

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

POSTAL RATE AND FEE CHANGES, 2006

Docket No. R2006-1

**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

The Association for Postal Commerce and the Mailing and Fulfillment Service Association (collectively "PostCom") support the United States Postal Service's motion to strike portions of the testimony document (GCA-T-1), presented as the testimony of Greeting Card Association ("GCA") witness James A. Clifton. PostCom concurs with the Postal Service that allowing this material as an attachment to Witness Clifton's testimony would wrongly give GCA the benefit of having this material appear as direct testimony without concurrently subjecting the testimony to cross-examination by adverse parties. Such a result would be clearly unfair to all parties.

Fundamentally, PostCom objects to the admission of Professor Kelejian's testimony as an attachment to Witness Clifton's testimony because admitting Professor Kelejian's testimony in such a manner would violate the prohibition against the use of hearsay found in Federal Rule of Evidence ("FRE") 802. Fed. R. Evid. 802. Absent specific rules to the contrary, trial-type hearings conducted pursuant to the Administrative Procedure Act are subject to the FRE. Under the FRE, hearsay is as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). FRE

802 provides that "hearsay is not admissible except as provided by these rules" Fed. R. Evid. 802. Professor Kelejian's testimony, when offered as an attachment to Clifton's testimony, qualifies as hearsay under the definition provided in FRE 801. His statements were made outside of this proceeding and are being offered by GCA to prove the truth of what Professor Kelejian asserts—namely, that the procedures used and results reached by Thomas E. Thress in his testimony on behalf of the Postal Service is problematic. Thus, Professor Kelejian's testimony is inadmissible unless a hearsay exception applies.

The full disclosure of the hearsay source underlying a testifying expert's opinion requires two critical factors: necessity and trustworthiness.. *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541 (5th Cir. 1978). In this case, both factors are lacking. Counsel for GCA, although understandably eager to bring to the Postal Rate Commission's attention Professor Kelejian's testimony, could have done so without resorting to hearsay and thereby shielding Kelejian from cross-examination. Professor Kelejian could easily be called to testify and thus be subject to cross-examination, and therefore the element of necessity is lacking. GCA's argument that it would be costly and burdensome to sponsor Professor Kelejian's testimony hardly constitutes a showing of necessity to warrant such a profound departure from the normal rules of evidence.

In addition, Professor Kelejian's testimony lacks any independent guarantee of trustworthiness that would justify dispensing with cross-examination. When courts have allowed disclosure of hearsay underlying an expert's opinion, they have done so because some external circumstance ensured the reliability of the evidence. *Bryan*, 566 F.2d at 546. Thus, courts have relied upon such hearsay evidence when it constitutes a routine and customary record of a business concern, *see Long v. United States*, 59 F.2d 602 (4th

Cir. 1932), or when experts—particularly doctors—customarily rely upon third party reports from other experts. *See Box v. Swindle*, 306 F.2d 882 (5th Cir. 1962). Neither of these situations is present here.

Finally, parties opposed to the views of Professor Kelejian have a due process right to challenge his testimony through cross-examination of Professor Kelejian himself. The Supreme Court has held that in "almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *see also ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 93-94 (1913); *Willner v. Committee on Character*, 373 U.S. 96, 103-04 (1963). Expert opinions and the basis for them are matters of fact. The present issue turns on questions of fact, and due process requires that interested parties be given an opportunity to confront and cross-examine Professor Kelejian.

For all of these reasons, the PostCom supports the Postal Service's motion to strike.

Respectfully submitted,

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