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

Postal Rate and Fee Changes Docket No. R2006-1

PRESIDING OFFICER'S RULING CONCERNING MOTION OF UNITED STATES POSTAL SERVICE TO STRIKE PORTIONS OF THE PREPARED DIRECT TESTIMONY OF GREETING CARD ASSOCIATION WITNESS JAMES A. CLIFTON

(Issued October 2, 2006)

On September 13, 2006, the United States Postal Service filed a motion[1] to strike portions of the document filed by the Greeting Card Association as Exhibit GCA-T-1, the Direct Testimony of James A. Clifton. The grounds on which the Service bases its motion are the testimony's inclusion of an appendix which the Service characterizes as "the testimony of another individual[;]"[2] witness Clifton's reliance on the substance of that appendix; and the purported reluctance of GCA to sponsor the appendix as separate testimony subject to discovery directed to the author of the appendix.

Appendix C to witness Clifton's testimony consists of an analysis—in the form of a letter to Mr. Clifton—prepared by Harry H. Kelejian, a professor in the Department of Economics of the University of Maryland. The Postal Service claims that the analysis, which exclusively addresses the work of Postal Service witness Thress in this case, is indistinguishable in nature and function from testimonies submitted by other intervenor witnesses. In view of the nature of the appendix, the Postal Service states that it contacted counsel for GCA and suggested that it be submitted as the testimony of

[1] Motion of the United States Postal Service to Strike Portions of the Testimony Document (GCA-T-1) of GCA Witness Clifton, September 13, 2006 (Motion to Strike).

[2] Motion to Strike at 1.

Professor Kelejian to enable written and/or oral cross-examination. According to the Service, GCA ultimately declined this suggestion.[3]

The Service claims that the effect of allowing the material in controversy to remain an attachment to the Clifton testimony, thereby immunizing its author from written and oral cross-examination, would be "patently unfair, not only to the Postal Service, but to all the other parties who have properly presented the analyses of their expert witnesses as direct testimony subject to the full panoply of adversarial testing."[4] In view of GCA's unwillingness to make Professor Kelejian available for cross-examination, the Service asserts that witness Clifton should not be allowed to attach to his testimony what in substance is the professor's separate testimony. Accordingly, the Service moves to strike Appendix C to GCA-T-1 in its entirety, as well as several portions of the text of the Clifton testimony which rely on Appendix C. The Service argues that this extraordinary remedy is justified under the circumstances. Additionally, even if GCA were to change its position, the Service claims that it may be necessary to move for an extension of discovery on what would be Professor Kelejian's testimony, and make him available for cross-examination to the same extent as all other witnesses.[5]

The Greeting Card Association responded to the Postal Service's Motion to Strike in an Opposition filed on September 20, 2006.[6] GCA argues that witness Clifton's incorporation and reliance upon Professor Kelejian's declaration in Appendix C is nothing atypical, as many courts have held that a testifying expert witness can rely on the opinion of another, non-testifying expert.[7] GCA further claims that the Service can test Professor Kelejian's analysis by directing interrogatories to witness Clifton, and

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[3] *Id.* at 1-2.

[4] *Id.* at 1.

[5] *Id.* at 3-5.

[6] Opposition of the Greeting Card Association to Motion of the United States Postal Service to Strike Portions of the Testimony Document (GCA-T-1) of GCA Witness Clifton, September 20, 2006 (GCA Opposition to Motion to Strike).

[7] *Id.* at 5-6.

observes that other means such as rebuttal testimony are available to challenge and rebut the accuracy of that analysis.[8] Noting that motions to strike are requests for extraordinary relief under the Commission's rules, GCA argues that it will be severely prejudiced if it is not permitted to present the Kelejian material, and that the Commission also would thereby be deprived of important information.[9] GCA also claims that the Postal Service's Motion to Strike seeks to strike several pages worth of matter in witness Clifton's testimony that either do not mention or stand independently of Professor Kelejian's declaration, and asserts that the Service's attempt to strike this independent matter is inequitable and improper.[10] Finally, GCA argues, to the extent it is required to present witness Kelejian as a testifying expert (which it says it will do if so required), the Postal Service should reimburse GCA for the costs of the professor's time spent in preparation and testifying.[11]

On September 22, 2006, other participants in this proceeding filed two motions[12] for leave to reply to GCA's Opposition to the Motion to Strike, together with replies[13] in support of the Postal Service's position. On the same day, GCA filed an Opposition[14] to PostCom's motion for leave to file a reply. While timely replies to the Postal Service's Motion to Strike would have been preferable, I shall consider the views expressed by

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[8] *Id.* at 6-7.

[9] *Id.* at 8.

[10] *Id.* at 1-5.

[11] *Id.* at 9.

[12] Motion of PostCom for Leave to File Reply to Opposition of GCA to Motion of the Postal Service to Strike Portions of the Testimony Document of GCA Witness James A. Clifton (GCA-T-1), September 22, 2006; Motion of Alliance of Nonprofit Mailers and National Postal Policy Council for Leave to File Reply to Opposition of Greeting Card Association to USPS Motion to Strike, September 22, 2006.

[13] Reply of PostCom to Opposition of the GCA to Motion of the United States Postal Service's Motion to Strike Portions of the Testimony Document of GCA Witness James A. Clifton (GCA-T-1), September 22, 2006 (PostCom Reply); Reply of Alliance of Nonprofit Mailers and National Postal Policy Council to Opposition of Greeting Card Association to Motion of USPS to Strike Portions of Testimony of GCA Witness Clifton (GCA-T-1), September 22, 2006 (ANM/NPPC Reply).

[14] Opposition of the Greeting Card Association to Motion of PostCom for Leave to Reply to Opposition of GCA to Motion of the Postal Service to Strike Portions of the Testimony Document of GCA Witness James A. Clifton, September 22, 2006 (GCA Opposition).

PostCom and ANM/NPPC in view of the prominent issue of procedural due process raised by this controversy, which affects all participants in this proceeding.

The PostCom Reply concurs with the Service's position that allowing Professor Kelejian's analysis as an attachment to the Clifton testimony would be clearly unfair to all parties by wrongly admitting the material as testimony without subjecting it to cross-examination by adverse parties. PostCom further claims that admitting Appendix C in this manner would violate the evidentiary prohibition against the use of hearsay.[15]

The ANM/NPPC Reply likewise asserts that allowing GCA to offer the material in Appendix C into evidence without discovery and cross-examination of Professor Kelejian would be unfair to other parties. ANM/NPPC argues that the declaration is opinion testimony resting on the judgment of Professor Kelejian and, as such, is subject to the discovery and other procedural requirements of section 30(e) of the Commission's rules of practice.[16] According to ANM/NPPC, accepting the Kelejian analysis into evidence while exempting it from discovery by other parties would violate the rule's requirements to the detriment of parties with adverse interests. Finally, ANM/NPPC asserts that GCA has failed to identify any burden other than the same kind of litigation costs ordinarily borne by proponents of opinion testimony in a Commission rate case, which ANM/NPPC claims to be fair in view of the potential impact of GCA's proposals in this case.[17]

In addition to protesting PostCom's attempt to file a reply not authorized under the Commission's rules, the GCA Opposition challenges PostCom's assertion that Professor Kelejian's testimony constitutes inadmissible hearsay. According to GCA, the Kelejian declaration is admissible in connection with the Clifton testimony because it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject…."[18]

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[15] PostCom Reply at 1-3.

[16] 39 C.F.R. § 3001.30(e).

[17] ANM/NPPC Reply at 1-4.

[18] GCA Opposition at 2, *quoting* Fed. R. Evid. 703.

Ruling. An examination of Professor Kelejian's declaration in Appendix C indicates that it constitutes opinion testimony that stands independently of Exhibit GCA-T-1. The declaration presents the professor's judgments concerning particular econometric procedures and their use, together with *curriculum vitae* at its conclusion which establishes his credentials for offering the analysis therein. There is no indication that the analysis in Appendix C was prepared under the direction of witness Clifton; on the contrary, witness Clifton's testimony cites Professor Kelejian's conclusions as independent support for his belief that Postal Service witness Thress's approach to modeling competing substitutes to First-Class single-piece letters is fundamentally flawed.[19]

Significantly, the opinions offered in Professor Kelejian's declaration do not constitute a general theoretical treatment of econometric procedures of a kind that might be published as a scholarly article or treatise. Rather, they specifically address and criticize the procedures witness Thress uses in USPS-T-7. Thus, it is obvious on its face that the opinions offered by Professor Kelejian in Appendix C were formed expressly for use in this rate proceeding, and he should present and defend them. This militates strongly in favor of a conclusion that Professor Kelejian's work product is subject to discovery under the same terms as other expert testimony in the case.

Furthermore, witness Clifton's own testimony relies significantly on Professor Kelejian's declaration in Appendix C. As noted above, he draws on Professor Kelejian's analysis to corroborate his critique of the methods used by witness Thress.[20] Features of Professor Kelejian's analysis apparently also guided the alternative demand estimation approach witness Clifton proposes. He testifies: "My VES linear demand approach to estimating the demand equation for First Class single piece letters….avoids most of the problem areas with Mr. Thress' model that Professor Harry Kelejian discusses in his Declaration dated September 5, 2006."[21]

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[19] GCA-T-1 at 2-3.

[20] GCA-T-1 at 3, 32-34, 58.

[21] *Id.* at 43, lines 15-18; *see also*, the testimony at 43, line 24 through 44, line 4.

These considerations support the arguments of the Postal Service, PostCom, and ANM/NPPC that Professor Kelejian's declaration, although incorporated within witness Clifton's testimony, cannot properly be admitted into evidence without Professor Kelejian's sponsorship and submission to discovery under section 30(e) of the rules of practice. Commission practice in analogous circumstances also suggests this outcome.

In Docket No. R97-1, the Postal Service filed a number of technical analyses as library references that were used in various ways in the direct testimony of its witnesses. In some instances, discovery upon the Service's witnesses revealed that, while they had relied on the content and conclusions of the library references, they had not produced and could not vouch for the technical analyses therein. In response to participants' motions to compel responses to discovery and to strike identified portions of Postal Service testimony, the Presiding Officer addressed the alleged need for sponsorship of such materials by a witness:

> Moreover, the need to sponsor a library reference, assuming it is properly characterized as such, depends on the extent to which a witness relies on it. Generally, the greater the reliance, the greater the likelihood that a witness will be expected to vouch for it.

Presiding Officer's Ruling No. R97-1/20, September 17, 1997, at 6. However, the ruling denied a motion to strike one piece of Postal Service testimony on the ground of its reliance on an unsponsored library reference, noting:

> [A] motion to strike testimony asks for extraordinary relief, and the Commission generally attempts to achieve a resolution that preserves a witness's testimony or that allows for other options. This ruling provides an opportunity for the Service to identify a sponsoring witness. If it chooses not to do so, the Commission will evaluate Fronk's testimony with due regard for the amount of evidentiary support for his surcharge proposals. Thus, the motion to strike Fronk's testimony is being denied, without prejudice to NDMS's right to refile.

Id. at 6-7. Subsequently, in reviewing several certified motions concerning the evidentiary status of materials initially submitted by the Postal Service as library references in the same proceeding, the Commission determined to accept into the evidentiary record those library references that had been sponsored by a witness and designated as evidence by the Postal Service.[22]

GCA suggests that the Postal Service can "obtain all the information it needs to defend its position by directing discovery or cross-examination to GCA witness Clifton."[23] Plainly, this would be an insufficient response to the discovery responsibilities assigned by section 30(e) of the rules of practice. As he did not direct Professor Kelejian's analysis—a product of the professor's own expert judgment—witness Clifton cannot claim competence to vouch for and defend it. Additionally, he may have difficulty responding to technical inquiries that would otherwise explore Professor Kelejian's views of appropriate econometric procedure generally.

For these reasons, and following the example of the Presiding Officer in Docket No. R97-1, the Postal Service's Motion to Strike is denied without prejudice. If GCA wishes to rely upon Professor Kelejian's declaration as part of its direct case, it should file it as a separate piece of testimony. As noted above, GCA has expressed its willingness to present Professor Kelejian as a testifying expert in this proceeding. Pending arrangements for his sponsorship of the declaration and availability for cross-examination, I will reserve an opportunity in the hearing schedule for the professor to appear in connection with the Clifton testimony.

Finally, there is no basis in applicable postal law or Commission practice for GCA's proposal to require the Postal Service to reimburse GCA for the costs of Professor Kelejian's time spent in preparation and testifying in support of its direct case.

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[22] *See* Order No. 1201, November 4, 1997.

[23] GCA Opposition to Motion to Strike at 6.

RULING

1. The Motion of PostCom for Leave to File Reply to Opposition of GCA to Motion of the Postal Service to Strike Portions of the Testimony Document of GCA Witness James A. Clifton (GCA-T-1), filed September 22, 2006, is granted.

2. The Motion of Alliance of Nonprofit Mailers and National Postal Policy Council for Leave to File Reply to Opposition of Greeting Card Association to USPS Motion to Strike, filed September 22, 2006, is granted.

3. The Motion of the United States Postal Service to Strike Portions of the Testimony Document (GCA-T-1) of GCA Witness Clifton, filed September 13, 2006, is denied without prejudice.

George Omas
Presiding Officer