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POSTAL REGULATORY COMMISSION
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RATE AND SERVICE CHANGES TO IMPLEMENT BASELINE NEGOTIATED SERVICE AGREEMENT WITH LIFE LINE SCREENING

DOCKET NO. MC2007-5

INITIAL BRIEF OF LIFE LINE SCREENING

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STATEMENT OF THE CASE

As the third customized service agreement providing volume block discount incentives on Standard Mail solicitations to be reviewed by this Commission, the terms of this Negotiated Service Agreement (NSA) are, by now, very familiar. In 2006, the Bookspan NSA set the conceptual framework for the evaluation of block discount incentives. While there are differences between this NSA and the Bookspan NSA -- and the pending Bradford Group NSA -- those differences are not material to the Commission's analysis. As the record in this case shows, the issues that have apparently animated the interveners and OCA are indistinguishable from the issues that the Commission carefully and thoroughly considered and decided in the Bookspan matter. This NSA complies with all of the applicable provisions of the Postal Reorganization Act ("PRA"). Moreover, the public policy embodied in the passage of the PAEA promote the Commission's favorable recommendation of this agreement, without qualification.

The Postal Service and Life Line Screening have established that the agreement (i) meets the ratemaking and classification criteria of the PRA and the policies of the PAEA, (ii) is not discriminatory, and (iii) is in the public interest. The Postal Service and Life Line Screening have put forward a reasonable and persuasive business case for entering into this deal, and there is no evidence in the record disputing that case. This record evidence cannot be overcome by speculative concerns. Moreover, the PAEA has firmly established the principle of pricing flexibility, and the Commission should not substitute its own business judgment for the judgment of the Postal Service. For these reasons, as detailed more fully in this Brief, Life Line Screening urges the Commission to favorably and unqualifiedly recommend implementation of this NSA.

STATEMENT OF FACTS

A. Description of Life Line Screening

Life Line Screening provides direct-to-consumer preventive health screenings that provide early detection of the risk of stroke, abdominal aortic aneurisms, peripheral arterial disease, and osteoporosis. LLS-T-1 at 1-2. Recently, the company also began to offer finger-stick blood tests to measure cholesterol, glucose and C-Reactive protein (an indicator for heart disease). LLS-T-1 at 2.

LLS staffs mobile ultrasound teams based in cities around the country. These teams travel in a 2-3 hour radius to pre-arranged sites on a daily basis to conduct screenings in local community settings such as hospitals, churches, community centers and senior centers. Since 1996, LLS has screened more than five million people in the continental United States. *Id.*

The modestly priced screenings and tests provide its customers with important information concerning their risk for treatable diseases and conditions. *Id.* Customers are typically aging baby boomers and senior citizens. *Id.* LLS's screenings have helped to uncover significant vascular disease in customers who were otherwise asymptomatic, prompting these individuals to obtain the preventative medical care they need. *Id*.

Part of LLS's mission is to educate Americans concerning the need for vascular screenings to detect cardiovascular disease, which is the number one killer of men and women in the United States. LLS-T-1 at 2. To increase awareness concerning the need for vascular screenings, and solicit customers for its screening events, LLS conducts national direct marketing efforts and community outreach programs.

As a direct marketer, LLS manages a portfolio of marketing channels to both communicate solicit new customers and communicate with past customers. LLS has found direct mail to be an excellent channel for it to educate the public, acquire new customers, and communicate with existing customers, but LLS also uses newspaper inserts, national and local radio, television, e-mail, website, and other means to generate sales. Like the other direct marketers whose NSAs have been before this Commission, the percentage that each media represents in LLS's overall marketing portfolio shifts depending on cost and effectiveness. LLS-T-1 at 5. The costs of direct mail (with postage as the largest component of that) have risen significantly over the last two years, leading LLS to expand its use of the web, e-mail, radio, and other channels for soliciting both new and repeat customers. Selection of marketing channels is made on a market by market, screening event by screening event basis, and is largely driven by the return on investment of one channel versus another. Increasing postage costs have thus made other marketing channels more competitive. LLS-T-1 at 4, 7-8, 9.

Over the last ten years, the company has grown from an Ohio-based organization with a handful of ultrasound teams, to a company with more than eighty teams and national coverage. LLS-T-1 at 3. During the period that LLS was increasing the number of ultrasound teams, the Postal Service benefited from the company's growing mail volume. Now that national coverage has been achieved, LLS has no plans to increase the number of ultrasound teams, and there is no longer expected to be growth in mail volume attributable to expansion of new ultrasound teams into new geographic markets. LLS-T-1 at 7.

Thus, the parties look to discount postage to increase mail volumes.

B. Description of the NSA

In this NSA, the Postal Service provides LLS with a financial incentive to shift its marketing efforts more heavily to direct mail. In exchange, the Postal Service receives the direct benefit of the revenues from additional Standard Mail letters. The Postal Service also receives the benefit of revenues from additional First Class and Standard Mail "multiplier mail" that results from each new customer successfully recruited through these incremental solicitations.

The NSA tracks many of the features of the Bookspan deal. First, like the Bookspan NSA, the LLS NSA provides for annual volume block discounts that provide an incentive to LLS to increase its use of Standard Mail for purposes of selling more of its product to a nationwide customer base. Second, as in the Bookspan deal, the volume commitments in the second and third year are subject to adjustment based on actual experience. Third, the agreement includes safeguards comparable to those established in the Bookspan NSA, that mitigate any risk to the Postal Service.

Key safeguards include:

• an annual volume commitment which must be met before discounts are payable, that is set well above the before-rates forecast;

• an annual adjustment mechanism for those volume commitments, based on actual experience (with an adjustment floor);

• a volume cap (subject to limited adjustment) beyond which no additional discounts will be earned;

• an automatic termination clause if letter volumes exceed 10 million above the top tier in any year; and

• an unconditional right of termination for both parties with 30 days notice.

One circumstance of this NSA that differentiates it from the circumstances with respect to the pure volume block discount NSAs the Commission has seen to date, is the absence of a downward trend in historic volumes. This distinction, however, offers no reason to recommend against the NSA. The LLS NSA provides an opportunity for gain for all concerned —for LLS, the Postal Service, and postal ratepayers overall—with minimal risk of loss to any postal stakeholder.

C. Commission Proceedings

LLS adopts the statement of the proceedings set forth in the brief of the Postal Service.

ARGUMENT

I. The LLS NSA Meets the Statutory Requirements of the PRA, and the Policies of the PAEA Weigh Heavily in Support of this NSA

The transition provisions of the Postal Accountability and Enhancement Act ("PAEA"), which became law on December 21, 2006, provide that with respect to requests for recommended decisions filed during the first year, the pre-existing statutory provisions and implementing rules shall apply. See 39 U.S.C. § 3622(f). This case was filed on August 8, 2007; therefore, the applicable provisions of the Postal Reorganization Act, 39 U.S.C. §§ 3622 and 3623, as it existed prior December 21, 2006, remain the core Commission standards in reviewing this NSA.

The *Bank of America* NSA proceeding was similarly reviewed under PRA standards after the passage of the PAEA. In that proceeding, the Commission further acknowledged that the PAEA was a clear Congressional expression of public policy, and concluded that "the enunciated policies and objectives of that legislation were both material and relevant, and that they should be applied under the aegis of 'such other factors as the Commission deems appropriate.'" *Opinion and Recommended Decision (Released from Protected Conditions),* Rate and Service Changes to Implement Baseline Negotiated Service Agreement with Bank of America Corporation, PRC Docket No. MC2007-1 (October 3, 2007), ¶¶ 4059-4060, citing former 39 U.S.C. §§ 3622(b)(9) and 3623(c)(6). The Commission further recognized that one of goals of the PAEA is to provide the Postal Service with a level of flexibility to set rates and develop classifications, including the ability to enter into mailer-specific agreements that it finds beneficial, and that to provide this flexibility, it is necessary to shift the initial responsibility to review and determine whether or not to proceed with mailer-specific agreements to the Governors of the Postal Service. *Id.*

The Commission set out the general requirements for NSAs in 2002, explaining that the Postal Reorganization Act, 39 U.S.C. §101 *et seq.*, permits the Postal Service to contract with individual mailers if (1) the contract is subject to the usual review procedures for rate and classification changes, (2) the terms of the contract satisfy the general ratemaking standards of the PRA and benefit mailers as a whole, and (3) the rates and services of the mailers specified in the contract are offered "on the same terms to other potential users willing to meet the same conditions of service."[1] Rule 190 of the Commission's Rules of Procedure states that "it shall be the policy of the Commission to recommend Negotiated Service Agreements that are consistent with the statutory criteria,

[1] *Authority of the United States Postal Service to Introduce New Products and Services and to Enter into Rate and Service Agreements with Individual Customers or Groups of Customers: A Report to the Congress by the Postal Rate Commission, February 11, 2002* (hereinafter "PRC Report to Congress") at 1.

and benefit the Postal Service, without causing unreasonable harm to the marketplace." 39 C.F.R. § 3001.190.

This NSA satisfies all of the applicable ratemaking and classification criteria of the Act. In satisfaction of sections 3922(b)(1) and 3623(c)(1), no evidence has been presented indicating any adverse effect on competitors to either party to the Agreement. The arrangement can be expected to yield a net positive contribution and is thus favorable to the general public and business mail users, § 3622(b)(4); there is thus no question whether the arrangement bears the required attributable and reasonably allocated institutional costs, § 3622(b)(3). Given the expected financial value and negligible risk (if any), the arrangement is highly desirable from the point of view of both the user -- LLS -- and the Postal Service. § 3622(b)(5). The "simplicity of structure for the entire schedule and simple, identifiable relationships between rates and fees" is, quite simply, not applicable to NSAs. § 3322(b)(7). This NSA has either no or a *de minimus* effect on the value of the mail service or kinds of mail (§ 3622(b)(2) and § 3623(c)(2)), the importance of classifications with high degrees of reliability and speed of delivery (§ 3623(c)(3)), and the importance of classifications which do not require high degrees of reliability and speed of delivery (§ 3623(c)(4)). Current tariff rates remain available to all users of the mail; thus, this Agreement does not affect "the available alternative means of sending and receiving letters and other mail matter at reasonable costs[.]" § 3622(b)(5). The mail matter sent by LLS and received by the recipients is generally business related in nature. While part of LLS's mission is to educate the public concerning the use of vascular screenings for early detection of cardiovascular disease, this information is not sent via the classes of mail to which the “educational, cultural, scientific and informational” values are traditionally ascribed. § 3622(b)(8).

There is no basis to argue that the agreement provides an unreasonable preference to LLS, 39 U.S.C. ¶ 403(c), or would therefore cause “unreasonable harm” to the market place. The record indicates that Life Line Screening is unique among its competitors in its use of the mail as an important means of marketing. USPS-T-1 at 11. To the extent there are any similarly situated mailers, they will be able to take advantage of these discounts by entering functionally equivalent agreements with the Postal Service.

Finally, the Commission should resolve that final business judgments concerning the risks and benefits of this NSA are in the Postal Service’s hands. With the passage of the PAEA, Congress has effectively determined that the best interests of the general public lie with allowing the Postal Service to exercise its business judgment.

II. Recommendation of the LLS NSA Is In the Public Interest

A. The Record Evidence Presented Compels Favorable Recommendation of this NSA

The Postal Service and LLS have met their burden of coming forward with record evidence to support the legality of this NSA. The burden of rebutting this demonstration therefore falls upon those who may oppose it.

Absolutely no evidence has been introduced into the record that discredits or rebuts this NSA. Moreover, no party has introduced evidence casting doubt on the reliability of the proponents’ testimony. Mr. Greenberg presents reliable historic volume data. This data forms the basis of his reliable before- and after-rates forecasts of the company’s volumes. He also provides an adequate description of the multiplier effect.

As the Commission knows well, it is bound by the record before it, and, as further described below, the record in this case establishes the high probability that this NSA will benefit the Postal Service (and, therefore, all users), as well as LLS. Therefore, the Commission should not allow itself to be swayed by worries about theoretical economic risks. These risks have been reasonably controlled for by incorporating firm terms and conditions in the agreement, including the thirty day termination provision, through which the Postal Service can stem any financial loss that might arise well before it becomes significant.

B. The NSA Is Overwhelmingly Likely To Have A Favorable Financial Impact On The Postal Service

The evidence in this case establishes that (1) this NSA will cause LLS to send more promotional letter mail, thereby providing financial benefits to the Postal Service, and (2) any risks to the Postal Service and other users of the postal system from this deal are negligible.

Witness Greenberg sets forth indisputable historic volumes figures; they have been fully reconciled with the Postal Service's volumes. In this case, the historic figures do not illustrate a downward trendline. Rather, Mr. Greenberg explains the operation of key factors that have driven the company's historic growth (and the accompanying growth in mail volumes), and why, regardless of whether the company continues to grow, Mr. Greenberg anticipates that LLS's annual mail volumes can be expected to decline and then flat line in the absence of an NSA beginning in FY 2008.

With regard to the key factors that have driven the company's historic growth, Witness Greenberg explains, first, that as the company has grown from an Ohio-based organization to one with national coverage, LLS has deployed additional ultrasound teams, expanding its territorial coverage around the country. As the company deploys these additional teams, the teams are capable of working a set number of additional screening events per month, offering limited screening capacity at each event. *See* LLS-T-1 at 2, 7. Additional marketing was required to inform customers of the availability of LLS's screening services and fill the limited screening capacity at each event. LLS-T-1 at 2-3, 7.

Another factor Witness Greenberg describes as driving corporate growth is the company's development of new marketing channels, including using web-based marketing, e-mail, radio, and other channels both for prospecting to new customers, and soliciting repeat customers. LLS-T-1 at 4.

As an experienced expert in the direct marketing business, Witness Greenberg projects a before-NSA decline in mail volumes. Known circumstances with respect to the above described factors, combined with increases in postage costs, heavily influence Witness Greenberg's forecasts of declining mail volumes beginning in FY2008, in the absence of an NSA. After three to four years during which the Postal Service enjoyed double digit increases in LLS mail volumes, Witness Greenberg anticipates a roughly six percent decline in mail volumes in FY2008.

Without plans to add domestic ultrasound teams, there is expected to be no growth in the number of screening events. An ultrasound team can hold a fixed number of screening events in a given month, and each screening event has limited screening capacity. LLS-T-1 at 2. Even if direct mail was consistently the communications medium of choice, only so much mail would be needed to reach full screening capacity.

When the case was filed in early August, Mr. Greenberg reported that national coverage had been achieved (with eighty-seven teams), and that ultrasound team growth would no longer be a major driver of direct mail growth. LLS-T-1 at 2-3. Indeed, as of the end of August, he reported only eighty-six ultrasound teams, Tr. 2/27 (OCA/LLS-T1-8(b), and in October he again confirmed that the company had no plans for new U.S. ultrasound teams. Tr. 2/13 (APWU/LLS-T1-1(c).). Thus, a major factor which has yielded historic increases in mail volumes will no longer be driving such increases.

Second, LLS manages a portfolio of marketing channels to communicate with potential and existing customers, and Witness Greenberg describes how decisions are made that can lead to more or less direct mail. LLS-T-1 at 6-7. LLS's customer are typically aging baby boomers and senior citizens. LLS-T-1 at 3. As the population ages, electronic communications will carry a higher ROI than it now does, LLS-T-1 at 9, making it more competitive with direct mail. An NSA discount would improve the ROI of direct mail campaigns, helping direct mail better compete for marketing dollars. See LLS-T-1 at 4 and 9. While the company's development of new marketing channels may well have driven corporate growth, its development of these channels, combined with the changing customer demographics, is reasonably likely to decrease mail volumes.

Witness Greenberg further observes that changes in postage costs can have significant impact on mail volume, decreasing even the volume of mail sent per screening event. It is evident from how the company manages its marketing portfolio that increases in postage costs will result in the company electing to mail less, while the discounts contemplated by this NSA will increase mail volume.

Witness Greenberg also acknowledges that changes in response rates, and growth in affinity partners may influence mail volume. Recognizing and weighing these factors, he offers his best estimate of the company's before- NSA volumes. LLS-T-1 at 9-10.

Ms. Yorgey's independent review of the market environment and population demographics suggests that Life Line's business is or should be growing. USPS-T-1 at 8. The Postal Service recognizes, however, that business growth does not necessarily equate with growth in mail volumes. In proposing this NSA, the Postal Service has responded to the marketplace, taking preventative action with regard to a currently mail-dependent business, and attempting to reverse its anticipated migration away from direct mail by offering incentives that keep direct mail competitive with other forms of communication with potential customers. The Commission should not require the Postal Service to lose mail volume before addressing foreseen circumstances. With the proposed incentives, Witness Greenberg anticipates modest growth in mail volumes (in lieu of a decline). LLS-T-1 at 10.

The Postal Service estimates it will benefit by $6.3 million in new contribution over the life of the Negotiated Service Agreement, while the value of the total incremental discounts is projected to be $.9 million, yielding a net financial benefit to the Postal Service of $5.4 million. There is no discount exposure. Ms. Yorgey's methodology is analogous to that which the Commission reviewed in the Bookspan deal, which was recommended to the Governors. There is no record evidence contesting the validity of this analysis.

As Ms. Yorgey explains, forecasts are by definition estimates. She therefore performed a sensitivity analysis of the volume forecasts for Year 1 of the Agreement.

USPS-T-1 at 10 and App. C. Her analysis illustrates the financial gains or losses to the Postal Service if the before-NSA volumes were severely over- or under-estimated. She concludes that a net loss to the Postal Service could occur only under “extreme mis-estimation or erroneous assumptions.” USPS-T-1 at 10. This analysis and conclusion does not take into account the fact that the Postal Service’s judicious exercise of its unconditional termination options would shield the Postal Service from unfavorable results. *Id.* Under any plausible scenario, the NSA will yield a net gain in contribution to the Postal Service.

In the Bookspan case, the Commission found the multiplier effect of incentive mail an additional justification for the NSA. Therefore, Witness Greenberg describes the nature of the “multiplier effect” with respect to LLS solicitations. He explains that a customer who participates in an LLS screening event (an “existing customer” – in other words, a customer that was successfully acquired as a result of the company’s marketing efforts) receives further mail correspondence from LLS, including screening results (by First-Class mail), a thank you letter, one or two new product offerings, and three additional solicitations to repeat preventive health screenings (by Standard Mail). Thus, the multiplier effect of a newly acquired customer is at least one First-Class mail piece, and five or six Standard mailpieces.

C. The Terms Of The Agreement Adequately Protect The Postal Service From Any Financial Exposure

The incentives of this agreement will encourage LLS to mail additional Standard Mail solicitation letters, generating increased volume which is expected to provide a net benefit to postal finances over the three-year period of the NSA of $5.4 million. USPS-T-1 at 6.

LLS is required to mail a specified volume commitment in each year before it is eligible for discounts. In the first year of the agreement, LLS must send 95 million letters in order to obtain a discount on any mail. Absent the discount, LLS expects to mail 90,000,000 letters in FY2008. LLS-T-1 at 10. The first-year commitments are thus set at 6% above LLS's before-rates volume forecasts.

Furthermore, the agreement incorporates adjustment mechanisms and termination provisions which protect the Postal Service against any potential forecast error.

An adjustment mechanism for the volume commitments in Years 2 and 3 mitigates the risks associated with any potential forecasting error. USPS-T-1 at 5. As Ms. Yorgey explains, the volume commitments in Years 2 and 3 of the agreement may adjust up or down depending on the actual volumes mailed in the preceding agreement year. The agreement also incorporates an adjustment mechanism designed to address circumstances of an acquisition or merger that increases the LLS's Standard Mail volumes. *Request*, Att. F at 4.

The termination provisions address unforeseen circumstances. First, the agreement provides the parties with unconditional rights of cancellation with thirty-days notice. *Request*, Att. F at 9; USPS-T-1 at 7. Thus, if unforeseen circumstances arise that may cause this agreement to become unprofitable, or even just less favorable to the Postal Service than not having the agreement, the Postal Service may terminate the agreement with thirty-days notice.

Second, the agreement terminates automatically, and all discounts cease to be earned if LLS volumes exceed 10 million pieces above the maximum (adjusted) volume of letters in the top volume blocks. *Request*, Att. F at 7-8; USPS-T-1 at 6. While the provision also operates as a cap on the potential financial benefits that can accrue to both parties under the agreement, it protects the Postal Service from the risk of changed circumstances. *Opinion and Recommended Decision, Rate and Service Changes to Implement Baseline Negotiated Services Agreement with Bookspan*, PRC Docket No. MC2005-3 (May 10, 2006), ¶ 4028.

Finally, the NSA addresses the unlikely circumstance that LLS may not enter enough solicitation mail during the first year of the agreement to substantially cover the Postal Service's transaction costs. To protect the Postal Service from this scenario, the NSA includes a penalty clause: if LLS does not mail at least 75,000,000 million eligible Standard Mail letters during the first year of the Agreement, it is required to pay the Postal Service $200,000. *Request*, Att. F at 2 (¶II.A). This figure operates in the Agreement as a proxy to cover Postal Service transaction costs, and has not been challenged by any party.

These several aspects of the agreement (the volume commitments, adjustment mechanisms, termination provisions, and the penalty clause) are analogous to provisions in the Bookspan NSA, and operate here, as they did in Bookspan, to virtually eliminate any forecast exposure that otherwise might have encumbered the Postal Service's reliance on the company's before- and after-rate forecasts.

In sum, the Postal Service has reasonably concluded that it will receive substantial economic benefit from the LLS NSA, and the Postal Service is taking virtually no risk in that, if economic benefit is not realized, the Postal Service can choose to terminate the agreement at any time.

CONCLUSION

For the reasons provided above, the Commission should recommend the adoption of the proposed NSA and implementing DMCS rate schedules.

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