

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

STATION AND BRANCH OPTIMIZATION AND ) DOCKET NO. N2009-1  
CONSOLIDATION INITIATIVE, 2009 )

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

On December 3, 2009, the National League of Postmasters ("League") filed its brief in this proceeding one day late due to computer problems, and filed a concurrent motion for late acceptance. In that brief, the League made two routine requests and asked the Commission to take judicial notice of its July 2009 Congressional testimony by Mark Strong (the Strong testimony<sup>1</sup>) as well as its July 2008 USO testimony by Charles Mapa (the Mapa testimony<sup>2</sup>) before this Commission in the USO docket. The League also attached a copy of the Strong testimony to the brief as a courtesy and convenience to the Commission. The Mapa testimony discussed the role of post offices in America.

On December 4, 2009, the Postal Service filed a document entitled "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." In its Motion, the Postal Service did not object to the late filing of the League's brief, but rather objected to 1) the portion of the League's brief where it asked the Commission to take notice of the July 2009 Strong Congressional testimony, 2) the portion of the

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<sup>1</sup> See <http://oversight.house.gov/images/stories/documents/20090730131038.pdf>.

<sup>2</sup> See <http://www.prc.gov/Docs/60/60667/Washington-DC-Public-Hearing-7-10-08.pdf>

League's brief where it asked the Commission to take notice of the League's July 2008 Mapa testimony, and 3) the attachment of the July 2009 Strong Testimony to the brief. USPS Motion In Opposition at 2-3.

As a preliminary matter, the League's request might have been better couched in terms of requesting the Commission to take "official notice" of those two pieces of testimony, since the purpose of its requests was to inform the agency of its concerns and not to suggest that any factual predicate in either of those pieces of testimony should be considered as "proven" facts in the record of this proceeding. Moreover, since both are matters of public record, the League finds no fault with asking the Commission to take official notice of the two pieces of testimony that are a matter of public record. Thus it here reiterates its request to the Commission to take official notice of those two documents. As detailed below, 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."

In terms of the attachment of the League's 2009 Congressional testimony to its brief, there is nothing inappropriate in attaching that testimony to the brief as a courtesy and for the convenience of the Commission, if indeed the Commission has the ability to take official notice of Congressional testimony. In fact, when a party requests a body to take official notice of a document, it is good practice to provide a copy of the document to the body at the time the party makes the request. That is exactly what the League did. It did not need to do so with the Mapa testimony because that testimony is already in the official possession of the Commission.

## Argument

**A. Official Notice.** There is nothing improper about a party asking a federal Commission to take official notice of Congressional testimony. In taking official notice of Congressional testimony, an administrative agency is more than capable of taking into account that any factual matter asserted in that Congressional testimony has not been “proven” in the record in its case, and thus it can weigh the testimony accordingly. In this case, the League’s request is not intended to suggest that the specific Congressional testimony of the League be entered into the record of this hearing for the truth of any matter asserted therein.

Rather, the request is intended to suggest 1) that the Commission should be aware of the fact that the oldest postmaster organization in the country has certain concerns about this consolidation initiative, 2) that it was asked by Congress to express those concerns to it in Congressional hearings and that it did so, and 3) that the Commission should know what those concerns are, without necessarily accepting any factual predicates of those concerns as proven matters for the record in this proceeding.

These three propositions should be viewed as three sets of legislative “facts” of which the League wishes the Commission to take notice. It is important to note that these three “facts” are not in the nature of adjudicative facts but are in the nature of legislative facts, and are not subject to reasonable dispute.<sup>3</sup> To be perfectly clear, when

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<sup>3</sup> The Federal Rules of Evidence concerning judicial notice do not apply to legislative facts. See explanatory note to FRE 201 (a) (“This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of “adjudicative” facts. No rule deals with judicial notice of “legislative” facts.”)

we say that these three sets of legislative facts are beyond reasonable dispute, we mean that 1) there is no question that the League has concerns about this matter, 2) there is no question that it has presented its concerns to Congress, and 3) there is no question that these concerns are presented in the Strong testimony.

The Commission should know what those concerns are. The Commission need not consider them “true” or “proven” for purposes of this record. Where any concern of the League treads upon a factual predicate that has not been “proven” in an adjudicative sense, the Commission is more than capable of taking that fact into consideration in its deliberations. The League’s concerns may be of consequence or they may be frivolous. That is up to the Commission to weigh, and the Commission certainly has the capability to consider the issue without prejudice.

Moreover, the Commission also has the power and capability to consider the League’s concerns without forcing the League to make significant financial expenditures on litigation, expenditures which it cannot afford to make. Put another way, the fact that the League cannot afford to engage in the extensive and expensive litigation process that this proceeding presents should not prevent the Commission from being informed as to the extent and nature of postmasters’ concerns, which would be the net result of granting the Postal Service’s motion.

The Commission is not precluded by law from considering either the fact that postmaster organizations have concerns with the Postal Service’s consolidation initiative, or the substance of those concerns, just because all the factual predicates of those concerns may not “proven,” or on the record. As the leading treatise on administrative law states:

In all adjudication by courts and agencies, judicial notice and official notice are ever present. No judge or administrator can possibly think about any questions of fact, law, or policy, or discretion without using extra record facts. . . . Facts in the mind of a judge or administrator merge with understanding and with thinking processes; one who has to exercise judgment necessarily uses the facts she knows and deems relevant, whether or not the facts are in the record of a particular case.<sup>4</sup>

Moreover, the Administrative Procedures Act itself makes provision for a party to have equal time if an agency decides to rely on any matter of which it has taken official notice:

When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.<sup>5</sup>

If an agency cannot take official notice of other matters, and rely on those matters, why is this section in the APA?

Turning to the Mapa Testimony, the League submits that there is nothing improper about asking the Commission to take judicial notice of the legislative type of testimony that was previously presented to it by Charles Mapa in the legislative type of hearing which it held in July 2008. Again, 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.

In summary, the fact that postmasters have concerns about the Postal Service’s initiative, and that they were invited by Congress to inform Congress of those concerns, are two matters the Commission needs to consider. It is surely in the public interest for the Commission to understand what those concerns are. Just as surely, it is in the public interest for the Commission to avoid the type of rigidity in proceedings that

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<sup>4</sup> 2 Pierce, Administrative Law Treatise (5<sup>th</sup> ed. 2010) §10.6 at 947-948.<sup>4</sup> See generally Pierce, at 958-959.

<sup>5</sup> 5 U.S.C. § 556(e)

interfere with a small organization's ability to participate in those proceedings. Taking official notice of those concerns is the way to accomplish that. As Wigmore said long ago, judicial notice "is an instrument of a usefulness hitherto unimagined by judges. Let them make liberal use of it; and thus avoid much of the needless failures of justice that are caused by the artificial impotence of judicial proceedings." 9 Wigmore Evidence 585 (3d ed. 1940); *accord* Thayer Preliminary Treatise on Evidence (1890) at 300 ("the failure to exercise it [judicial notice] tends daily to smother trials with technicality and monstrously lengthens them out.")

If there is one thing that this Commission does not need, it is monstrously lengthened proceedings that are smothered with legal technicalities. Not liberally using the tool of official notice would do just that and put in place a rigidity in the Commission's process that is the very antithesis of the flexibility that administrative bodies are supposed to show, and of the flexibility that the PAEA meant to introduce into the postal regulatory system.

As Pierce has said:

The law of official notice is not characterized by the widespread confusion that infects the law of judicial notice. Agency adjudicators do not have to construct elaborate rules of evidence to accommodate the complicated roles play by lay jurors in court trials. Moreover, agency adjudicators are in a much better position to take notice of legislative facts than are judges. Agency adjudicators have expertise in the areas in which they adjudicate and APA § 556(e) describes a procedural framework that provides parties an opportunity to participate in the process of resolving disputes concerning legislative facts."<sup>6</sup>

**B. Attaching the Strong Testimony.** Attaching the July 2009 Strong Testimony to the League's brief was done solely as a courtesy and convenience to the

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<sup>6</sup> Pierce §10.6 at 955. (

Commission. The League did not attach the Mapa testimony since it was already in the Commission's possession.

The Strong testimony is a matter of public record, and the Commission is more than capable of looking up the piece itself on the House Subcommittee's website. Nevertheless, it is good practice to provide a body with a copy of something one is asking it to take notice of. Consequently, so long as it is appropriate to take judicial notice of the Strong testimony, it is appropriate to submit it to the Commission.

The timing of the League's request is of no great consequence since requesting a body to take official notice of something may be done at any time during a proceeding, including during oral argument.

## **Conclusion**

The League objects to the Postal Service's objection to the League's request that the Commission take official notice of both the 2009 Strong Testimony and the 2008 Mapa Testimony. Both are matters of public record. Thus, the Commission can take official notice of both and give them whatever weight it sees fit. Submitting a copy of the Strong testimony is merely a matter of courtesy and convenience for the Commission, and is of no substantive consequence.

As the Postal Service and the Commission work out their relationship under the PAEA, and define the parameters of the new law and the new procedures, flexibility and not rigidity must be the operating paradigm.

The Postal Service's motion should be denied.

Respectfully submitted,

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December 7, 2009