

DOCKET SECTION

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

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U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

OPPOSITION OF THE UNITED STATES POSTAL SERVICE TO MOTION OF
PERIODICALS INTERVENORS TO STRIKE PORTIONS OF THE REBUTTAL
TESTIMONY OF POSTAL SERVICE WITNESS DEGEN (USPS-RT-6) AND MOTION
TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY OF MAGAZINE
PUBLISHERS OF AMERICA WITNESS COHEN (MPA-RT-2) AND REQUEST FOR
WAIVER OF SPECIAL RULE OF PRACTICE 1C
(March 17, 1998)

The United States Postal Service hereby opposes the Motion of Periodicals Intervenors to Strike Portions of the Rebuttal Testimony of Postal Service Witness Degen (USPS-RT-6) and Request of Waiver of Special Rule of Practice 1C, filed March 13, 1998 ("*Motion*").¹ The Postal Service believes that the same standards should apply to all rebuttal testimony. Thus, the Postal Service moves that portions of the rebuttal testimony of Magazine Publishers of America ("*MPA*") witness Cohen likewise be stricken.² In conjunction with its motion, the Postal Service also requests waiver of Special Rule of Practice 1C. The Postal Service's opposition and motion will be discussed separately.

¹ Specifically, the Periodicals mailers request that the portions of witness Degen's testimony "that report the results of a 'Qualifier/Non-qualifier Analysis' and a 'Decile Analysis' of Regular Rate Periodicals (specifically, USPS-RT-6, at 31, l 12 through 32, l.9 and Table 5 [at 33]" be stricken. *Motion at 1.*

² If, however, the Presiding Officer declines to grant the motion to strike portions of witness Degen's rebuttal testimony, then the Postal Service withdraws its motion to strike portions of witness Cohen's rebuttal testimony.

OPPOSITION TO PERIODICAL INTERVENORS' MOTION

Background

Although the Periodicals mailers previously have complained about the alleged excessive increases in Periodicals costs and about the Postal Service's purported failure to take their concerns seriously, the Postal Service had reason to believe that those issues would not be raised in this proceeding. A recent series of meetings with Periodicals mailers and discussions concerning a possible cooperative study on Periodicals issues were viewed as indication that matters might be deferred until a later date. Once the issue was raised in the testimonies of various Periodical intervenors, however, the Postal Service had no choice but to respond as it did. The Postal Service believes that witness Degen's rebuttal testimony sheds fresh light on this vexing issue. The Postal Service further believes that this evidence adds valuable information to the record of this proceeding that deserves to be heard.³

³ The Periodicals mailers apparently believe that the only explanation which merits attention on this issue is their insistence that the Postal Service has hordes of "automation refugees" in operations where Periodicals are handled -- an explanation which has never been supported by more than conjecture, and which has never been accepted by either the Postal Service or the Commission. Moreover, in this proceeding, the rebuttal testimonies of witnesses Degen (USPS-RT-6) and Steele (USPS-RT-8) present compelling evidence contrary to the Periodicals mailers' claim.

In addition, the Periodicals mailers attempts to paint the Postal Service as offering a series of ever-changing explanations for Periodical cost increases must be disregarded. In matters as complex as postal costs, there usually is not a single explanation which accounts for all cost changes. What might cause cost changes at one time, such as second-class transfer hubs in the late 1980's, does not necessarily shed light on what has happened in the 1990's. Of course, it is also somewhat ironic that the Periodicals mailers, who have viewed all explanations proffered thus far with great skepticism, are complaining about the Postal Service's attempts to look at further explanations.

Waiver under Special Rule 1C

The Postal Service does not challenge the Periodicals mailers' motion on the basis of the fourteen-day requirement of Special Rule 1C. It concedes that the compressed time schedule, which required filing of rebuttal testimonies only one week prior to commencement of hearings on those testimonies, would make strict compliance impossible. The compressed time frame, however, also militates against granting the motion. The Postal Service and any other party responding to a motion to strike, obviously, cannot take the full seven days usually allowed to respond to a motion to strike under Special Rule 1C. Coupled with the press of preparing for rebuttal hearings and beginning brief writing, adequate time does not exist to fully research and develop all arguments in opposition. This suggests that the better alternative here would be for the disputed portions of the testimony to be allowed into evidence, and for the Commission to consider the arguments made in both the motion to strike and in the opposition in determining what weight the evidence should be accorded.

The Degen Testimony is Proper Rebuttal

The Periodicals mailers rely principally on “two leading Commission precedents” which are professed to support their motion.⁴ A careful and reasoned perusal of the relevant Commission order demonstrates, however, that the Periodicals mailers “precedents” are not controlling in the present situation.

The Periodicals mailers point to two rulings in Docket No. R80–1, one granting a motion to strike the rebuttal testimony of a Postal Service witness and one denying a motion to strike the rebuttal testimony of an intervenor witness. In modifying the

⁴ *Motion at 4.* Of course, the dearth of cited precedents also underscores that striking testimony is an extraordinary remedy.

Presiding Officer's Ruling to strike the rebuttal testimony of a Postal Service witness which presented two new studies to demonstrate that a study filed as part of the Postal Service's direct case was representative, the Commission stated:

The additional studies, *if the Postal Service wished to rely on them to support its proposal*, could and should have been included in its direct case The Postal Service has the initial burden to show that the San Francisco study should be accepted by this Commission. If it wants to argue that the results of the San Francisco study are acceptable because two subsequent studies produced the same results, it must produce all the studies in its direct case unless it gives a compelling reason why the studies could not have been done earlier. The Postal Service has offered no reason why the studies could not have been completed in time to include the results in its direct case.

Docket No. R80-1, Order No. 362, Order Modifying Presiding Officer's Ruling Striking USPS-RT-4, November 24, 1980, at 3 (emphasis added). The Commission further held:

[O]ne of the cases the Postal Service cites to support its position that rebuttal can contain materials also suitable for direct testimony, holds that the trial court had discretion "to require the plaintiff to assume in advance that the defendant would deny as a witness the truth of the plaintiff's case." We are not holding the Postal Service to such a strict rule. We are not asking that the Postal Service be omniscient. *We are requiring that the Postal Service file in its direct case the studies on which it intends to rely.*

Id. at 4 (footnote omitted) (emphasis added).

Here, quite clearly, the disputed portions of witness Degen's rebuttal testimony are *neither presented nor relied upon* to support any of the Postal Service's proposals or any studies or analyses presented in its direct case. In fact, the Periodicals mailers do not make such an assertion. The Postal Service's new costing methodology for determining the volume variability and proper distribution of mail

processing costs, presented in its direct case by witnesses Bradley (USPS-T-14) and Degen (USPS-T-12), affects all classes of mail, not just Periodicals.

Even more importantly, that costing methodology is not itself implicated by has the complained of increase in Periodicals costs. This is evident from the Periodicals mailers' motion, where it is argued that "both mailers and the Commission have been trying for years to discover the inexplicable reasons for rising Periodicals costs, and they have repeatedly, in Commission proceedings, private meetings with Postal management at the highest levels, and communications to the Governors, urged the Postal Service to respond to their perplexity." *Motion at 7.*

It is also evident from the Periodicals mailers' testimony in this proceeding. For example, MPA witness Little complains about increases in Periodicals costs from FY 1986 to FY 1996. *Tr. 27/14544.* In other words, witness Little's data are derived from the FY 1996 CRA, which incorporates the prior mail processing costing methodology, and not from the BY 1996 cost data presented in this case, which incorporates the Bradley-Degen costing methodology.⁵ Similarly, ABP witness Crain complains about Periodicals costs increases over a ten-year period (*Tr. 28/15279*) and further states, "[T]his is not a new problem, and it is not a problem of which the Postal Service is unaware. I will leave to Rita Cohen, appearing for the Magazine Publishers of America, the task of providing the year-by-year, case-by-case history and detail of the

⁵ Witness Little expressly acknowledges that his data are from CRA reports. *Id.* He further draws a clear distinction between the Postal Service's new costing methodology and the complaints of Periodicals mailers, stating, "In this case to its credit, the USPS attempts to improve its costing methodology. The fundamental problem set forth at the beginning of this testimony, however, remains unresolved." *Id. at 14548.*

industry's efforts to identify and cure the problem...." *Id. at 15280.* MPA witness Cohen, while taking issue with parts of the Postal Service's new mail processing costing methodology, complains about the allegedly excessive increases in mail processing costs for periodicals over an 11-year period, stating, "Despite diligent efforts, these trends remain largely unexplained. A problem clearly persists, and the USPS has made no meaningful effort to address it." *Tr. 26/14029.* As witness Degen concludes in his rebuttal testimony:

As my analysis demonstrates, Periodicals costs are not out of control. The increase in Periodicals costs relative to inflation has been exaggerated. The increases we do observe appear to be very correlated with the increases in the use of more aggregate pallets. *However, none of this discussion is relevant for evaluation of the enhancements to the costing system. If it were, it would argue in favor of the new method, since, under it, measured Periodicals costs would rise less than they have under LIOCATT as shown in Figures 4 and 5.*

USPS-RT-6, at 33 (emphasis added).

Thus, the disputed portions of witness Degen's rebuttal testimony cannot, under any reasonable interpretation, be seen as adjuncts to the Postal Service's direct case which were required to be presented at that time. Rather, the Degen rebuttal is much like the situation presented in the other "precedent" relied upon by the periodicals mailers.

In distinguishing in Docket No. R80-1 between the Postal Service rebuttal testimony that it did strike and the intervenor rebuttal testimony which it did not, the Commission stated:

The testimony at issue here differs from Mr. Renken's testimony for ATCMU. Mr. Renken did not design a study, present some results, and then conduct an additional study when other parties said the results did not

represent what they were offered to represent. Rather, Mr. Renken was responding to an OOC proposal that was not filed until the intervenors filed their cases. Mr. Renken's testimony was permitted because *it is reasonable that ATCMU would not know whether it wanted to conduct a study opposing the OOC rate structure until it had seen it and the support offered for it.*

Docket No. R80-1, Order No. 362, at 5-6 (emphasis added). It is astounding that the Periodicals mailers apparently believe that at least a portion of this quotation supports their argument. See *Motion at 6.* The disputed portions of witness Degen's rebuttal testimony are in no manner presented to demonstrate that the results of his initial cost distribution methodology "represent what they were offered to represent." As acknowledged by the Periodicals mailers, the issue of Periodicals cost increases is an issue separate from witness Degen's cost distribution methodology.

Moreover, the highlighted portion of the above quotation is clearly analogous to the instant situation. It was reasonable for the Postal Service not to know whether it wanted to present any type of analysis of Periodicals costs until it had seen what the Periodicals mailers said on the issue and what support they offered for their statements. Given the recent series of meetings with Periodicals mailers that had taken place and the ongoing discussions concerning a future cooperative study relating to Periodicals issues, the Postal Service had reason to believe that Periodicals mailers might not even raise the issue in these proceedings.⁶

⁶ In any event, mailers using all classes and subclasses of mail routinely complain about both cost and rate increases and challenge those increases in a variety of ways during rate proceedings, some of which are mere reiterations of arguments from past proceedings. The Postal Service would truly have to be omniscient if it were expected to prepare its direct case to address in advance all such complaints. Even if this were possible, such a standard would increase the number of witnesses and supporting documentation filed with every case exponentially. It also would place the Postal Service

Further, it is clear that the disputed portions of the Degen rebuttal are in direct response not only to Periodicals mailers general complaints of increasing costs, but also to specific allegations by Periodicals mailers that their worksharing efforts should be mitigating or even reducing costs. For example, MPA witness Little stated, "These cost increases and productivity declines have occurred despite many efforts by Periodicals mailers to prepare their mail more efficiently than ever before, through *increased levels of presortation, palletization, and drop shipping....*" *Tr. 27/14547 (emphasis added)*. ABP witness Crain stated, "We explained that the cost trend should be downward, not upward, in light of the industry's growing investment of time and money in mail preparation and drop shipping activities...." *Tr. 28/15281*. Likewise, Time Warner witness Stralberg complained of Periodicals cost increases "despite both new technology and *increased mailer presorting, barcoding and palletization* that should have made the Postal Service's job easier." *Tr. 26/13821 (emphasis added)*. MPA witness Cohen testified, "Periodicals mailers have undertaken other activities to reduce the costs of processing their mail, such as *shifting Periodicals from sacks to pallets and other types of containers.*" *Id. at 14030 (emphasis added)*. As the disputed portions of witness Degen's rebuttal clearly establish, it is the shift to aggregate pallets which has contributed to the cost increases.⁷

at a significant litigation disadvantage, raising due process concerns. This is of particular concern where mailers complain that the costs do not reflect their worksharing efforts, yet offer nothing beyond mere assertions as support.

⁷ It should be noted that when the Postal Service directed discovery to the Periodicals mailers concerning the very worksharing practices touted in their testimonies, the Postal Service was met either with disclaimers that the Periodical mailers had such

As the above discussion amply demonstrates, the disputed portions of USPS-RT-6 constitute proper rebuttal testimony. The Periodicals mailers have not carried their burden of demonstrating that the extraordinary relief they request should be granted.

The Degen Testimony has been Reasonably Documented

The Periodicals mailers arguments of inadequate documentation of witness Degen's "Qualifier/Non-qualifier" and "Decile" analyses are, in some instances, plain wrong, and, in other instances, exaggerated. For example, it is asserted that [n]either the PERMIT data for FY 1993, 1994, 1995 or 1996, or the IOCS tally data for 1993, 1994 and 1995 have been provided the Postal Service or are available elsewhere on the record of this or other proceedings." *Motion at 9-10*. This statement is not entirely accurate. In fact, both the PERMIT and IOCS tally data for FY 1993 were presented in Docket No. MC95-1. *USPS LR-MCR-11, Documentation for USPS-T-6*. The FY 1994 IOCS tally data also were presented in Docket No. MC95-1. *USPS LR-MCR-106, In-Office Cost System (IOCS), Machine-Readable Copy of Output Data; USPS LR-MCR-107, IOCS Tally Analysis Documentation*. The FY 1995 IOCS tally data were made available in Docket No. MC96-3. *USPS LR-SSR-22, In-Office Cost*

information or with a great hue and cry concerning the alleged lack of relevance of the requested information and the burden involved in producing it. See, for example, *Response of the Alliance of Nonprofit Mailers to Interrogatories USPS/ANM-1 through -34, February 6, 1998; Responses of Coalition of Religious Press Associations Witness Stapert to Interrogatories of the United States Postal Service (USPS/CRPA-1-34, February 4, 1998; Objection of Time Warner Inc. to Postal Service Interrogatories USPS/TW-3-33, February 2, 1998; Objection of American Business Press to USPS Interrogatories USPS/ABP-T1-1-34 and USPS/ABP-T3-1-34; and Objections and Responses of Dow Jones & Company, Inc. to Interrogatories and Requests for Production of Documents of United States Postal Service, February 2, 1998.*

System (IOCS), Machine-readable Copy of Output Data; USPS LR-SSR-23, IOCS Tally Analysis Documentation. Also, the FY 1996 IOCS tally data are available in this proceeding. *USPS LR-H-23, In-Office Cost System (IOCS), Machine-readable Copy of Output Data; USPS LR-H-24, IOCS Tally Analysis Documentation.* Witness Degen rests his conclusions upon a comparison between FY 1993 and FY 1996. See *USPS-RT-6, at 32, l. 2–3.* Thus, the only information of the four most relevant data sources that currently has not been provided is the FY 1996 PERMIT data.

As explained in the USPS LR-H-348, that information, as well as the FY 1994 and FY 1995 PERMIT information, is publication specific and accordingly cannot be provided.⁸ The Periodicals mailers scoff at this claim, but a major reason why the Postal Service has traditionally not provided this information is because the *mailers themselves* historically have claimed that it is confidential and do not want it released. If the individual and association Periodicals mailers are willing to forego claims of confidentiality on behalf of themselves or their association members, then the Postal Service will release that data, although it still would not be prepared to release the data for other publications who are not represented in these proceedings without individually contacting them. Obviously, this would be a time-consuming process and likely could not be completed in the time left in these proceedings.

⁸ Although witness Degen does not rely on the FY 1994 and FY 1995 data for the comparison between FY 1993 and FY 1996 presented in his testimony, it is instructive to note that the information for those years presented in LR-H-348 follows the same trend. In other words, unit costs for qualifiers rise faster than the unit costs for non-qualifiers for those years, in a reasonably stable pattern that underscores the reliability of the 1993 to 1996 "end point" analysis presented in the testimony.

Another alternative would be for the Postal Service to mask identifying data and then release the information. This was done in Docket No. MC95–1, but that situation was unlike this one. In Docket No. MC95–1, the data were provided, with recoded publication numbers, and with the 10 largest volume publications aggregated. Recoding could be done here, although again it would be very time-consuming. Also, here, the top decile contains data for only one mailer and the second decile contains data for only three mailers. Aggregation seemingly would not provide sufficient protection.

Further, although the Postal Service acknowledges that not all inputs have been provided, the “Qualifier/Non-qualifier” analysis is merely an update of that presented in Docket No. MC95–1. *USPS-RT-6, at 31; USPS LR-MCR-11*. This analysis was the source of much attention in that docket, some of it by the very parties now complaining about its use here. An examination of the relevant materials from Docket No. MC95–1 and LR-H-348 will show that the methodology has not changed, only more recent data have been added and the data have been split into ten groups (deciles) rather than two groups. In addition, LR-H-348 contains the programs and program output. Although it is true that, without all inputs, the analysis cannot be mechanically duplicated, the Periodicals mailers have all the information needed to perform the more important task in examining an analysis—verifying the logic used in the programs.

Do the Periodicals mailers really dispute witness Degen’s results? They certainly have not said that they do. Even assuming for the sake of argument that there are

some errors in the inputs, do the Periodicals mailers really dispute that some of their largest members are making increasing use of aggregate pallets and that this is increasing Postal Service costs? Those mailers have the data about their own publications in their possession. These data would certainly give some indication of the validity of witness Degen's results, yet the Periodicals mailers are silent on this point. The Periodicals mailers also remained silent, until the filing of this motion late last Friday, about their alleged concern with inadequate documentation. No effort was made to contact counsel for the Postal Service to see if some compromise or interim solution was possible. Instead, the Periodicals mailers filed a motion to strike, thus indicating that their genuine motivation is not to understand, replicate or verify witness Degen's findings, but rather to prevent them from becoming evidence in this proceeding. Rather than allow the Commission and the parties to gain some insight into the causes for Periodicals cost increases, the Periodicals mailers prefer the struthious response. The irony is that the parties demanding the Postal Service response, object to it once it is provided.

In any event, there are legitimate confidentiality concerns here for not providing the input data. Also, the schedule for preparation of rebuttal testimony and hearings on that testimony is very compressed, causing all parties to have limited time to review and analyze rebuttal testimony. Striking testimony is an extreme remedy under the best of circumstances. Under the unique circumstances presented here, the Postal Service suggests that striking the disputed testimony is not warranted. The Commission should allow witness Degen's complete testimony to be entered as

evidence, but consider such matters as the unavailability of all input data in determining the weight to be accorded the disputed portions of the testimony.

MOTION TO STRIKE PORTIONS OF MPA WITNESS COHEN'S TESTIMONY

The Postal Service moves to strike those portions of MPA witness Cohen's testimony relating to her alternative distribution of mixed-mail and not-handling costs under two different assumptions. Specifically, the Postal Service moves to strike the portion of witness Cohen's testimony beginning at page 12, line 22 and continuing through page 13, line 15 (the end of Table 1).

Waiver under Special Rule 1C

In bringing this motion to strike, the Postal Service requests a waiver of Special Rule 1C. As discussed previously, the compressed schedule for the filing of rebuttal testimony and rebuttal hearings has made it impossible to comply with the fourteen-day requirement contained in the rule.

The Cohen Testimony is not Proper Rebuttal

The disputed portion of witness Cohen's testimony is asserted to be in response to UPS witness Sellick's testimony. Witness Cohen states:

To illustrate the potential impact on his [Sellick's] proposed distribution, I performed some rudimentary calculations comparing the distribution of \$2.2 billion of mixed-mail and not-handling costs at allied operations under two different distribution assumptions: (1) costs are distributed on the basis of direct tally costs only at allied operations, and (2) costs are distributed on the basis of direct tally costs at all operations.

MPA-RT-1, at 12. This clearly is not proper rebuttal testimony. The alleged "cost pool interrelationships" or "cross pool relationships" was an issue raised by witness Cohen and also Time Warner witness Stralberg in their initial testimonies, where they

alleged that witness Degen had ignored these effects. For example, Time Warner witness Stralberg stated in his initial testimony, "However, I strongly disagree with Degen's further decision to distribute all mixed mail and not handling costs exclusively within their assigned pools. Doing so ignores all cross pool relationships and leads to severe distortions." *Tr. 26/13824–25*, MPA witness Cohen likewise claimed in her initial testimony, "Even more troubling than witness Degen's unsupported subclass proxy assumptions is his decision to confine his mixed-mail and not-handling distributions to tallies within cost pools....As long as witness Degen applies the correct variability percentage to each tally, he is free to distribute costs to classes and subclasses across cost pools....Degen's proposed distribution, not required or implied by witness Bradley's cost pool variabilities, severely exacerbates the mail processing cost distribution problem. *Tr. 26/14050*.

In fact, the position that witness Cohen's new analysis is in rebuttal to witness Sellick is belied by other statements in her rebuttal testimony. In the paragraph immediately preceding the section where she presents her new analysis, witness Cohen states:

Both witness Degen, who intended to be consistent with witness Bradley, and witness Sellick, who intended to be consistent with witness Degen, should have distributed mixed-mail and not-handling costs across more aggregated groupings of distribution operations.

MPA-RT-1, at 12. It is thus clear that witness Cohen's analysis could have and should have been presented in her initial testimony. Witness Cohen certainly cannot plead lack of time to prepare her initial testimony, since the schedule was extended, allowing intervenors an additional six weeks to prepare their cases-in-chief.

The Cohen Testimony has not been Documented

Witness Cohen presents the results of her analysis in Table 1 on page 13 of her testimony. That table is footnoted with the following cryptic reference: "Calculated from data in USPS-LR-23 and USPS-LR-146." *MPA-RT-1, at 13, n.25*. No further explanation is provided, much less any exhibits, workpapers, spreadsheets or library reference. This clearly does not even begin to feign compliance with either the Commission's documentation rules or with any sense of fair play to other parties who might want to examine that analysis. The short time between filing of rebuttal and hearings makes is extremely difficult for parties to analyze what has been provided; where nothing has been provided, the task of attempting to decode what someone might have done becomes impossible.

CONCLUSION

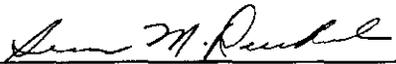
For all of the foregoing reasons, the Periodicals mailers' motion to strike portion of the rebuttal testimony of witness Degen should be denied. If their motion is denied, then the Postal Service withdraws its motion to strike the above-cited portion of MPA witness Cohen's rebuttal testimony.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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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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March 17, 1998