

PRESIDING OFFICER'S  
RULING NO. N2009-1/17

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Station and Branch Optimization and  
Consolidation Initiative, 2009

Docket No. N2009-1

PRESIDING OFFICER'S RULING  
CONCERNING NATIONAL LEAGUE OF POSTMASTERS INITIAL BRIEF

(Issued December 10, 2009)

A Motion of the National League of Postmasters for Late Acceptance of Brief was filed on December 3, 2009 (Motion). The Initial Brief of the National League of Postmasters (Brief) was filed at the same time. Within the Brief, the National League of Postmasters (League) requests that the Commission take judicial notice of the testimony that Mark Strong presented on behalf of the League on July 30, 2009 before the House Subcommittee on the Federal Workforce, Postal Service & the District of Columbia, and the testimony of Charles Mapa presented before the Commission on July 10, 2008. A copy of the Strong testimony is attached to the Brief.

On December 4, 2009, the Postal Service filed an opposition to the Motion and a request to strike portions of the Brief "to the extent that it includes, incorporates or references what amounts to rebuttal testimony heretofore not submitted to the Commission in accordance with the procedural schedule established for this docket."<sup>1</sup> Postal Service Motion at 1. Specifically, the Postal Service requests that the motion for

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<sup>1</sup> Motion of the United States Postal Service in Opposition to the Motion for Late Acceptance and the Late Filing of Rebuttal Testimony by the National League of Postmasters, December 4, 2009 (Postal Service Motion).

late acceptance not be granted until such time as the League withdraws the Brief and submits a version with the offending material removed. *Id.* at 3.

The League filed a response to the Postal Service Motion on December 7, 2009.<sup>2</sup> The League asserts that the purpose of its requests for judicial notice are intended to suggest to the Commission that (1) the League has certain concerns about the consolidation initiative, (2) that the League has expressed these concerns in “legislative” hearings, and (3) the Commission should know of the concerns without necessarily accepting any factual predicates of those concerns as proved on the record. Response at 3 and 5.

The League also attempts to distinguish between “judicial notice” and “official notice” and between “adjudicative facts” and “legislative facts.” It argues that “requesting the Commission to notice these two pieces of testimony does not necessarily mean that the Commission need accept any factual predicate in either piece as being ‘true.’” Response at 2. It contends that “the Commission is more than capable of weighing the validity of the testimony and distinguishing that any fact presented therein is not a matter ‘proven’ through the adjudicatory process.” *Id.* at 5; *see also id.* at 2.

*Analysis.* Commission rule 31(j) governs official notice of facts.

Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter peculiarly within the general knowledge of the Commission as an expert body: *Provided*, That any participant shall, on timely request, be afforded an opportunity to show the contrary.

Black’s Law Dictionary (8<sup>th</sup> ed. 2004) in part defines judicial notice as “[a] court’s acceptance, for purposes of convenience and without requiring a party’s proof, of a

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<sup>2</sup> Response of the National League of Postmasters to the Postal Service Motion in Opposition to the League’s Motion for Late Acceptance and the Late Filing of the League’s Brief, December 7, 2009 (Response).

well-known and indisputable fact; the court's power to accept such a fact <the trial court took judicial notice of the fact that water freezes at 32 degrees Fahrenheit>.”

In addition, rule 31(e) governing designation of evidence from other Commission dockets establishes a deadline for submitting requests for designations of at least 28 days before the date for filing a participant's direct case. This rule may apply to the Mapa testimony.

The deadline for submitting rebuttal testimony in this docket was October 21, 2009. Two parties filed rebuttal testimony. Discovery was allowed concerning this material, and an opportunity for oral cross-examination was provided at a November 18, 2009 hearing. These procedures afforded participants with substantial adversarial due process rights to probe the contents of proffered rebuttal testimony.

The time for entering new testimony has passed as this proceeding is now in the final reply brief stage. At this late date, the League, via a brief, requests that the Commission take judicial notice of what in essence is two new pieces of testimony. There is no explanation as to why this testimony could not have been presented in a timely fashion, or why it should be accepted at this time. There no longer is the opportunity for opposing parties to be “afforded an opportunity to show the contrary” as required by rule 31(j). As to the Mapa testimony, it certainly has not been filed at least 28 days before the date for filing any participant's direct case as required by rule 31(e).

The League's argument that the Commission is capable of weighing the validity of the testimony is not persuasive. Although the Commission may be capable of undertaking this task, it will not do so without allowing participants the due process opportunity to express opposing views.

The connotation of official or judicial notice does not resolve this matter. The League asserts that it is not requesting judicial notice of the facts that may appear in the testimonies it wishes to place before the Commission, but only of the fact that the League has made similar assertions to other legislative-type bodies. That could simply have been done by explaining its position on brief, and citing to other occurrences of where it had previously made the same point.

The Motion to accept the Brief one day late is granted. However, all references to the Strong and Mapa testimonies shall merely be treated as citations to support the proposition that the League previously has made statements consistent with the positions it espouses in its Brief. Judicial notice will not be taken of either testimony, nor will the content of either testimony be considered in this proceeding.

#### RULING

1. The Motion of the National League of Postmasters for Late Acceptance of Brief, filed December 3, 2009, is granted consistent with the body of this ruling.
2. The Motion of the United States Postal Service in Opposition to the Motion for Late Acceptance and the Late Filing of Rebuttal Testimony by the National League of Postmasters, filed December 4, 2009, is granted consistent with the body of this ruling.

Ruth Y. Goldway  
Presiding Officer