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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

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

Complaint of the Continuity Shippers Association	)	Docket No. C99-4

AMMA BRIEF AND OPPOSITION TO MOTION TO DISMISS

The Advertising Mail Marketing Association ("AMMA") submits this brief as permitted by the Commission's Order No. 1265. Because the AMMA position on the merits of the case very substantially overlaps the reasons for denying the Motion to Dismiss that has been filed by the Postal Service, we have combined our position on that motion with our position on the merits.

The Postal Service has again moved to dismiss the complaint filed for the Continuity Shippers Association (respectively, the CSA Complaint and CSA). The basis for the Postal Service's position is the contention that CSA has not created a record sufficient to permit the Commission to adjudicate the claim that BPRS rates are too high and the request that, in the interval between Commission action on the CSA complaint and its adjudication of the next omnibus rate case, a lower rate be imposed.[1] It is true enough that the CSA presentation does not follow the standard model of record building in complaint adjudications. CSA has not, for example, presented any testimonial evidence. CSA has, however, in reliance on evidence available from other Commission proceedings, easily verifiable facts of which the Commission

[1] CSA requests a rate of $1.48. Using reasoning that is only slightly different, AMMA, through this submission, supports a rate of $1.47.

can take official notice and earlier Commission decisions made all of the record necessary for an adjudication of its claims. The Postal Service's Motion to Dismiss should be denied and the relief requested by CSA (or something very like it) granted.

Although not framed expressly in these terms, CSA has requested a summary adjudication of its claims on the basis of this record. This is an entirely valid approach. As one court put it after noting that summary judgment is in some ways a more important tool for administrative bodies than courts:

> Administrative summary judgment is not only widely accepted, but also intrinsically valid. An agency's choice of such a procedural device is deserving of deference under "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544, 98 S.Ct. 1197, 1212, 55 L.Ed.2d 460 (1978).

Puerto Rico Aqueduct & Sewer Authority v. U.S. EPA, 35 F.3d 600, 606 (1st Cir. 1994).[2] This case illustrates very well the appropriateness of summary judgment in the administrative environment. It proposes an interim rate pending full adjudication of a longer lived rate in an omnibus rate case where the scrutiny of costs and coverage advocated by the OCA in its October 1 filing in the proceeding will be undertaken. If it is clear, as we believe that it is, that some relief is immediately appropriate for BPRS mailers, a full-blown proceeding at this point will almost certainly preclude the timely accomplishment of rate relief and would be terribly inefficient. So long as the Commission is able to find a basis for interim relief on facts that are substantially uncontested or uncontestable, quick relief through summary judgment adjudication makes infinitely good sense.

[2] Although the PRCs rule concerning summary adjudication may be a bit more cursory than those of some of the agencies cited by this court, such procedures are contemplated: "All motions to dismiss proceedings or other motions which involve a final determination of the proceeding shall be addressed to the Commission." Section 21, rules of practice.

We believe that that basis is available here. The Postal Service, as part of its settlement obligations under the Revised Stipulation and Agreement approved by the Commission in MC97-4, undertook a special study to determine the costs of the new BPRS offering. The Postal Service reported (after revisions) a BPRS attributable cost per piece of $1.04, a full 8 cents less than the unstudied cost estimate informing settlement negotiations in MC97-4. That is a substantial difference and means that, since implementation of MC97-4, BPRS mailers have been paying substantially more than they should have for the service. CSA and AMMA have agreed to accept, for the purpose of this proceeding only, the attributable costs reported in the Postal Service BPRS study, as revised.

This satisfies the better part of the first step of the "Rate Commission's two-tier approach to rate setting . . ." National Association of Greeting Card Publishers v. USPS, 462 U.S. 810, 823 (1983). It establishes an attributable cost base. Although the study has not been admitted into evidence in this proceeding, as CSA quite correctly points out there is no impediment to its admittance. See Continuity Shippers Association Opposition To Postal Service's Renewed Motion To Dismiss (CSA Opposition), 2. No party has indicated an inclination to cross-examine the study and therefore no sponsoring witness is necessary. The study is an accepted and acceptable starting point for determining attributable costs.

As CSA also correctly notes, id., methodological rigor probably requires that the BPRS study's costs be rolled forward to the year in which they will take effect, calendar 2000. CSA invokes one of the measures of changes in the consumer price index regularly published by the Bureau of Labor Standards. That number is not technically in evidence either but it is a fact that is "not subject to reasonable dispute and . . . [is] easily

verified" of the kind of which agencies regularly take what is variously called administrative or official notice. Llana-Castellon v. INS, 16 F.3rd 1093, 1097 (10th Cir. 1994).

There is only one condition to the evidentiary integrity of facts integrated into the record through official notice. Parties to a proceeding must be given an opportunity to contest the accuracy of the facts of which notice was taken and the appropriateness of any inferences drawn from those facts:

> Section 556(e)'s assurance that parties must have "an opportunity to show the contrary" encompasses a chance not only to dispute the facts noticed but also to "parry [their] effect," i.e., to offer evidence or analysis contesting the Commission's inferences. The Attorney General's Report on the APA confirms this reading, saying that the section entitles parties "not only to refute but, what in this situation is usually more important, to supplement, explain, and give different perspectives to the facts upon which the agency relies." *Attorney General's Report* at 72. See also *Administrative Procedure Act: Legislative History* 32 (1946) (adopting approach of the Attorney General's Report on official notice issue).

Union Electric Co. v. F.E.R.C., 890 F.2d 1193, 1203 (D.C. Cir. 1989). The statutory reference is to the Administrative Procedure Act, 5 U.S.C. § 556(e), which makes express provision for official notice. In the Union Electric case, the court had no difficulty at all with F.E.R.C.'s official notice of Treasury interest rates, but faulted the agency for not allowing the regulated utility an adequate hearing on its attack on the inferences that the Commission sought to draw from the T-Bill rates. Here, the Postal Service has been given (and has declined) the opportunity to present evidence challenging the accuracy of the CPI-U numbers presented by CSA, and to argue that even if those numbers are

accurate, they are an inappropriate gauge of the roll forward effect. The opportunity to be heard on officially noticed matter has been fully accorded to the Postal Service. As the Postal Service declined the opportunity to present objections to CSA's proposed use of the CPI-U, it cannot erect evidentiary barriers to that use. For the purposes of an interim rate proceeding such as this one, CPI-U is a close enough proxy for more complexly calculated roll forward inflators.

This takes one to the second tier of the Commission's ratemaking analysis, the assignment of institutional costs by creating an attributable cost coverage factor. There is a judically created exception to the Section 556(e) right to contest officially noticed facts. The courts have created special rules for an agency's official notice of facts found or conclusions reached in a prior proceeding. The rule is a participant in the proceeding has no right to challenge such conclusions in a later proceeding. Once thoroughly litigated, the facts found and the conclusions drawn from them an earlier case can be re-applied as relevant in subsequent cases without providing the Section 556(e) "opportunity to show the contrary". NLRB v. Harrah's Club, 403 F.2d 865, 872-73 (9th Cir. 1968). The Supreme Court discussed the merger of the records in two separate proceedings before an administrative agency in the following terms:

> It is true that ordinarily an administrative agency will act appropriately, in a proceeding of this sort, upon the record presented and such matters as properly may receive its attention through "official notice." It is also true that this Court, in appropriate instances, has limited the use of the latter implement in order to assure that the parties will not be deprived of a fair hearing. . . . But in doing so it has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact

> determinations, even more rigidly than the courts in strictly judicial proceedings. On the contrary, in the one case as in the other, the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result.

United States v. Pearce Auto Freight Lines, 327 U.S. 515, 529-30 (1946) (footnotes and citations omitted). See also, S.D. Public Utilities Commission v. F.E.R.C., 643 F.2d 504, 515 (absent showing of substantial prejudice, merger of administrative records from two cases permissible).

In R97-1 the issue of the proper coverage for Regular Standard A mail was thoroughly litigated and thoughtfully determined by the Commission. The record established in that proceeding is more than adequate for applying the coverage found appropriate there to the BPRS pieces here. The mail is Standard A mail, after all. If anything, an application of Section 3622 factors (b) (2) – value of service – and (b) (5) - alternative means – illustrate that a mail piece has greater value to both the sender and the recipient on its Standard A outward bound leg than on its BPRS return leg. From the vantage of the recipient this is clear; the recipient has determined that it does not want to retain the merchandise when it commits a piece to BPRS handling. The same is true in a somewhat more subtle way for the merchandise mailer. On the outbound Standard A leg, the Postal Service is being used to consummate a transaction that, at least in design, will result in profit to the mailer. The return leg represents a sales transaction that has foundered. Using BPRS to reclaim the remnants of a failed transaction is not unimportant to the mailer. But surely the value of the mail on the return portion of its round trip is of less value than the service which holds out a prospect of profit.

The record in our R97-1 ably supports the conclusion that the Standard A mail piece that returns through BPRS should bear the same 135% coverage as it bore on the outbound leg, at most. Applying that factor to the $1.09 calculated by CSA to represent the CPI-U roll forward cost from the BPRS study yields a rate of $1.47. That may not be exactly the right rate for BPRS, the rate that the Commission will find appropriate after deeper examination of the issues in the next omnibus rate case. However, but it is a rate that is demonstrably fair based on cost numbers that the Postal Service cannot dispute (because they came from the Postal Service) with a cost coverage found by the Commission as appropriate to mail in this category. It is certainly a fair enough rate to provide some relief for BPRS mailers in the context of a summary judgment proceeding designed to have only interim life.

Respectfully submitted,

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October 20, 1999

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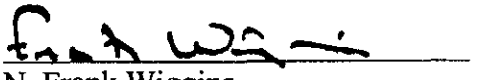
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.



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