

Before the  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

Rules Applicable to Renew or Modify )  
Previously Recommended Negotiated ) Docket No. RM2005-3  
Service Agreements )

**INITIAL COMMENTS OF HSBC NORTH AMERICA HOLDINGS INC.**

(March 14, 2005)

Pursuant to Order No. 1430, issued on February 10, 2005, and published at 70 Fed. Reg. 7704 (Feb. 15, 2005), HSBC North America Holdings Inc. ("HSBC") respectfully submits these comments.

On February 23, 2005, the Postal Service and HSBC filed a proposed Negotiated Service Agreement ("NSA") with the Commission for approval as functionally equivalent to the Capital One NSA.<sup>1</sup> HSBC believes that NSAs provide the Postal Service flexibility to tailor arrangements to the unique needs of an individual mailer. As demonstrated by the recent interim report of the Postal Service on the financial results of the Capital One NSA,<sup>2</sup> this flexibility can significantly benefit the Postal Service, the NSA partner, and all mailers. HSBC therefore appreciates the Commission's commitment to explore NSAs and to develop procedural rules for streamlining the NSA approval process.

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<sup>1</sup> Request of the USPS for a Recommended Decision on Classifications, Rates and Fees to Implement a Functionally Equivalent Negotiated Services Agreement With HSBC North America Holdings, Inc., Docket No. MC2005-2 (February 23, 2005).

<sup>2</sup> Docket No. MC2002-2, USPS Data Collection Report for Sept. 1, 2003 to Sept. 30, 2004 (January 31, 2005).

Order No. 1430 solicits comments on proposed Rules 197 and 198 to govern requests for renewal or modification of previously approved NSAs. The proposed rules are generally reasonable and recognize the need to dispense with unnecessarily protracted litigation to streamline the NSA process. In four respects, however, the rules should be clarified.

(1) The Commission's list of changes that do not "materially alter"<sup>3</sup> a proposed renewal or modification of an NSA is too restrictive. The proposed rules would recognize only four kinds of changes in NSA terms as immaterial: correcting a "technical defect," updating rates and fees, accounting for unforeseen circumstances or an "intervening event" unanticipated when the NSA was initially recommended.<sup>4</sup> Over the course of an NSA's three-year term, however, there is a high likelihood that the parties' experience with the implementation of the NSA will lead to mutual agreement on changes to the NSA terms in ways that could not have been anticipated at the outset, and which cannot be anticipated or exhaustively catalogued in a general rule of procedure, but which nonetheless do not materially change the economics of the deal.

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<sup>3</sup> Though the "materially alter" standard only appears in the text of proposed Rule 197(a), the Commission includes the standard in its discussions of proposed Rule 198(a) as well as Rule 197(a). See Order No. 1430 at 3 and 6-7.

<sup>4</sup> Proposed Rules 197(a) and 198(a); Order No. 1430, 70 Fed. Reg. at 7705-06. Each of the proposed rules enumerates three "immaterial" changes. Two of these appear in both proposed rules: correcting a technical defect and accounting for an intervening event. The third "immaterial" change varies, however. Proposed Rule 197(a) would allow the "updating" of "the schedule of rates and fees" specified in the original NSA; Rule 198(a) would allow modifications in the original NSA to "account for unforeseen circumstances not apparent when the existing agreement was first recommended." Order No. 1430 does not explain why the Commission proposes these differences in wording. Moreover, the overall similarity of the changes recognized as "immaterial" in proposed Rules 197(a) and 198(a) leaves unclear what difference, if any, the Commission contemplates between the coverage of Rules 197 and 198.

The Commission should therefore label its current list of immaterial changes as examples, and allow itself discretion to consider other requests as well.

(2) The proposed rules appear to impose on NSA proponents the burden of proving the reasonableness of the terms of the modified or renewed NSA if the NSA is contested. This is illogical. The terms of a proposed NSA that qualifies for review under proposed Rule 197 or Rule 198 will, by definition, differ only immaterially from NSA terms that the Commission has already found to comply with the Postal Reorganization Act. Requiring the NSA proponents to re-justify the reasonableness of substantially the same terms each time the NSA is renewed or immaterially modified would be a substantial and needless deterrent to the use of NSAs. The Commission is entitled in a proceeding under Rule 197 or Rule 198 to rely on the findings it made in an earlier proceeding concerning the same NSA under Rule 195 or Rule 196. As the Court of Appeals noted in upholding the decision of the Interstate Commerce Commission to rely in one proceeding on factual findings previously made in a related but separate case, Congress “did not command the ICC to behave like Penelope, unraveling each day’s work to start the web again the next day.” *Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D. C. Cir. 1984). The burden of proof in this situation should therefore rest with the opponents, not the proponents, of a renewed or modified NSA without material alterations.

(3) Neither proposed rule specifies a timetable for the “accelerated review;” instead, the Commission may establish procedural schedules on a case-by-case basis. Such an approach would deter the use of NSAs. Litigation costs are a major concern to firms in the private sector. Procedural schedules set on a case-by-case basis after the

commencement of an NSA proceeding are not an adequate substitute for knowing in advance the outer limits of a case's duration. Accordingly, the final rules should set explicit limits on the duration of "accelerated" review.

The schedule adopted by the Commission in Rule 196 is instructive. Because the scope of issues open to relitigation in a proceeding under Rules 197 or 198 should be much more limited than in a Rule 196 proceeding,<sup>5</sup> a shorter timetable for accelerated review apply in cases under Rule 197 and 198. For example, instead of prescribing a decision within 120 days of the Commission's decision if a hearing is required and 60 days if the hearing is waived (as in Rule 196), perhaps a schedule imposing 90 day and 45 day limits, respectively, would be more appropriate.

Additionally, the Commission should enforce the provisions of the Administrative Procedure Act that require that parties seeking a hearing in opposition to a proposed NSA demonstrate the existence of a material issue of fact concerning the lawfulness of the NSA. Absent such a showing—which includes more than just a conclusory allegation in a pleading—the Commission should end the proceeding and recommend that the NSA renewal or modification be implemented forthwith.

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<sup>5</sup> A request for renewal or modification which the Commission has determined does not materially alter the terms of the original approved NSA by definition has already been reviewed at several levels. For example, if the original agreement was a functionally equivalent NSA, the Commission has already carefully reviewed (1) the original baseline agreement, (2) the functionally equivalent original NSA (and any deviations from the baseline agreement), and (3) the differences between the original NSA and the renewal or modification (to determine if there is any "material alteration"). For renewals, the Commission has also received at least two years of information from its Data Collection Plan. By the time the Commission has determined that Rule 197 or 198 applies, there are few remaining issues open, and a very short procedural schedule should suffice.

(4) It is quite likely that an NSA request that fails to qualify for renewal or modification under either of the proposed rules, would still qualify as functionally equivalent to another NSA under Rule 196—whether the relevant baseline NSA is the original agreement or an NSA with another mailer. Hence, Rules 197(c) and 198(c) should make clear that NSA proposals that fail to qualify for review under the rules governing renewal or modification requests may proceed under *either* Rule 195 (pertaining to baseline provisions) *or* Rule 196 (pertaining to functional equivalents), as applicable.

### **Conclusion**

HSBC respectfully requests that the Commission modify its proposed rules as explained above.

Respectfully Submitted,

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David M. Levy  
Joy M. Leong  
Sidley Austin Brown & Wood LLP  
1501 K St., N.W.  
Washington, D.C. 20005  
(202) 736-8000

*Counsel for HSBC North America Holdings Inc.*

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