

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

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Rate and Service Changes to Implement )  
Baseline Negotiated Service Agreement with )  
Bookspan ) Docket MC2005-3  
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Initial Brief of  
Discover Financial Services, LLC (DFS)  
December 6, 2005

Discover Financial Services, LLC (DFS) respectfully submits its brief in this case pursuant to the revised schedule set forth in Presiding Officer's Ruling MC2005-3/15.

DFS urges the Commission to approve the Bookspan NSA, as negotiated and submitted, with no other limitations or modifications.

In its February 11, 2002 Report to Congress on the Authority of the Postal Service to enter into NSAs, this Commission correctly concluded that Negotiated Service agreements are legally permissible, if three conditions are present:

- The proposal is reviewed in a public proceeding, as the Reorganization Act requires.
- The agreed-upon rate and service changes will work to the mutual benefit of mail users and the postal system as a whole.
- The negotiated rate-and-service package is made available on the same terms to other potential users willing to meet the same conditions of service.<sup>1</sup>

These conditions are necessary to ensure that NSAs do not run afoul of Section 403(c) of the Postal Reorganization Act. That section provides that the Postal Service may

discriminate among mailers, so long as it is not done on an undue or unreasonable basis and does not give any mailer any undue or unreasonable preference. 29 U.S.C. § 403(c)

In February of 2004, the Commission promulgated regulations that ensured that the first and third conditions would always be present in any postal NSA. The regulations do so by requiring formal public proceedings in all cases, by creating separate rules for the expeditious consideration of functionally equivalent NSAs for similarly situated mailers, and by requiring that NSAs do no unreasonable harm to the marketplace.<sup>2</sup>

The Bookspan NSA is being approved in a formal public procedure. It ensures that similarly situated mailers may obtain functionally equivalent NSAs. It does no harm to the marketplace. Hence the Bookspan NSA is fully compliant with the Commission's regulations, and with the first and third conditions the Commission cited in its 2002 Congressional submission.

With the first and third conditions satisfied, the remaining consideration is whether a proposed NSA will work to the mutual benefit of mail users and the postal system in general. Two separate concerns exist in this area.

The first is whether the Postal Service is better off financially with the NSA than without it. The public policy presumption that underlies this concern is that all mailers will benefit if the Postal Service makes a profit on an NSA because, to some degree,

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<sup>1</sup> Report To Congress, Authority Of The United States Postal To Introduce New Products And Services And To Enter Into Rate And Service Agreements With Individual Customers Or Groups Of Customers. Postal Rate Commission, February 11, 2002 at 1.

<sup>2</sup> Postal Rate Commission Order 1391, issued February 18, 2004; *accord* Order 1439, issued May 26, 2005 (Procedural Rules applicable for Renewals or Modifications).

that profit will reduce the institutional costs of the overall postal system. If that institutional cost burden is lowered, all mailers benefit.

The second concern focuses on whether there are any negative consequences to competitors and to the marketplace that would justify rejecting a proposed NSA. The Commission had made it quite clear that the Postal Service must ensure that similarly-situated mailers be able to obtain functionally equivalent NSAs.<sup>3</sup> Consequently, any showing in this area would have to overcome a presumption that the ability to obtain a functionally equivalent NSA in an expeditious fashion ensures that competition and the marketplace are not harmed.

The public policy issues underlying this concern have not been thoroughly developed since the Postal Service has negotiated no NSAs that have any appreciable affect on any competitors. Further development awaits a case where the NSA at issue has competitive implications.

In this case, there are no competitive concerns. No competitor of Bookspan has appeared in this case, much less objected to the Bookspan NSA, despite the wide-spread publicity that Bookspan's NSA filing has had in the mailing community.

Consequently, the only issue that the Commission must decide is whether the Postal Service will be better off with the Bookspan NSA that it would have been without it. While there is not precise agreement among the parties as to how much additional contribution the Postal Service will gain under the Bookspan NSA, there has been no suggestion that the Postal Service will be worse off with the Bookspan NSA than without it. Indeed, the testimony and responses of Witnesses Yorgey that have been placed on

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<sup>3</sup> *E.g.*, Opinion and Recommended Decision in Docket MC2002-2, Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One, May 15, 2003 at 136.

the record more than show that the Postal Service will not lose money on this NSA.<sup>4</sup> Further, Bookspan has provided record evidence that its business model and mail structure create a multiplier effect.<sup>5</sup> Even though the precise dollar value of this multiplier has not been officially quantified and entered into the record, its existence and overall parameters—which are on the record—should be more than sufficient to offset any lingering doubt that the Commission could have about the profitability of this NSA.

For these reasons, DFS submits that the Commission should approve the Bookspan NSA as negotiated and submitted, with no other limitations or modifications.

Respectfully submitted,

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December 6, 2005

### **Certificate of Service**

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

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Robert J. Brinkmann

December 6, 2005

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<sup>4</sup> *E.g.*, Direct Testimony of Michelle K. Yorgey, USPS-T-2 at 6-7.

<sup>5</sup> *E.g.*, Direct Testimony of Robert J. Posh, Jr. on Behalf of Bookspan, Bookspan-T-1, Transcript at 449e.