

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

POSTAL RATE AND FEE CHANGES, 2006

Docket No. R2006-1

MOTION OF THE UNITED STATES POSTAL SERVICE TO STRIKE PORTIONS OF  
THE TESTIMONY DOCUMENT (GCA-T-1) OF GCA WITNESS CLIFTON  
(September 13, 2006)

The United States Postal Service hereby moves to strike portions of the document denominated as GCA-T-1 and provided as the alleged testimony of Greeting Card Association (GCA) witness Clifton. The problem with the material in question (essentially Appendix C – Kelejian Declaration) is that it is not the testimony of witness Clifton, but is instead the testimony of another individual. Any question regarding its testimonial nature is quickly resolved by noting that the material includes a declaration signed by its author attesting under penalty of perjury to the truth of its content. The effect of allowing this material as an attachment to the testimony of witness Clifton would be to allow GCA the benefits of having this material appear as direct testimony, but to immunize its author from written and oral cross-examination. Since such a result 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. Accordingly, the Postal Service moves to strike Appendix C of GCA-T-1, plus all references to the contents of that material in the text of GCA-T-1.

Appendix C to GCA-T-1 consists of a discussion (presented in the form of a letter) of analysis conducted by Prof. Harry Kelejian focusing exclusively and directly on

the work submitted in this proceeding by Postal Service witness Thress, a declaration executed by Prof. Kelejian stating that the material was provided in support of the GCA's direct case, and Prof. Kelejian's 8-page *curriculum vita*. The nature and function of the analysis submitted by Prof. Kelejian appear to be no different from those of the testimonies submitted by a host of other intervenor witnesses. In GCA-T-1, Dr. Clifton affirmatively states (e.g., page 32) that he is relying on the materials submitted by Prof. Kelejian, and proceeds to do so as if that material had properly been filed as a separate piece of testimony. If GCA had presented this material as the direct testimony of Prof. Kelejian, the Postal Service would have had no objection. Consequently, shortly after the document was filed, the Postal Service informally contacted counsel for GCA and suggested that, in order for the Postal Service to be able to conduct written and/or oral cross-examination of Prof. Kelejian regarding his analysis, it would be necessary for him to submit his own testimony, like all other witnesses. GCA ultimately declined this suggestion, leaving the Postal Service no alternative but to file this motion to strike.

It perhaps bears noting that the instant circumstances are quite distinct from those occurring when the Postal Service provides, for example, an institutional discovery response. First, in that situation, the Postal Service is not refusing to produce a witness (as GCA essentially has done in this instance), because no need for a witness has yet been identified. More importantly, when the Postal Service is providing an institutional response to a request for materials or information initiated by some other party, it is not seeking to enhance the status of the materials provided by emphasizing the stature of the author or authors of that material. (In fact, institutional responses are often provided because no single individual has sufficient expertise to be able to

address the full scope of matters included, and responsive input has to be aggregated from multiple sources). In contrast, here GCA appears to be deliberately trying to capitalize on the claim of Dr. Clifton (GCA-T-1 at 3) that Prof. Kelejian is a “noted econometrician,” and to that end has attached his entire C.V. GCA cannot have its cake and eat it too. If GCA wishes to rely on the personal expertise of Prof. Kelejian and the unpublished analysis he conducted specifically for purposes of supporting GCA’s case in this proceeding, it must be prepared to make him available for cross-examination. Since GCA is (as yet) unwilling to do so, Dr. Clifton should not be allowed to attach what in substance is the separate testimony of Prof. Kelejian to his own, and rely on it as if it had been submitted as an independent piece of testimony.

Therefore, the Postal Service moves to strike Appendix C to GCA-T-1 in its entirety. The portions of the text of GCA-T-1 which rely on Appendix C and therefore need to be stricken as well, are: the first two sentences of the paragraph beginning on line 3 of page 3; pages 32-33 and the first two lines of page 34; the sentence beginning on line 16 and the sentence beginning on line 21 of page 43; the paragraph beginning on line 24 of page 43 and continuing through line 6 on page 44; the clause “and that, in any event, he did not use a correct Box-Cox transformation on the data when he did employ it” on lines 1-2 of page 50; the clause “what he mislabeled a “Box-Cox” transformation” on line 14 of page 5, and the clause “and that of Prof. Harry Kelejian in his Declaration” on line 8 of page 58.

Under Rule 21(c), motions to strike are requests for extraordinary relief. That should not be an impediment to favorable resolution of the Postal Service’s instant request for two reasons. First, what GCA is attempting constitutes an extraordinary

challenge to the orderly administration of Commission proceedings. If GCA can immunize its expert from cross-examination by attaching a declaration to his testimony and appending it to the testimony of another witness, what is to stop all other parties from likewise being able to immunize their experts by adoption of this strategy? The result would be proceedings in which the due process rights of parties would not be protected in accord with the applicable provisions of the Administrative Procedure Act. In reality, of course, it is well-established that parties wishing to rely on the testimony of experts must make those experts available for cross-examination, or their testimony cannot be admitted. To date, GCA has provided no indication of why it is incapable of following these entirely normal procedures in this instance.

Second, the Postal Service's original objective in this dispute was not to exclude material from the record – which presumably is the extraordinary relief disfavored by Rule 21 -- but to allow the record to be enhanced through the appearance of Prof. Kelejian as a witness subject to cross-examination. As just indicated above, if GCA were simply willing to follow the same procedures as all other parties, there would be no necessity of reaching the question of striking (or otherwise excluding) material from the record. But, since the Postal Service cannot compel GCA to produce Prof. Kelejian as a witness, the only feasible recourse to the failure to make him available for cross-examination is to exclude what amounts to his testimony (regardless of the form in which it is presented) from evidence upon which GCA or its other witnesses can rely.

In reality, therefore, the relief sought by this pleading seeks the exclusion of the indicated portions of GCA-T-1 only in the alternative, to the extent that GCA continues to refuse to treat Prof. Kelejian's submission as a separate piece of testimony, subject

to cross-examination. It must be noted, however, that, by choosing to resolve this dispute through motion practice, GCA has already succeeded in substantially eating into the relatively short time period allotted for discovery on intervenor direct cases. Even if GCA were now to change its position and convert Prof. Kelejian's declaration to testimony, either immediately or subsequently after a favorable ruling by the Presiding Officer on the Postal Service's request for relief, it may be necessary for the Postal Service to move for an extension of discovery on that testimony and the related portions of Dr. Clifton's testimony.

Therefore, the Postal Service respectfully requests that the above-indicated portions of GCA-T-1 be excluded from the record unless GCA converts Appendix C into the separate testimony of Prof. Kelejian, and makes him available for cross-examination to the same extent as all other witnesses presenting evidence in this proceeding.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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September 13, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served the foregoing document in accordance with Section 12 of the Rules of Practice and Procedure.

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