

DISSENTING OPINION OF COMMISSIONER GOLDWAY

I am not joining with my fellow Commissioners in favorably recommending that the Postal Service proceed with implementing the Bookspan Negotiated Service Agreement. The majority opinion does include a thoughtful explication of several of the problems that I enumerate below. Unfortunately, I believe those problems and others are of such significance that approval is simply not appropriate under the provisions of Title 39. Further, I am concerned that the Commission's Decision sends confusing signals to the Postal Service and its potential Negotiated Service Agreement partners jeopardizing future agreements.

First, all previous Negotiated Service Agreements, as recommended, protected mailers not party to the Agreement from having to make up contributions lost from unintentionally paying discounts on mail that otherwise would have been mailed at the established rate. The Bookspan Decision provides too little protection.

Second, the Commission's Negotiated Service Agreement rules require rigorous evidentiary presentations for new baseline cases. This allows functionally equivalent requests to be handled more expeditiously. The Commission was encouraged by the Declaration of Michael K. Plunkett presented on reconsideration in the Bank One case that the Postal Service was developing independent tests of mailer-supplied volume estimates. The Postal Service's presentation in Bookspan does not approach the example set in Mr. Plunkett's Declaration. The Commission should be more forceful in signaling the Postal Service to provide more support for and be more forthcoming in its baseline Negotiated Service Agreement requests.

Finally, the Postal Service should be aware of the chilling effect that just one failed Negotiated Service Agreement could have on the entire Negotiated Service Agreement program. I would like the Postal Service to be successful in its Negotiated Service Agreement endeavors. Thus, I believe that the Postal Service needs to place more emphasis on due diligence, and should share the results of these efforts with the Commission when presenting its Negotiated Service Agreement requests.

The volume estimates presented on the record in this case suffer from infirmities similar to those present on the Capital One and Bank One Negotiated Service Agreement records. In those cases, as in the instant case, the Commission could not rely on the mailer-provided volume estimates. The Commission was unable to find that the Postal Service would not be made financially worse off by entering into this Agreement. And the Commission expressed concern that this created unreasonable risk, and that the burden of recovering from this risk would unfairly fall largely on captive monopoly mailers not party to the Agreement. Fortunately, the Capital One and Bank One agreements included cost savings features that could be employed (in the form of stop-loss caps) to counterbalance the risks associated with unreliable volume estimates. This permitted the Commission to issue favorable recommendations. The Bookspan agreement, however, does not offer a comparable method to protect mailers not party to the Agreement. Therefore, I believe this Agreement does not meet one of the essential obligations which the Commission must require of the Postal Service. I cannot and do not recommend that the Postal Service proceed with the Agreement.

The Commission relies heavily on the “multiplier effect” to tip its decision in favor of recommending that the Postal Service proceed with the Agreement. While I do not dispute that Bookspan may exhibit a multiplier effect, the nebulous characterization of the Bookspan multiplier effect presented on the record does not allow me to accord this factor much weight.

First, the economic impact of the multiplier effect is not quantified. Without quantification, it is not possible to determine to what extent, if any, the multiplier effect counterbalances the risks associated with unreliable volume estimates. Second, there is no requirement that Bookspan continue to utilize the Postal Service for its fulfillments. Thus, a substantial component of the multiplier effect could evaporate if Bookspan so chooses. Finally, because the multiplier effect is not relied on by the Postal Service in evaluating the financial impact of the Agreement, and the rationale for limiting functionally equivalent agreements as described in the Domestic Mail Classification

Schedule is not adequately explained, potential similarly situated mailers attempting to obtain comparable agreements may find the application of the multiplier effect requirement arbitrary, and possibly discriminatory in effect.

The Commission also relies heavily on the contract provision which allows the Postal Service to terminate the Agreement with 30 days' notice. The ability to terminate without cause provides the Postal Service with an important safety valve, which offers protection from unexpected results. However, it does little to add protection from the risks identified from unreliable volume estimates. The termination provision assumes that the Postal Service sufficiently monitors the progress of the Agreement, and that the metrics exist to decide when to exercise this provision. Without reliable before-rates volume estimates, the Postal Service lacks the critical information needed as a starting point to evaluate whether or not the Agreement is progressing as planned. The Postal Service may not be able to determine, even after the fact, the point at which the Agreement becomes no longer beneficial.¹ If the Postal Service can not determine this turning point, it can not determine when to exercise the termination provision. Further, the contract provision is not implemented automatically. This allows freedom for an agreement to continue, whether or not it remains beneficial.

Several participants, American Postal Workers Union, AFL-CIO; Newspaper Association of America; National Newspaper Association; Office of the Consumer Advocate; Valpak Direct Marketing Systems, Inc.; and Valpak Dealers' Association, Inc., oppose the implementation of the Bookspan agreement. Arguments were presented questioning the validity of the volume estimates, the use of system-wide versus mailer-specific data, the sufficiency of the cost data, the basis of the multiplier effect, and the absence of a requirement in regard to conversion of solicitation flats to letters. To the extent that each argument is valid, the concerns raised by this group of intervenors

¹ Without mailer-specific inputs, the Panzar test referenced in the Commission's Decision only provides an indication of where the Agreement turns unbeneficial.

further weigh in favor of not recommending that the Postal Service proceed with the Bookspan agreement.



Ruth Y. Goldway, Commissioner