

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

Rate and Service Changes To Implement
Baseline Negotiated Service Agreement With
Bookspan

Docket No. MC2005-3

COMMENTS OF
THE NEWSPAPER ASSOCIATION OF AMERICA
ON NOTICE OF INQUIRY NO. 1
(November 14, 2005)

The Newspaper Association of America (“NAA”) hereby respectfully submits its comments on Notice of Inquiry No. 1 in this proceeding.¹ As NAA will explain in its initial brief, the NSA proposed in this proceeding is unlawful under the Postal Reorganization Act. However, NAA submits that, if this NSA were approved, both the specific language of the formal Request and ample record testimony make clear that the only mail that could be eligible for the discounts contained in this NSA or in any functionally-equivalent NSA are Standard Regular letters.

Section 3001.193(c) of the Commission’s rules of practice directs the Postal Service to include in a formal request for a new baseline NSA “proposed changes, in legislative format, to the text of the Domestic Mail Classification Schedule and any associated rate or fee schedule.” An important purpose of this requirement is to put the Commission and potentially interested parties on notice of the scope of the case. As a

¹ *Notice of Inquiry No. 1 In Regard To Domestic Mail Classification Schedule and Data Collection Plan Language* at 7 (Nov. 3, 2005).

matter of due process, potentially interested parties should be able to rely on the parameters of the Request as set out in the DMCS language.

In compliance with this requirement, the Postal Service commenced this case by filing the following proposed DMCS language that, as the Commission notes, provides (in relevant part) as follows:

Eligible Standard Mail under this section is defined as letter shaped pieces sent by Bookspan for the purpose of soliciting book club memberships . . .

Attachment A, Proposed Section 620.11. This language by its terms is imprecise and does not specify whether eligible letters must be in Standard Regular or Enhanced Carrier Route mail. As the NOI recognizes, the proposed language to describe what would qualify as a functionally-equivalent NSA was similarly imprecise:

Fun[c]tionally equivalent NSAs, involving declining block rates for Standard Mail letter solicitations . . .

Like proposed Section 620.11, this “functionally-equivalent” language refers only to Standard letters without specifying Regular or ECR, much less commercial or non-profit.

Although these provisions are imprecise, a different provision in the Postal Service’s formal Request in this case resolves any doubt by plainly specifying what mail would be eligible for volume discounts. Proposed DMCS section 620.23, entitled “Incremental Discounts” and providing for the declining block discounts, states as follows:

Bookspan’s eligible Standard Mail is subject to the otherwise applicable Standard Mail postage in Rate Schedule 321A or 321B, less the discounts [for each year of the agreement].

Rate Schedules 321A and 321B present the rates for Standard Regular Presort and Automation categories, respectively.² Accordingly, the Postal Service's formal Request initiating this proceeding plainly provides for discounts *only* from the Standard Regular rate schedule. The proposed DMCS language in the Request contains no indication that discounts are proposed for Standard ECR-rated letters.

The testimony of Postal Service witness Plunkett both in interrogatory responses (for which a witness has the benefit of time and the assistance of counsel) and at the hearing that the discount affects only Standard Regular letters was fully consistent with the text of the Request. In particular, in response to interrogatory VP/USPS-T1-1 (filed Sept. 9, 2005), he stated that the NSA involved the application of "declining block rates to Standard Mail Regular." Tr. 2/269. He reaffirmed this on Sept. 20, stating in response to interrogatory NAA/USPS-T1-8 that "any mailer qualifying as functionally equivalent would be producing Standard Mail Regular letters for the purpose of acquiring customers." Tr. 2/223; see *also* Tr. 2/277. On oral cross-examination, he confirmed that he could think of no reason why the NSA should not be limited to Standard Regular letters. Tr. 2/325-326.

After conclusion of the hearings, the Presiding Officer issued Information Request No. 3. Question 2 therein reviewed the above cross-examination testimony and asked the proponents to clarify their intent. POIR No. 3, Question 2 (Nov. 2, 2005). On the next day, the Commission issued this NOI, again the Postal Service's repeated descriptions of mail eligible for the NSA as Standard Regular letters.

² Rates for Standard ECR mail appear in Rate Schedule 322.

On November 9, the Postal Service responded to POIR 3, Question 2, by stating that it “was and remains the intention of the proponents that eligible mail include both Standard Mail Regular and Standard Mail ECR.” This unexplained change conflicts with the same witness’s written and oral cross-examination at the Oct. 19 hearing and is otherwise completely unexplained. Nor has the Postal Service made any effort to amend the interrogatory and hearing statements to the effect that letters must be Standard Regular to earn the discounts. That testimony remains the record evidence today upon which the Commission must base its decision.

While the proponents may always have secretly “intended” for the discount to extend to all Standard letters, the formal Request has always limited the discounts to the Standard Regular rate schedule only, as clearly and unambiguously set forth in proposed Section 620.23. To amend the Request at this late stage by extending the discounts to the Standard ECR rate schedule would create a substantial due process problem. As this Commission recently observed in Order No. 1443: “It is extremely important that adequate notice be given before the Commission considers potential rules applicable to groundbreaking issues.”³ It is too late in the day to amend the notice in this proceeding without restarting the case.

For the foregoing reasons, NAA believes that the Commission has no choice consistent with the Administrative Procedure Act and this record but to amend the

³ Order No. 1443 at 9 (August 23, 2005).

proposed DMCS language to clarify that only Standard Regular letters are eligible for the discount or for a functionally-equivalent NSA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the instant document on all participants requesting such service in this proceeding in accordance with section 12 of the Rules of Practice.

November 14, 2005

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