

**BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON DC 20268-0001**

Rate and Service Changes To Implement)
Functionally Equivalent Negotiated Service) Docket No. MC2004-3
Agreement with Bank One Corporation)

**PETITION OF J.P. MORGAN CHASE & CO.
TO REOPEN RECORD
(September 14, 2005)**

J.P. Morgan Chase & Co. ("Chase")¹ respectfully petitions the Commission to reconsider Order No. 1443, *Order Establishing Procedural Framework for Reconsideration* (issued Aug. 23, 2005), to the extent that it disallows the filing of any supplemental testimony in this case by the NSA proponents. *Id.* at 4, 6-9.

INTRODUCTION AND SUMMARY

Chase submits this pleading from the perspective of a stakeholder that seems to have been overlooked in the recent proceedings in this case: the customer who actually pays the postage.

Chase is not a regulated utility with a statutory monopoly franchise. The company lives in the real world of competitive markets, where postage and litigation expenses are costs of doing business that come out of shareholders' pockets, not recoverable elements of a regulated revenue requirement. To a customer like Chase,

¹ Bank One Corporation, the original party in this case, merged with J.P. Morgan Chase & Co. on July 1, 2004. Beginning with this pleading, the company will refer to itself by the name of the successor firm. We refer to the pre-merger J.P. Morgan Chase entity "heritage-Chase".

which normally operates outside the postal regulatory arena, the Commission's handling of this case has been mystifying and disheartening.

At the outset of this case, the pathway to regulatory approval of a *Capital One*-like NSA appeared straightforward. Under Rule 196, an NSA of this kind appeared eligible for streamlined review as a “functionally equivalent” NSA if the proposed terms included (1) an “address correction element” and (2) a “declining-block rate element,” and if (3) the net financial effect of the NSA appeared likely to be positive. Order No. 1391 at 47; MC2002-2 Op. & Rec. Decis. ¶¶ 7020-21 (functionally equivalent NSA need not generate as large a net financial benefit as the baseline NSA). As to the latter element, the Commission had stated that the necessary proof of positive financial impact would be comparable to the safeguards used by private businesses to make sure that their own discount contracts are likely to be profitable—a test that the Commission had described as “minimal”:

Many if not all private sector businesses try to assure themselves that they will not lose substantial amounts of money over the course of a contract they are negotiating. *The Postal Service should be able to develop NSAs that meet that minimal test.*

MC2002 Op. & Rec. Decis. ¶ 8023 (emphasis added). The Commission also made clear that the analysis of financial impact entailed an assessment of the financial risks of capping the proposed discounts, *id.*, ¶¶ 8021-22, as well as well as the risks of leaving them uncapped, *id.*, ¶¶ 5086-5112, 8013-8020.

Chase, relying on these pronouncements, invested the substantial time and resources needed to negotiate an uncapped NSA and develop the testimony, exhibits, workpapers, and discovery responses apparently required by the Commission's standards. Chase also commissioned an economic study to show that capping the

NSA discounts would choke off the incentives for Chase to increase its First-Class Mail volume, and thus was likely to reduce the net expected contribution to the USPS from the NSA by millions of dollars.

At the close of the record in October 2004,² Chase believed that it had satisfied the existing standards for a Capital One-like NSA. So, apparently, did every other participant. The uncapped NSA proposal was ultimately supported by an unopposed (and near-unanimous) Stipulation and Agreement among the other participants. The settling participants represented a cross-section of the interests that would be harmed if the USPS were awarding excessive discounts to large First-Class mailers like Chase: ordinary consumers, business users of other classes of mail, and postal labor. And several of the participants were businesses, or trade associations of businesses, having extensive experience with the negotiation of price discounts in contracts.

The Commission's Recommended Decision of December 17, 2004, two months after the close of the record, unveiled a far more onerous and restrictive standard of review than the Commission had stated in *Capital One*. The differences began with the basic conceptual framework: rather than balancing the financial risk of uncapped discounts against the financial risk of a cap, the Commission held that the latter was irrelevant, and that the risks of uncapped discounts should be assessed in isolation. This one-sided definition of relevant risk led in turn to a disproportionate concern with the accuracy of the Before Rates projections. Rather than the standard of proof prescribed under the Administrative Procedure Act, the preponderance of the

² See Presiding Officer's Ruling No. MC2004-3/7 (Oct. 21, 2004) (closing record).

evidence,³ the Commission effectively demanded that the NSA proponents prove that the NSA would be profitable beyond a reasonable doubt—or even beyond a hypothetical doubt. The Commission’s finding that the financial effect of the uncapped discounts was too uncertain, and the resulting financial risk thus disqualified the NSA for consideration as functionally equivalent to the Capital One NSA, unsurprisingly followed. The cost savings cap—imposed solely on the Commission’s initiative, and over the express opposition of the co-proponents, OCA, Valpak and the other settling parties—was the ultimate result.

The Governors of the Postal Service voted to implement the Recommended Decision under protest and remand the case for reconsideration. The Postal Service then lodged supplemental testimony aimed at meeting the Commission’s newly-announced risk standards. In Order No. 1443, however, the Commission declined to reopen the evidentiary record. There “has been no showing,” the Commission stated, “that the material could not have been entered during the litigation of this docket.” *Id.* at 8. The Commission also declined to give Chase and other participants any opportunity to comment on the appropriate procedures for reopening, as the Postal Service had requested.⁴ Instead, the Commission ruled that (1) it would accept no further company-specific factual evidence bearing on the risk issue in this docket, and (2) would instead devote its limited resources to an industry rulemaking to develop policies and standards of general applicability for *future* NSA cases. Order No. 1443 at 3-5, 8-9.

³ The degree of proof required to carry the burden of persuasion in an on-the-record adjudication under 5 U.S.C. §§ 556 and 557 is the preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981).

⁴ USPS Motion for Leave to File Memorandum on Reconsideration and for Proposed Procedures (filed March 7, 2005) at 2-4.

Reopening the record is required by the standards for reopening spelled out by the Commission itself in Order No. 1443, as well as the basic norms of due process under the Administrative Procedure Act. The Commission recognized in Order No. 1443 that reopening is warranted where the proffered material is “directly on point” and its exclusion would result in “an injustice.” *Id.* at 8. Both of the categories of supplemental evidence proffered by Chase satisfy these elements: (1) the Plunkett supplemental testimony detailing the procedures and safeguards followed by the Postal Service to minimize the risk of paying discounts for volume that the mailer would enter anyway; and (2) data on actual Chase mail volumes.

First, the proffered testimony is “directly on point” with the Commission’s stated concerns that the USPS failed to take rigorous enough steps to verify Chase’s Before Rates volume estimates, and that the Chase/Bank One merger had injected unacceptable additional uncertainty into the actual Before Rates volume of the merged company. Second, exclusion of the testimony would clearly result in “an injustice.” Due process entitles the NSA proponents to notice of the Commission’s current standards for approval of uncapped discounts, and an opportunity to submit evidence responsive to the standards, *before* the Commission can lawfully decide whether the evidence submitted by the NSA proponents has satisfied the standards.⁵ Moreover, exclusion of the updated Chase volume data would be unjust for an additional reason: Chase could not have submitted those data before the close of the record because hold-separate

⁵ Pursuant to Order No. 1443, Chase will file comments on September 16 showing that the standards relied on by the Commission for capping the NSA discounts proposed in this case are arbitrarily and unlawfully restrictive. Unless and until the Commission abandons those standards, however, Chase and the USPS are entitled to an opportunity to submit evidence showing that the original discount proposal would satisfy even the Commission’s restrictive standards. Hence this separate petition.

restrictions on bank operations before regulatory approval of the merger denied access to the data.⁶

To avoid a notice problem, the Commission should have extended the proceeding to allow the NSA proponents an opportunity to submit supplemental testimony addressing the Commission's standards. Because the Commission did not provide this opportunity before closing the record, due process requires that the record be reopened. Moreover, due process requires reopening now—*before* the cumulative discounts received by Chase reach the Commission-imposed cap—not months or years later, after it is too late to make either NSA partner financially whole. At current volume trends, Chase could reach the Commission-imposed discount cap as early as May 2006—only one year into the three-year life of the NSA. By the time the contemplated rulemaking ended, and the Commission returned its attention to this case, any relief that the Commission might offer would come too late, for the Postal Reorganization Act does not authorize retroactive refunds. The discounts forgone by Chase, and the potential volume and contribution lost by the USPS, would never be recovered.

The Commission's concern that reopening the record would impose an undue burden on the Commission and other participants, particularly while Docket No. R2005-1 is still pending, has it backwards. Reopening this docket is likely to be the *least* time-consuming and burdensome way to resolve the issues raised by the Governors in this case. Scheduling conflicts can be avoided by staging the procedural deadlines appropriately. Moreover, the only person likely to seek discovery of the supplemental testimony proffered here is the Commission itself: all of the active participants in the case

⁶ These legal restrictions, and the difficulty in obtaining complete data immediately after the merger, constitute "an acceptable demonstration of why material could not have been initially presented during the course of the proceeding." Cf. Order No. 1443 at 8.

are signatories to the settlement agreement supporting the proposed rates. By contrast, the alternative of a notice-and-comment rulemaking, followed by a modification proceeding under Rule 198, would require the Commission to initiate and conclude two new proceedings, one of potentially industry wide scale and the other of unknown scope, to address a potentially far broader range of policy issues than the narrow factual issue of the adequacy of the data and analyses underlying the Postal Service's volume projections for a single mailer in a single NSA case.

Finally, the Commission's finding that the uncapped NSA proposal was not functionally equivalent to the Capital One NSA under Rule 196 cannot bar reopening of the record. The Commission's holding on this issue appears to have been premised on the Commission's finding that uncapped NSA discounts would be too risky for the Postal Service's finances. If the financial effect of the proposed NSA, including uncapped discounts, is likely to be positive, the factual predicate of the Commission's holding on functional equivalence collapses.⁷

Chase believes that the Commission is moving forward in good faith to fulfill the Commission's regulatory responsibilities while accommodating the Postal Service's need for contract rate discounts and other modern competitive tools in an increasingly challenging business environment. But the Commission's change of position in this

⁷ A finding of functional non-equivalence made *independently* of the financial risk of the uncapped discounts would improperly transform a procedural rule into a retroactive substantive standard. The Commission's asserted authority to rescind an initial finding of functional equivalence does not entitle the Commission to rescind such a finding without adequate notice. Moreover, Chase relied on the standards of functional equivalence set forth in Order No. 1391 in formulating its negotiation and litigation strategy, and relied on the Presiding Officer's finding of functional equivalence in pursuing the case to a final decision. That reliance, which was both reasonable and foreseeable, bars the Commission from invoking its belated finding of functional non-equivalence as a reason not to reopen the record on the issue of financial risk.

case has harmed a company that normally operates outside the postal regulatory arena. Having justifiably relied on the Commission's pronouncements, Chase now finds itself denied due process: Unless Chase has a timely opportunity to supplement the record, a profound injustice to Chase will result.

ARGUMENT

I. THE COMMISSION'S STANDARDS FOR REOPENING, AND BASIC NORMS OF DUE PROCESS, ENTITLE THE NSA PROPONENTS TO SUBMIT EVIDENCE RESPONSIVE TO THE RISK STANDARDS SPELLED OUT FOR THE FIRST TIME IN THE RECOMMENDED DECISION.

A. The Governing Legal Standards

As Order 1443 recognizes, reopening the record for additional evidence would be appropriate "if the material was *directly on point* and there would be an *injustice if the record were not reopened.*" Order No. 1443 at 8 (emphasis added).

The case law makes clear that the "injustice" can arise from several sources. One, as Order No. 1443 recognizes, is denial of an opportunity to submit relevant evidence that could not have been offered earlier because it did not exist, or was not within the knowledge or control of the party.⁸

Another, equally important, source of injustice is denial of advance notice and opportunity to be heard on the relevant legal and factual issues. Section 5(a) of the Administrative Procedure Act, 5 U.S.C. § 554(b), provides that "Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law

⁸ The alternative ground for reopening stated in Order No. 1443—"if there is an acceptable demonstration of why material could not have been initially presented during the course of the proceeding, and why it should be considered late in the proceeding" (Order No. 1443 at 8)—appears designed to accommodate this circumstance. Chase explains in section I.C, *infra*, why the material proffered here was unavailable to it earlier.

asserted.”⁹ The right to timely notice includes the right to advance notice of the positions asserted by a government tribunal:

The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise, the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

Morgan v. United States, 304 U.S. 1, 18-19 (1938); accord, *Newsweek, Inc. v. USPS*, 663 F.2d 1186, 1205 (2d Cir. 1981), *aff'd sub nom. National Ass'n of Greeting Cards Publishers v. USPS*, 462 U.S. 810 (1983); *Mail Order Ass'n of Am. v. USPS*, 2 F.3d 408, 427-430 (D.C. Cir. 1993) (“It was not until the January 4, 1991, recommended decision that the overlap theory [for city carrier cost attribution] sprang suddenly to life, emerging full-grown from the Commission’s collective brain.”).

The courts have repeatedly invoked these concepts to overturn agency action that relied on proof requirements of which the parties were not timely notified. See, e.g., *Hill v. FPC*, 335 F.2d 355, 358, 362 (5th Cir. 1964) (holding that the FPC denied natural gas producers a fair hearing by denying their proposed rate increase for failure to meet evidentiary standards not disclosed until the FPC decision itself); *Port Terminal R.R. Ass'n v. United States*, 551 F.2d 1336, 1342-43 (5th Cir. 1977) (overturning ICC decision rejecting proposed rate increases on the ground that the proponents had failed to submit cost data in compliance with a cost model not previously identified as mandatory); *Wyoming v. Alexander*, 971 F.2d 531, 542 (10th Cir. 1992) (holding that it was

⁹ 39 U.S.C. § 3624(a) applies this requirement to Commission rate and classification cases. *Mail Order Ass'n of Am. v. USPS*, 2 F.3d 408, 429 (D.C. Cir. 1993).

“*unreasonable* for [a regulatory commission] to fault the State for not responding to an issue that neither the auditors, the Assistant Secretary, nor the Agency ever raised”) (emphasis in original).

B. The Commission Failed To Give The NSA Proponents Advance Notice Of The More Stringent Risk Standards Underlying The December 2004 Recommended Decision.

The Commission’s unilateral decision to impose a cost-savings cap on discounts in this case rested largely on the Commission’s finding that uncapped discounts would create an unacceptable risk that the Postal Service would provide discounts for “anyhow” First-Class Mail volume—volume that Chase supposedly would enter even without the discounts. See Op. & Rec. Decis. ¶¶ 1010-1011, 6014, 6043, 6051-6077; Order No. 1443 at 1 & 3. In concluding that this possibility posed unacceptable financial risks to the Postal Service, the Commission went far beyond its stated grounds for imposing a cost-savings cap in the baseline Capital One NSA case. To demonstrate this fact, we summarize in turn (1) the risks standards set forth in *Capital One*; (2) the evidence submitted by the NSA proponents in this case in reliance on the *Capital One* risk standards; and (3) the more stringent risk standards that the Commission unveiled for the first time in the Recommended Decision in this case. The point of this discussion is not to challenge the soundness of these more stringent proof requirements—that is an issue to be raised at another time—but simply to demonstrate that these requirements are much more stringent than the requirements established in *Capital One*, and that the Commission failed to give advance notice of the change in standards before the close of the record.

1. The risk standards established by the Commission in *Capital One*

In *Capital One*, the Commission imposed a discount cap for the stated purpose of preventing a “large” loss in net revenue in case the USPS had “seriously underestimated” Capital One’s demand for First-Class presorted mail. MC2002-2 Op. & Rec. Decis. ¶¶ 1008, 5061-5073; MC2004-3 Op. & Rec. Decis. ¶ 6050. The Commission found, in particular, that the proponents’ estimates of Capital One’s Before Rates and After Rates volumes were simplistic, and that Capital One’s recent history of “rapidly increasing First Class mail volume” made historic volume data an unreliable proxy for projected Before Rates volumes. Hence, the Commission concluded, without a “stop-loss provision,” there would be no reasonable assurance that the USPS would not “lose money on this NSA.” MC2002-2 Op. & Rec. Decis. ¶¶ 1008, 5086-5112, 8013-8020.

Moreover, the *Capital One* standard was bilateral: the Commission found relevant both the potential financial risks of uncapped discounts, and the financial risks of a cap itself. Although the “stop-loss provision theoretically limits the benefits Capital One may enjoy as a result of this NSA,” the Commission found that this concern was of little practical significance, because the After Rates volumes projected by Capital One were unlikely to qualify it for enough discounts to reach the cap. *Id.* ¶¶ 8021-22.

The overall thrust of the risk standard gave considerable deference to the judgment of Postal Service management. The Commission explained that the due diligence it expected the USPS to undertake concerning the mailer’s Before Rates volumes was akin to the due diligence customarily undertaken by unregulated private businesses in negotiating long-term contracts. The Commission characterized this requirement as a “minimal test,” which the USPS “should be able to . . . meet”:

Many if not all private sector businesses try to assure themselves that they will not lose substantial amounts of

money over the course of a contract they are negotiating. The Postal Service should be able to develop NSAs that meet that minimal test.

Id. ¶ 8023. This deferential standard was consistent with the repeated court holdings that that Congress intended to vest in the Governors of the Postal Service considerable flexibility in managing the business affairs of the Postal Service. *Governors of the USPS v. PRC*, 654 F.2d 108, 114-15 (D.C. Cir. 1981); *Newsweek, supra*, 663 F.2d at 1203; *Time, Inc. v. USPS*, 710 F.2d 34, 37 (2d Cir. 1983).

2. The NSA Proponents' Reliance On The *Capital One* Risk Standards

Chase and the Postal Service relied upon the risk standards spelled out in *Capital One* in the course of their negotiations and in the development of their evidentiary record to support the NSA. The NSA proponents submitted evidence, in particular, that:

- The historical First-Class Mail volumes of the pre-merger Bank One, during the years preceding the NSA test year, were far more stable than those of Capital One. Bank One Br. (Oct. 8, 2004) at 14-15 (citing record).
- The same was true of the historical First-Class Mail volumes of heritage-Chase. *Id.* at 15 n. 10 (citing record).
- Bank One's First-Class Mail volume, unlike Capital One's First-Class Mail volume, consists primarily of operational (or "customer") mail—e.g., monthly account statements—not solicitation or marketing mail. The volume of operational or customer mail is largely nondiscretionary and bears a fixed relationship to the number of customer accounts. Hence, a significant increase in Bank One's Before Rates First-Class Mail volume would require an unprecedented explosion of Bank One's solicitation volume. The record is devoid of

any evidence that such a discontinuity in volume trends is likely, or even possible. *Id.* at 15-16.

- The remote possibility that Bank One's actual Before Rates volume would significantly exceed projections, coupled with the substantial likelihood that the discounts would generate a large additional volume of high-margin First-Class solicitation mail, rendered "highly improbable" any scenario that would make the NSA discounts unprofitable for the Postal Service. *Id.* at 46-49 (citing record); *accord*, OCA Br. at 2-3.
- The Bank One NSA includes much more elaborate safeguards than the Capital One NSA against the payment of discounts for volume that the mailer would have entered anyway. These safeguards include a mechanism that adjusts the discount floor to reflect changes in the number of credit cards and checking accounts; and a provision that limits the total number of flats eligible for discounts to the number entered by Bank One in 2003. Bank One Br. at 7-8, 44-46.
- The mechanism in the Bank One NSA for adjusting volume thresholds in response to mergers and acquisitions is much more sophisticated than its earlier counterpart in the Capital One NSA. *Id.* at 7-8.
- Although the Bank One/Chase merger occurred too late to include Chase volume data with the initial testimony of the NSA proponents, the proponents supplemented the record with preliminary data on historical and projected volume and its likely financial contribution to the USPS from both heritage-Chase and the merged company. *Id.* at 28-30. The preliminary data showed that the integration of Chase volumes into the NSA would virtually double the profitability of the NSA for the USPS. *Id.* at 29-30.
- Chase and the Postal Service also submitted evidence that the anticipated financial benefits of their NSA, to a far greater extent than in the Capital One

NSA, resulted from growth in volume incented by the discounts, not cost savings. *Id.* at 6 (citing record). Accordingly, the potential of a cost-savings cap to choke off the upside benefit of the NSA for the Postal Service (and thus all other mailers) was much greater. *Id.* at 6. Application of a standard optimization methodology like those used by credit card marketers indicated that a cost savings cap was likely to deprive the USPS of tens of millions of dollars in potential additional contribution over the life of the NSA. A “stop-loss” cap based on the cost savings of the NSA thus was more likely to be a “stop-gain” cap. *Id.* at 2, 13-14, 16-19, 40-41, 46-52 (summarizing record).

This evidentiary showing, along with additional safeguards negotiated with the OCA and Valpak to allay their concerns about the profitability of the NSA at the margin (see Br. 30-36), satisfied every participant in the case. None of the intervenors sought a hearing or filed rebuttal testimony. At the close of the record, the Postal Service, Bank One, and OCA entered into a Stipulation and Agreement with the Alliance of Nonprofit Mailers, American Bankers Association, American Postal Workers Union, AFL-CIO, Association for Postal Commerce, Discover Financial Services, Inc., Magazine Publishers of America, National Association of Postmasters of the United States, National Postal Policy Council, Inc., Parcel Shippers Association, and Valpak in support of the NSA. See Modified Stipulation and Settlement (filed Oct. 5, 2004). Not a single participant opposed the settlement. Moreover, not a single participant asked the Commission to impose a cost-savings cap.

Indeed, the OCA and Valpak, the two most aggressive skeptics of the NSA during the earlier stages of the case specifically asked the Commission not to impose a stop-loss cap on discounts:

The OCA and Valpak join Bank One and the Postal Service in asking the Commission not to impose in this case a stop-loss cap, or any other constraints on the proposed NSA, different from the constraints set forth in the proposed DMCS

language submitted herewith. Based on the amended DMCS language and the evidentiary record in this case, the OCA and Valpak are satisfied that the Postal Service is protected against the risk of significant financial loss. Further, the potential of the NSA to provide additional contribution to the Postal Service by generating new First-Class Mail volume is preserved.

Modified Stipulation and Agreement (Oct. 5, 2004) at 4 ¶ 8. *Accord*, OCA Br. at 4 (“The Commission should not impose a cap on volumes eligible for discounts.”).

3. The more stringent risk standards adopted by the Commission in its December 2004 Recommended Decision

The Commission responded to this extraordinary showing not by approving the uncapped discounts, but by raising the evidentiary bar and then pronouncing it unsatisfied. The most important change in norms involved the scope of the risks to be weighed. Abandoning its previous willingness to balance the potential downside of uncapped discounts against the potential downside of a cap,¹⁰ the Commission held

¹⁰ See MC2002-2 Op. & Rec. Dec. *Id.* ¶¶ 8021-22 (finding that financial costs of stop-loss cap in Capital One case could be disregarded because total discounts were unlikely to reach the cap in any event); MC2004-2 Op. & Rec. Decis. at 13-14 (holding that the “reasonably bounded risk of potential revenue leakage estimated by the Service” from its experimental Priority Mail flat rate box proposal “does not significantly detract from the merits of its proposed innovation” in comparison with the potentially significant gain in contribution offered by the proposal). The Commission tries to distinguish MC2004-2 on the ground that the Priority Mail flat rate box proposal, unlike the Bank One NSA, was reviewed under the Commission’s rules for experimental classification changes. MC2004-3 Op. & Rec. Decis. ¶ 6046. This is a distinction without a difference. The point is that neither proposal implicates more than small fraction of the Postal Service’s total revenues; hence, neither would jeopardize the overall financial integrity of the Postal Service even in a worst-case scenario. Moreover, the notion that approval of the Bank One NSA would lead to a flood of similar proposals “ad infinitum prior to determining its success or failure” (*id.*) is completely at odds with actual experience. Only one other uncapped NSA has been proposed since the Commission issued its recommended decision in this case. A total of five NSAs have been proposed. Until the Commission drastically reduces the high transaction costs of obtaining an NSA under the existing rules, the notion that this trickle will swell enough to place a large share of the Postal Service’s revenue at risk before the Commission can observe the actual performance of existing NSAs is unsupported.

that the evidence of the massive potential losses to the USPS from a cost-savings cap on Bank One's discounts was irrelevant as a matter of law. MC2004-3 Op. & Rec. Dec. ¶¶ 6044, 6046-6047, 6063, 6090) (refusing to consider evidence of offsetting financial risks of stop-loss cap). From this one-sided perspective, a much stricter standard of proof followed. Instead of the deferential or "minimal" scrutiny applied in *Capital One*, MC2002-2 Op. & Rec. Decis. ¶ 8023, the Commission reviewed the NSA proponents' evidence concerning Chase's Before Rates volume and likely effects of the Chase/Bank One merger essentially *de novo*. Instead of applying the preponderance-of-the-evidence standard mandated by the Administrative Procedure Act, the Commission effectively required proof beyond a reasonable doubt—or even proof beyond a hypothetical doubt. These heightened standards of proof in turn led unsurprisingly to the Commission's ultimate conclusion, that the risk of uncapped discounts was unacceptable.

(1) The evidence submitted by Chase and the USPS showed that both a massive underestimate of Before Rates volume and a massive overestimate of After Rates volume sensitivity would be required to make the NSA discounts unprofitable for the Postal Service (Bank One Br. at 46-49). The Commission apparently found this evidence irrelevant to the issue of financial risk, for the Recommended Decision does not mention the evidence at all.

(2) The Commission dismissed the enhanced mergers and acquisition and volume adjustment mechanisms in the Bank One NSA as "a poor substitute for actual data and analysis where a merger or acquisition is either imminent or already has taken place." MC2004-3 Op. & Rec. Decis. ¶ 6094. The Commission likewise dismissed the extensive record evidence on the positive effect of the Chase merger on the profitability

of the NSA for the USPS, including the voluminous data submitted by the NSA proponents concerning the historical, Before Rates and After Rates volumes of Chase, as a “hypothetical situation.” Op. & Rec. Decis. ¶ 1011. The Commission found “no persuasive evidence on the policies that the merged entity will follow,” and dismissed Mr. Rappaport’s observations about which marketing department employees would succeed to control of the combined marketing operation as an “assumption.”¹¹ Hence, the Commission concluded, “there continues to be much uncertainty about whether this Negotiated Service Agreement will help or hurt the Postal Service, if or when eligible J.P. Morgan Chase mail volume is integrated with Bank One mail volume.” Op. & Rec. Decis. ¶ 6094; *id.*, Concurring Opinion at 3.

(3) As noted above, most of the participants joined in an unopposed stipulation and settlement supporting adoption of the NSA, concurring with the NSA proponents that the NSA was likely to make a positive financial contribution to the USPS, and specifically urging the Commission not to impose a cost savings cap. The Commission dismissed the settlement on the ground that a settlement “must be consistent with applicable statutory requirements and . . . the evidentiary record.” *Id.*, Concurring Opinion at 2; Order No. 1443 at 17. The Commission did not explain why a stipulation supported by most of the active participants had no evidentiary weight, or how the NSA, if the participants were correct in their judgment that the NSA would have a positive financial impact on the USPS, would violate any “applicable statutory requirements.”

¹¹ Compare Answers of Chase witness Rappaport to OCA interrogatories OCA/BOC-T1-19 (reproduced at 2 Tr. 151-152) and OCA/USPS-T1-44 (“post-merger marketing decisions for the merged corporate entity will be the responsibility of a company-wide marketing department composed primarily of former Bank One marketing employees, and headquartered in Wilmington, Delaware, the home of the former Bank One marketing department”) (reproduced at 2 Tr. 155) with MC2004-3 Op. & Rec. Decis. ¶¶ 6058-6059, 6075.

Each of these Commission findings represents or reflects a heightening, if not an outright repudiation, of the proof requirements previously stated in the Capital One NSA case. The traditional deference to USPS management judgment reflected in the “minimal test” established by the Commission in the Capital One NSA case, MC2002-2 Op. & Rec. Decis. ¶ 8023, has given way to much stricter scrutiny. Whether the Commission’s heightened risk standards are appropriate (as the Commission believes) or inappropriate (as Chase intends to argue in its comments responding to Order No. 1443), there can be no serious dispute that the standards have changed, and that Chase faces a much more exacting standard of proof.

C. The Two Categories Of Supplemental Evidence Proffered By Chase And The USPS Satisfy The Commission’s Standards For Reopening The Record.

The only effective remedy for the lack of notice of the heightened risk standard is to reopen the record to allow the NSA proponents to submit supplemental evidence satisfying the standard. Chase requests that the Commission reopen the record for two specific categories of evidence: (1) the supplemental testimony of Michael Plunkett, submitted by the USPS on May 16, 2005, detailing the procedures and safeguards followed by the Postal Service to minimize the risk of paying discounts for volume that the mailer would enter anyway; and (2) data on actual Chase mail volumes. Both categories of evidence are directly responsive to the Commission’s newly heightened risk standards, and both satisfy the relevant standards for reopening.

1. Mr. Plunkett’s supplemental testimony concerning the validation of Bank One’s Before Rates by the USPS.

The testimony is “directly on point.” The Plunkett testimony describes in considerable detail the procedures and safeguards followed by the Postal Service to validate Bank One’s Before Rates estimates in order to minimize the risk of offering

discounts for volume that the mailer would enter anyway. In Order No. 1443, the Commission acknowledged that this material was “notable”:

It indicates real progress in the Postal Service’s procedures to ascertain the mailing characteristics of its [NSA] partners. . . . Presentation of an analysis based on Mr. Plunkett’s review procedures outlined in his declaration potentially could improve the confidence level of partner supplied estimates If the evidentiary record before the Commission had been developed with the new factual and theoretical information now proffered by the Postal Service, the Commission might well have had more confidence in the Bank One volume estimates.

Id. at 7.

The Commission’s rejoinder that the testimony is too “general” or “unsupported” unless the record is “reopened, the material entered into evidence, the opportunity for adversarial provided, and the record is re-closed,” *id.* at 7, underscores precisely why the record *should* be reopened. The Commission should admit Mr. Plunkett’s declaration (and any further testimony offered by the NSA proponents) into evidence, and then satisfy the Commission’s concerns about the analyses and other factual underpinnings of the testimony by filing appropriate Information Requests.¹² Chase believes that the Commission, if it pursues this inquiry, will be pleased by the detail and rigor of the “data sources” and “methodologies” that the Postal Service actually used to test Bank One’s mail volume projections. *Cf.* Order No. 1443 at 7 n. 10.

Excluding this material would be unjust to Chase. Excluding Mr. Plunkett’s supplemental testimony would be unjust for the primary reason explained in Section I.A: the courts have made clear that an agency violates due process, and thus commits an

¹² It is unlikely that any of the participants will seek discovery. All of the active participants in this docket signed the Modified Stipulation and Agreement. Paragraph 10 of the agreement bars its signatories from subsequently challenging the proposed NSA.

injustice, by relying on decisional criteria without giving litigants adequate notice and opportunity to submit evidence relating to those criteria. See Section I.A, *supra* (citing authorities). It would be unjust to impose a cap on discounts because the NSA proponents have failed to submit additional evidence that the participants could have filed if the Commission had disclosed the strictness of its standards for risk analysis.

Excluding Mr. Plunkett's testimony would be unjust to Chase on a second and independent ground: Chase *could not have included* it in the original record, or demanded that the USPS include it in the record, because Chase was *unaware of its existence* until after the Governors acted on the December 2004 Recommended Decision, and the Postal Service disclosed to Chase the contents of Mr. Plunkett's declaration. The Postal Service advised Chase that it kept the material confidential because it feared that disclosing its precise methods of data collection and commercial intelligence would handicap the Service in negotiations with financial institutions over the terms of NSA discounts.¹³ Whatever the merits of the Postal Service's position vis-à-vis the Commission, it would be manifestly unjust to penalize *Chase*, the mailer, for not submitting (or urging the Postal Service to submit) information of which Chase was totally unaware.

2. Mail volumes of the post-merger Chase

The testimony is "directly on point." Actual data on the effect of the 2004 Chase/Bank One merger on the Before Rates mail volume of the merged entity is directly on point with the cap issue. As noted above, the Commission's concerns about the merger were a major factor in the Commission's decision to impose a cap on

¹³ The USPS has also advised us that it interpreted POIR 1, Question 7 (reproduced at 2 Tr. 424) as seeking point estimates only, rather than the broader range of assessments subsequently disclosed in Mr. Plunkett's supplemental testimony.

discounts. Op. & Rec. Decis. ¶¶ 4032-35, 6056-59, 6067, 6075, 6094; *id.*, Concurring Opinion at 3. Evidence on heritage-Chase volumes, both pre-merger and immediately post-merger, would clearly address these stated concerns. Chase believes that access to these data will give the Commission added confidence in the accuracy and reliability of the Before Rates volume projections for the merged company.¹⁴

Excluding this material would be unjust to Chase. The merger of Bank One and J.P. Morgan Chase occurred after filing of this NSA case. Until the merger was consummated, Bank One and J. P. Morgan Chase could not lawfully exchange this volume information with each other, and thus could not submit data on actual heritage-Chase volumes to the Commission.¹⁵ After the merger, Bank One made strenuous efforts, even while the post-merger integration of the merged entity was still underway, to obtain as much preliminary information as possible about heritage-Chase volumes.¹⁶ Since the remand, more data have become available to Chase, and it now can submit additional information about the history of both heritage-Chase and heritage-Bank One volumes. Under the circumstances, the prior unavailability of these data is a legitimate reason for reopening the record now.

¹⁴ Chase would not be introducing the evidence to change the level of the cap (i.e., to revalue the cost savings to the Postal Service), but to assuage the Commission's concern that any cap should be imposed at all.

¹⁵ See 12 U.S.C. §§ 1828(c)(1)(A), (c)(6) (barring consummation of bank mergers until specified waiting period after regulatory approval); M. Howard Morse, "Mergers and Acquisitions: Antitrust Limitations on Conduct Before Closing," 57 *Business Lawyer* 1463, 1474-1486 (Aug. 2002) (discussing antitrust restrictions on exchange of information before consummation of merger).

¹⁶ See Responses of Bank One witness Rappaport to OCA/BOC-T1-13, 17, 19 (2 Tr. 142-143, 147-148, 151-152), OCA/USPS-T1-44 (2 Tr. 153-157), and POIR 2, Question 1 (2 Tr. 176); response of USPS witness Plunkett to OCA/USPS-T1-44 (revised) (2 Tr. 306-320), OCA/USPS-T1-45 (revised) (2 Tr. 321-329) and OCA/USPS-T1-50 (2 Tr. 335-372).

II. INITIATING A RULEMAKING ALONE WILL NOT PREVENT CHASE FROM SUFFERING IRREPARABLE HARM; REOPENING THE RECORD IN THIS CASE IS ONLY WAY TO CURE THE DUE PROCESS VIOLATION.

Reopening the record for additional evidence under the Commission's new risk standards is the only feasible way to remedy the Commission's notice problem. The alternative suggested by the Commission—an industry wide rulemaking for the “development” of “general guidance” on uncapped volume discounts, followed by a Chase/USPS request for approval of a modified NSA under Rule 198—is not an adequate substitute. *Cf.* Order No. 1443 at 5-6, 8-9; Op. & Rec. Decis. ¶¶ 1015, 6048.

A notice-and-comment rulemaking devoted to the general subject of “the applicable evidentiary standard that must be met to substantiate a volume-based discount provision without the application of a stop-loss cap,” *id.* at 5, or the “broader issue of uncapped volume-based discounts,” *id.* at 8, would of necessity be a high-level proceeding, focusing on principles rather than company-specific information such as volume data, demand factors, and competitive alternatives. Even if the rulemaking ultimately led to the adoption of rules supportive of uncapped NSAs, approval of uncapped discounts in this or any other individual NSA case presumably would still require the individualized adjudication of the accuracy and “thoroughness” of company specific data, including the submission of testimony and data into evidence, the opportunity for discovery by the Commission. *Id.* at 7.

Chase does not have the luxury of time for this procedural detour, particularly if the pendency of other cases is likely to slow the progress of either docket. At current and projected volume trends, Chase could exhaust the aggregate volume cap imposed by the Commission as early as May 2006—barely a year into the three-year scheduled

life of the NSA.¹⁷ Unless the cap is vacated by then, Chase will begin to lose discount dollars; and the USPS will begin to lose volume and contribution from Chase. These losses, once incurred, will be irrevocable, for 39 U.S.C. § 3681 bars mailers and competitors from obtaining refunds of postage (or other retroactive relief) if rates paid are later found to be unreasonable. The Commission has acknowledged this fact:

Ratemaking, under our statute, is an entirely prospective affair. We cannot recommend to the Governors that the Service make reparations to mailers or competitors for damage we might find had flowed from an inappropriate rate in the past.

R83-1 Op. & Rec. Decis. at 34.

Hence, delaying relief from the Commission-imposed cap on discounts until after the conclusion of some future rulemaking proceeding would be the same kind of "administrative law shell game" that was held unlawful in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 3020 (1993) (FCC erred in deferring an issue raised by AT&T's complaint to a future rulemaking, where the rulemaking could offer only prospective relief). *See also AT&T Communications of Illinois, Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402, 411 (7th Cir. 2003) (holding that state regulatory commission set rates arbitrarily by updating some ratemaking elements, while deferring the updating of other ratemaking elements to a future proceeding).

A Rule 198 modification is inappropriate for another reason. A modification request would entail a new and separate proceeding, entailing the filing of a new request, with new testimony and exhibits, including "[a]ll special studies developing information pertinent to the request completed since the recommendation of the existing

¹⁷ Indeed, well before the cap is reached, Chase will have to make decisions about its postal budget, which will reflect the company's expectations about the continued availability of the NSA discounts.

agreement,” and a new opportunity for any person to intervene, pursue discovery, and demand a hearing. Rule 198(a). Chase, however, is not seeking to modify its NSA. It seeks a fair hearing on its original proposal in *this* case. Mailers are entitled under 39 U.S.C. § 3624(a) to a fair adjudication of the reasonableness of proposed rates and classifications before—not after—they take effect. Requiring Chase to undergo anew the “arcane rigors of the regulatory process,” merely to get a fair opportunity to be heard on the terms of its *original* NSA proposal, would be arbitrary and unfair. *Cf. Arizona Electric Power Cooperative, Inc. v. United States*, 816 F.2d 1366, 1368 (9th Cir. 1987).

The Commission’s rejoinder that reopening the record would unduly burden the Commission and others involved in the other cases now pending before the Commission is baffling. *Cf. Order No. 1443* at 12-13. The record in Docket No. R2005-1 will close in a month. The Commission presumably will issue its decision one to two months later. The procedural deadlines in a reopened docket can be staged appropriately to avoid overburdening the Commission until the end of the omnibus rate case. It bears noting that an NSA case on reopening is not subject to the fixed deadlines governing the adjudication of such cases in the first instance.

Moreover, reopening this docket is likely to be the *least* time-consuming and burdensome way to resolve the issues raised by the Governors in this case. Chase is not proposing to depart from the NSA terms that are the subject of the Modified Stipulation and Agreement executed by most of the parties in October 2004. Because all of the active participants in the case signed the Stipulation, as a practical matter the only entity likely to seek discovery of the supplemental testimony is the Commission itself. By contrast, the alternative of a notice-and-comment rulemaking, followed by a modification proceeding under Rule 198, would require the Commission to initiate and

conclude two new proceedings, one of potentially industry-wide scale and the other of unknown scope, to address a potentially far broader range of policy issues than the narrow factual issue of the adequacy of the data and analyses underlying the Postal Service's volume projections for a single mailer in a single NSA case.

The Commission's assertion that reconsidering the discount cap in this docket might "inhibit" the "participants that signed the Modified Stipulation and Agreement" from "fully litigating all issues presented upon reconsideration within the context of the instant docket" (Order No. 1443 at 13) is also wide of the mark. In fact, the signatories to the Stipulation *should be* inhibited. "[E]ffectively end[ing] the signatories' adversarial role in [a] case," *id.* at 13, is the whole point of a settlement. The consideration received by Chase and the USPS in exchange for the concessions that led to the Modified Stipulation and Agreement was a commitment by the other signatories to support the rate and classification changes as proposed. Chase and the USPS are not proposing to alter the terms of their proposal, and thus are entitled to expect the other settling parties to honor their agreement.¹⁸ See Modified Stipulation and Agreement ¶ 10 (quoted in Op. & Rec. Decis. ¶ 5018).

This commitment in no way ties the hands or prejudices the rights of the signatories in any other case. Any signatory is free, in any other NSA case or NSA-related rulemaking proceeding, to advocate any position without regard to its consistency with the terms of the signatory's commitment in this case. See Modified Stipulation and Agreement ¶¶ 12-13 (quoted in Op. & Rec. Decis. ¶¶ 5020-5021).

¹⁸ Chase is not seeking to introduce evidence of changed circumstances. Rather it is seeking to introduce evidence because it was unavailable earlier or because the Commission had not indicated that it was necessary.

III. DUE PROCESS DOES NOT ALLOW THE COMMISSION TO INVOKE ITS BELATED FINDING OF FUNCTIONAL NON-EQUIVALENCE AS A BAR TO REOPENING THE RECORD.

The Commission's application of the functional equivalence standard of Rule 196 raises an equally serious due process issue. Near the outset of this case, the Commission ruled, in Presiding Officer's Ruling No. MC2004-3/1, that the case could proceed on the expedited procedural track established by Rule 196 for functionally equivalent NSAs. In its Recommended Decision, two months after the close of the record, the Commission held that the finding of functional equivalence had been mistaken, and that the NSA proponents had therefore waived their right to an uncapped NSA by accepting the Commission's invitation to proceed along the Rule 196 track. Op. & Rec. Decis. ¶¶ 6041-42, 6048-50, 6067, 6085, 6086; *id.*, Concurring Opinion at 3; Order No. 1443 at 9-12. This belated change of position does not begin to comport with due process, and certainly cannot be invoked to bar reopening of the record.

At the outset of the case, the eligibility standards for functional equivalence appeared to be relatively straightforward. In Docket No. RM2003-5, *Rules Applicable to Baseline And Functionally Equivalent Negotiated Service Agreements* ("Order No. 1391"), the Commission ruled that "'Functional equivalency" focuses on (1) a comparison of the literal terms and conditions of one Negotiated Service Agreement with the literal terms and conditions of a second Negotiated Service Agreement, and (2) a comparison of the effect that each agreement has upon the Postal Service." *Id.* at 47. For proposed NSAs modeled on the Capital One NSA, the Commission prescribed two elements of functional equivalence: "an address correction element (which is the primary cost savings element for the Postal Service), and a declining-block rate element." *Id.*

Order No. 1391 did not specify a stop-loss cap as a necessary element of functional equivalence with the Capital One NSA. Nor did Order No. 1391 suggest that the “financial effect” prong of the test for functional equivalence would require a stop-loss cap, as long as the functionally equivalent NSA, like the baseline NSA, was likely to have a positive financial effect on the Postal Service. Indeed, the Commission had made clear in the Capital One case that a functionally equivalent NSA need not offer the same *magnitude* of financial benefits to the USPS as the baseline NSA. Because the purpose of giving expedited consideration to “functionally equivalent” NSA proposals was to ensure that “the essential features of the Capital One agreement” would be readily “available to other similarly situated mailers,” the Commission emphasized that even “mailers with much smaller volumes than Capital One would have a realistic chance to qualify for an agreement like Capital One’s.” MC2002-2 Op. & Rec. Decis. ¶¶ 7017, 7020-21.

Chase and USPS made emphatically clear at the outset of this case that they were seeking both (1) approval of an NSA without a cap on its volume discounts, *and* (2) expedited review of their proposal under Rule 196, the rule for functionally equivalent NSAs. USPS Request (June 21, 2004) (proposing uncapped discounts); Plunkett Direct at 15-17 (filed June 21, 2004) (explaining why USPS and Bank One were proposing uncapped discounts); Buc Direct (filed June 28, 2004) (explaining why cap on discounts was unnecessary and harmful).

None of the other participants objected to proceeding on the functionally equivalent track. See, e.g., Prehearing Conference, 1 Tr. 19-20 (July 15, 2004).¹⁹ Eight days

¹⁹ The Commission’s speculation that other potential participants may have been lulled by its designation as functionally equivalent into refraining from intervening in this case (Order No. 1443 at 9-11) is unsupported by the record. Nearly as many parties (13 vs. 15) intervened in the Bank One case as have intervened in the Bookspan NSA case, a

later, Chairman Omas ordered that the case “shall proceed under rule 196 for functionally equivalent Negotiated Service Agreements.” Presiding Officer’s Ruling No. MC2004-3/1 (July 23, 2004) at 5 (Ordering Paragraph 3). The case remained on the procedural track for functionally equivalent NSAs without challenge through the close of the record in October 2004.

The Commission’s subsequent Recommended Decision can only be described as a flip-flop. The Decision held that the NSA, absent a cost savings cap on discounts, had *not* been functionally equivalent to the Capital One NSA after all. Chase and the USPS, relying on the Rule 196 procedural track for functionally equivalent NSAs, had waived any claim to uncapped discounts, to their financial detriment. Op. & Rec. Decis. ¶¶ 6041-42, 6048, 6049-50, 6067 n.41, 6085, 6086; *id.*, Concurring Opinion; Order No. 1443 at 13-14. Presiding Officer’s Ruling No. MC2004-3/1, and its directive that “Docket No MC2004-3 shall proceed under rule 196 for functionally equivalent Negotiated Service Agreements,” were henceforth null and void. “This statement provide[d] procedural direction only.” Op. & Rec. Decis. at 33 n. 30.

It is unclear whether the Commission intended its belated finding of functional non-equivalence as a consequence of its finding of undue financial risk, or as an alternative and independent ground for imposing a discount cap. Certain passages of the Recommended Decision and Order No. 1443, read in isolation, suggest the latter. Op. & Rec. Decis. ¶¶ 6041-42, 6048; Order No. 1443 at 10-11. Elsewhere, however, the Commission seems to indicate that its finding of functional non-equivalence was prem-

pure volume discount NSA that is unabashedly a baseline case under Rule 195. Moreover, *every participant* in the Bookspan case that has expressed hostility to or skepticism about the Bookspan NSA (i.e., APWU, NAA, NNA, OCA and Valpak) also appeared in the present case.

ised on the Commission's finding that uncapped NSA discounts might harm the USPS financially. Op. & Rec. Decis. ¶¶ 6049-50, 6067 n. 41, 6085, 6086; Order No. 1443 at 13-14. The "Concurring" Opinion of the Commission to its own Recommended Decision, for example, stated:

The addition of a stop-loss cap in this case *should not be construed as establishing a precedent that all NSAs, or even all NSAs functionally equivalent to the Capital One agreement must include a stop-loss cap.* That is not the Commission's view. The reliability of before rates volume estimates is a factual issue that must be evaluated by the Commission, but this does not bar an NSA without a stop-loss cap.

Op. & Rec. Decis., Concurring Opinion, at 3 (emphasis added). In either event, however, the Commission's post-record finding that the Bank One and Capital One NSAs were not functionally equivalent cannot serve as a lawful basis for imposing a discount cap.

As noted in Section I.A, *supra*, the courts have consistently held that an agency violates the due process rights of a party by failing to give adequate notice of the standard the party must meet, or by changing a previously followed standard without giving advance notice of the change. Thus, in *Public Service Com'n of Kentucky v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005), the court found that FERC had "violated due process" in determining the allowed rate of return on equity for a regional transmission organization by "fail[ing] to place the parties on notice that its post-hearing order would contemplate an incentive-based premium" for the organization's member transmission owners, when no such premium had been factored into the proposed rates. *Id.* at 1012. In response to FERC's argument that the parties should have been aware that FERC possesses the power to modify rate proposals to ensure that they meet statutory

standards, the court stated “FERC’s power to take such action does not carry with it authority to exercise such power without adequate notice of the basis for doing so.” *Id.*

In *Wyoming v. Alexander*, 971 F.2d 531 (10th Cir. 1992), the court partially vacated and remanded a decision of the United States Department of Education Appeals Board (“EAB”), which had ordered the State of Wyoming to refund certain federal educational payments. *Id.* at 534. The Department of Education (“DOE”) had based its decision in part on a disagreement with the costing methodology used by the State, an issue that the DOE had not disclosed to the State before issuing the refund order. *Id.* at 542. The court explained:

We are unconvinced on this record that Wyoming was ever ‘reasonably apprised’ that the Secretary intended to challenge the cost approach used for this grant before the EAB ruled on the issue. Rather, it was *unreasonable* for the EAB to fault the State for not responding to an issue that neither the auditors, the Assistant Secretary, nor the Agency ever raised.

Id. (emphasis in original).

And in *Port Terminal Railroad Ass’n v. United States*, 551 F.2d 1336 (5th Cir. 1977), the court held unlawful the refusal of the Interstate Commerce Commission (“ICC”) to reconsider and grant a further hearing on its order disallowing rate increases proposed by the railroad petitioners. *Id.* at 1337. The court noted that the ICC decision relied on the failure of the railroads’ studies to comply with Rail Terminal Form F, a formula-based costing method to determine switching costs. *Id.* at 1339. The ICC, however, had never stated before that Form F was the only acceptable methodology. To the contrary, the ICC had always characterized Form F as only one of several permissible methods to compute switching costs. *Id.* When “carriers appear before the Commission, they are entitled to know by what standard they are going to be judged.”

Id. at 1342-43. Failure to “apprise[] [the carriers] of the standard by which they would be judged” was an abuse of discretion. *Id.* at 1345.

The Commission’s attempt to excuse its belated somersault over the functional equivalence issue by characterizing its earlier finding of functional equivalence as a “statement [that] provide[d] procedural direction only” (Op. & Rec. Decis. at 33 n. 30), and thus was open to later modification or reversal, completely misses the point. A regulatory commission’s “power to take such action does not carry with it the authority to exercise such power without adequate notice of the basis for doing so.” *PSC of Kentucky, supra*, 397 F.3d at 1012. Administrative decisionmaking “is not a game of Lucy and the football from the world of Charles Schulz.” *Bowen v. Hood*, 202 F.3d 1211, 1222 (9th Cir. 2000).

The injury caused by the Commission’s belated change of position cannot be remedied by reopening the record. Chase relied on Order No. 1391, and Presiding Officer’s Ruling No. MC2004-3/1, in formulating and pursuing its negotiating and litigation strategies. Had the Commission stated at the outset of this case that a cap was a prerequisite for functional equivalence, Chase may well have adopted a different litigation strategy. More importantly, had Order No. 1391 indicated that a cap was necessary for functional equivalence, Chase might very well have sought more modest NSA terms, or no NSA at all, because the value of the contract to Chase would have been reduced below the costs of defending uncapped discounts before the Commission.²⁰

²⁰ The observation that the finding of functional equivalence in Presiding Officer’s Ruling No. MC2004-3/1 was qualified by the phrase “[u]ntil such time that new information is presented which requires a change of direction” ignores the context of that statement. Op. & Rec. Decis. ¶ 5007 n. 30 (quoting POR MC2004-3/1 at 2). The sentence immediately before the quoted passage makes clear that the Presiding Officer was acting merely to preserve the procedural rights of “one participant [that] was still considering the issue” of functional equivalence (POR MC2004-3/1 at 2). There is certainly nothing in the two sentences that would put a reasonable person on notice that

Accordingly, the Commission's finding of functional non-equivalence, whether dependent on or independent of the Commission's finding that uncapped NSA discounts would be overly risky, cannot justify continued imposition of a discount cap if the reopened record demonstrates that uncapping the discounts is likely to benefit the Postal Service financially.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that the Commission reopen the record for (1) the supplemental material submitted by the USPS on May 16, 2005, and (2) supplemental data from Chase on the recent actual volumes of heritage-Chase and heritage-Bank One mail. We suggest that the Commission set a filing date 30 days after the Commission reopens the record. The Commission, if it wishes, should be permitted to engage in discovery concerning the material.

Respectfully submitted,

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the Commission was reserving the right to revoke a finding of functional equivalence, solely on its own initiative, after the close of the record. No reasonable party would have proceeded in reliance on a finding so contingent and provisional.