

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

Rules Applicable to Renew or Modify)
Previously Recommended)
Negotiated Service Agreements)

Docket No. RM2005-3

OFFICE OF THE CONSUMER ADVOCATE
REPLY COMMENTS
IN RESPONSE TO COMMISSION ORDER NO. 1430
(April 11, 2005)

In Order No. 1430,¹ the Commission established a rulemaking proceeding for the purpose of soliciting comments on new rules for modifying or extending previously recommended Negotiated Service Agreements. The rules applicable to Negotiated Service Agreements (NSAs) are codified at 39 C.F.R. § 3001.195 *et seq.* The Office of the Consumer Advocate (OCA) hereby submits comments in reply to those of other participants.

As stated in our initial comments,² OCA understands one of the primary purposes of the NSA rules to be expedition. Other commenters appear to agree. Yet some commenters have suggested changes to the proposed rules that would effectively delay proceedings.

¹ "Notice and Order Establishing Rulemaking Docket for Consideration of Proposed Rules Applicable to Requests to Renew or Modify Previously Recommended Negotiated Service Agreements," issued February 10, 2005.

² Office of the Consumer Advocate Comments in Response to Commission Order No. 1430, March 14, 2005.

HSBC North America Holdings Inc. (HSBC) complains that “[t]he proposed rules appear to impose on NSA proponents the burden of proving the reasonableness of [all] the terms of the modified or renewed NSA if the NSA is contested.”³ Certainly, in the case of rule 197 (extension or renewal), the Commission should not require NSA proponents to support retention of existing provisions in the absence of changed circumstances.⁴ But proponents *should* be required to demonstrate the immateriality of changes they do wish to make. It is the lack of significance of changes that permits expedition with respect to renewal in the first place. It is not only logical, but imperative, that proponents desiring to make use of the new rules demonstrate that the rules actually apply to their situation.

In the case of rule 198 (alteration of an existing NSA), expedition is even more difficult. The mere filing of a case under this rule declares that something has gone seriously wrong with the previously approved NSA. Proponents of 198 proceedings should be required to explain (1) why the need for the modification was overlooked in the initial proceeding and (2) why the Commission should believe that no other difficulties still exist. Given that parties to an NSA have already balanced risk and reward in a businesslike fashion,⁵ the need for a modification should be a very rare event. And the proponents of a 198 modification should be able to demonstrate their need for both modification and expedition.

³ Initial Comments of HSBC North America Holdings Inc., March 14, 2005, at 3. Bank One Corporation and Discover Financial Services, Inc., concur. Initial Comments of Bank One Corporation, March 14, 2005, at 9, 12; Initial Comments of Discover Financial Services, Inc., March 14, 2005, at 5.

⁴ Although the uncertainty associated with NSAs strongly suggests that at least some circumstances will always have changed after three years. See Bank One Initial Comments at 11.

⁵ See Bank One Initial Comments at 2 (“prudent risk-reward tradeoffs”).

Several commenters have suggested that the Commission impose explicit deadlines on itself.⁶ Such deadlines would actually create incentives for delay. Specifically, if proponents of the use of rules 197 or 198 knew in advance that the Commission was committed to issuing a recommended decision in a certain (short) time, they would have no incentive to submit detailed information up front. Proponents could be expected to expend as little effort as possible⁷ on their initial filing and leave the Commission struggling to reach a rapid decision on the basis of incomplete information.

Respectfully submitted,

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⁶ HSBC Initial Comments at 3-4; Discover Initial Comments at 3; Bank One Initial Comments at 12-14; Initial Comments of the United States Postal Service, March 14, 2005, at 3.

⁷ See Discover Initial Comments at 2 (“significant concern about the costs of negotiating and litigating NSAs”).