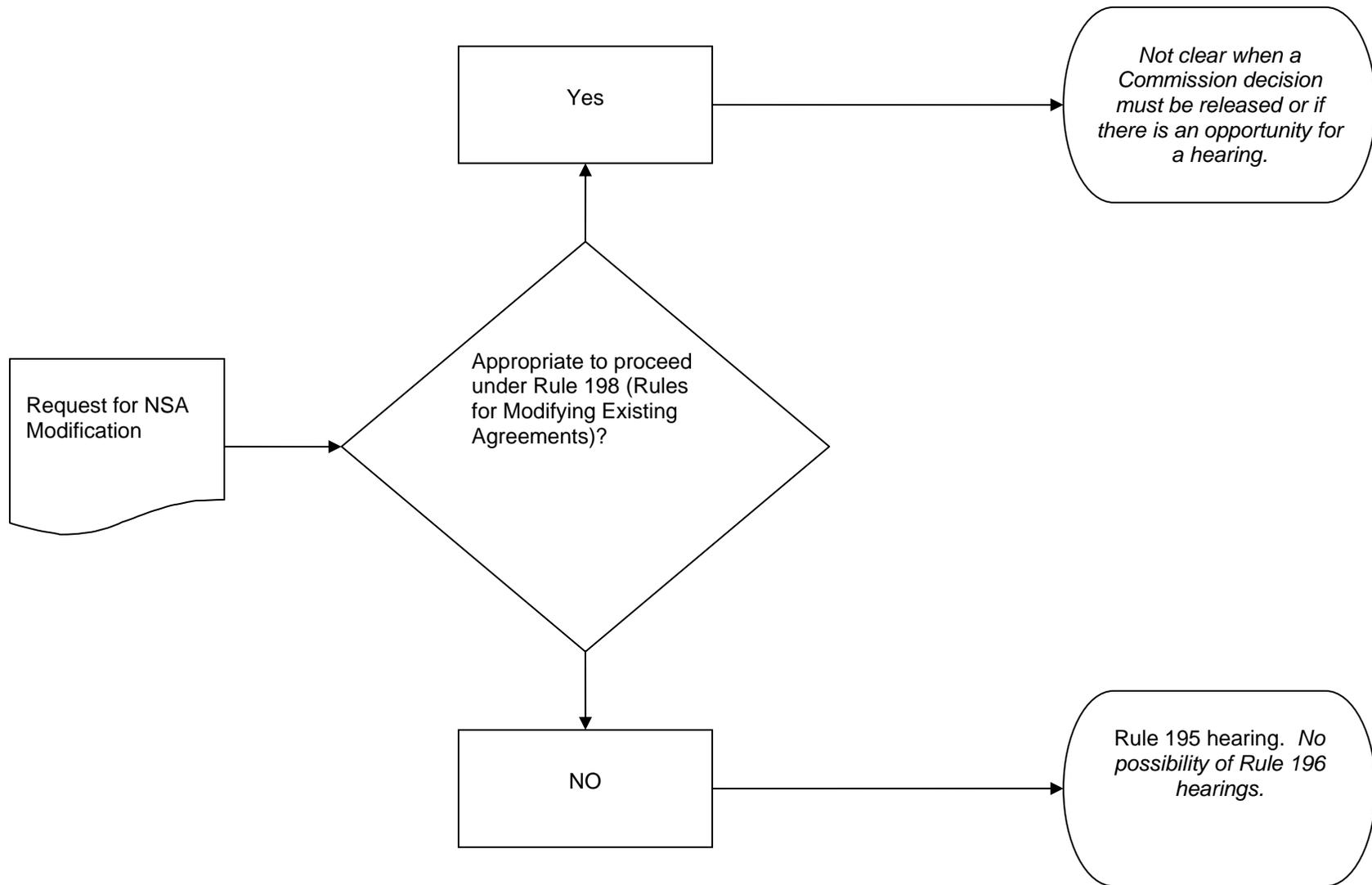
# Appendix I: Flowchart of How the Commission's Proposed Rule 197 Would Operate.



# Appendix II: Flowchart of How DFS Suggests Rule 197 Operate.



Appendix III: Flowchart of How the Commission's Proposed Rule 198 Would Operate.



# Appendix IV: Flowchart of How DFS Suggests Rule 198 Operate.

