

PRESIDING OFFICER'S
RULING NO. R2006-1/91

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

Postal Rate and Fee Changes

Docket No. R2006-1

PRESIDING OFFICER'S RULING ON
MCGRAW-HILL REQUEST FOR CLARIFICATION OF THE STATUS
OF CERTAIN PROPOSED DESIGNATIONS

(Issued October 26, 2006)

Background. The McGraw-Hill Companies, Inc. (McGraw-Hill) seeks clarification of the evidentiary status of certain segments of witness Schaefer's Docket No. C2004-1 testimony (MH-T-1).¹ This request, given certain assumptions and observations in the McGraw-Hill Motion, is also deemed, in part, a motion for reconsideration of limited aspects of P.O. Ruling 2006-1/75.²

The McGraw-Hill Motion is the latest in a series of filings sparked by the interest Time Warner Inc. (Time Warner) expressed, via a motion invoking Commission rule 31(e), in designating limited portions of the Docket No. C2004-1 testimony of witnesses

¹ See Motion by The McGraw-Hill Companies for Clarification of Presiding Officer's Ruling on Periodicals-related Designations from Other Cases, October 10, 2006 (McGraw-Hill Motion). The referenced ruling is Presiding Officer's Ruling No. R2006-1/75, issued October 6, 2006. This ruling divided the material McGraw-Hill proposed designating into five "segments" to facilitate discussion. The Fifth Segment, for example, included the MH-T-1 cover, the table of contents and material referred to as "exhibits." Portions of the material in the Second Segment that were opposed by Time Warner were identified as "parts" for discussion purposes. The ruling (and related pleadings) generally include references to both the pre-filed Schaefer testimony and to the official transcript. This arises because original pagination is overlaid with new numbering when the material is transcribed.

² This approach appears to be the most effective way of achieving an expeditious resolution and conserving the resources of participants and the Commission.

Stralberg and Mitchell into the evidentiary record of this proceeding.³ McGraw-Hill moved to counter-designate a considerable amount of witness Schaefer's Docket No. C2004-1 testimony.⁴ Time Warner formally contested some, but not all, parts of the segments of testimony covered by the proposed counter-designation.⁵ Time Warner Opposition at 1-2, 4. McGraw-Hill, in turn, asserted that Time Warner's opposition was without merit.⁶ P.O. Ruling R2006-1/75 addressed these (and related) pleadings.

The McGraw-Hill Motion is deemed to raise four points. A review indicates two can be readily settled, without the need for detailed explanation. Resolution of the remaining two points can be achieved through clarification and reconsideration.⁷

An attachment reflecting the permitted McGraw-Hill counter-designation is provided.

³ Time Warner's rationale for invoking the rule 31(e) mechanism was that it offered a means of preventing needless duplication of effort with respect to providing support for, and background information related to, the rate design proposal it is sponsoring in this case. Presiding Officer's Ruling No. R2006-1/75 confirmed the validity of this rationale.

⁴ Motion of The McGraw-Hill Companies, Inc. to Counter-Designate Evidence from a Prior Commission Docket, August 23, 2006, at 1 (McGraw-Hill Counter-Designation Motion).

⁵ Partial Opposition of Time Warner Inc., to Motions of American Business Media and McGraw-Hill to Counter-Designate Evidence from Prior Docket, August 30, 2006 (Time Warner Opposition).

⁶ Motion of The McGraw-Hill Companies, Inc. for Leave to File Reply to Partial Opposition of Time Warner Inc. to Motions of American Business Media and McGraw-Hill to Counter-Designate Evidence from Prior Docket, September 5, 2006; and Reply of the McGraw-Hill Companies, Inc to Partial Objection of Time Warner Inc. to Motions of American Business Media and McGraw-Hill to Counter-Designate Evidence from Prior Docket, September 5, 2006 (McGraw-Hill Reply).

⁷ One of these points involves McGraw-Hill's suggested extension of a designation; the other involves its supposition that a portion of a proposed segment was inadvertently omitted.

Discussion. Some of the longstanding guidelines associated with practice under rule 31(e) at the Commission have been addressed, to varying degrees, in two rulings issued in this docket.⁸ Rulings in other cases have covered similar ground, generally evaluating requests in terms of one or more pertinent factors.⁹ The analytical framework need not be repeated at this point; however, it is worth emphasizing that while formal opposition to a proposed designation may bring the merits of admission into sharp focus, neither the scope of an opposition (or the absence of an opposition) constrains the decision maker's review. Instead, the appropriateness of the full designation is at stake (in the context of the pending proceeding), not simply the contested portion. The decision maker should consider all applicable factors, not simply those a participant opposing the designation chooses to pursue.

The reasons for this reservation of authority and discretion include, among others, that admission of designated material is not a matter of right, but of discretion, and that the agency, in the final analysis, has independent institutional obligations with respect to the evidentiary record and to overall perceptions of fairness and due process.

McGraw-Hill Motion: consistency of text and certain entries in an attachment. With reference to the requested clarification, the "First Entry" in the Second Segment in Attachment D-2 (in P.O. Ruling R2006-1/75) is expressed accurately in terms of the citation to the official transcript; however, as McGraw-Hill usefully notes, the corresponding reference to pagination in witness Schaefer's testimony should read "page 5" instead of "page 7." In addition, consistency of Attachment D-2 with the intent and main text of the ruling warrants addition of the following designation: Tr. 6/1924, line 15 *through* Tr. 6/1925, line 4.

⁸ Presiding Officer's Ruling No. R2006-1/68, issued September 22, 2006, captioned "Presiding Officer's Ruling on Valpak's Proposed Designation of Evidence from Other Cases," and Presiding Officer's Ruling No. R2006-1/75 (the ruling addressed here), cited in fn. 1.

⁹ The extent to which the factors are discussed varies, depending on the context of the proposed designation, the need to balance the time involved in issuance of a ruling with the press of competing demands, and other pertinent factors.

McGraw-Hill's suggested extension of an authorized designation. McGraw-Hill's reading of the ruling leads it to suggest that an entry for one of the authorized designations (covering material at Tr. 6/1924, line 15 *through* Tr. 6/1925, line 4, which corresponds to the addition referred to above) should perhaps be extended to include a small additional portion. This suggestion apparently arises because McGraw-Hill does not discern a specific ruling on this material in terms of the Time Warner Opposition. See McGraw-Hill Motion at 2. As indicated, however, disposition of a proposed counter-designation is not limited by the scope of an objection; independent concerns may apply.

The suggested extension consists of a numbered heading and a follow-on sentence. This material (originally subsumed within a broader segment of McGraw-Hill's proposed counter-designation) was referred to, but not reproduced, in P.O. Ruling R2006-1/75. This was based on the assumption that all interested parties were familiar with the content. The material is supplied in its entirety. The heading reads: "IV. Complainants' Proposal is Fundamentally Misdirected Because Smaller-Circulation Publications Have in Fact Borne the Brunt of the Cost Increases Upon Which Complainants Focus." The sentence that follows (referred to in the McGraw-Hill Motion as an introductory sentence, given its relationship to other material that *has* been deemed admissible) reads:

Testimony presented by witness Mitchell focuses on the inordinate rise in mail processing costs attributed to Periodicals since the late 1980's (Tr. 3/805-08) as the point of departure for Complainants' proposal in this proceeding to de-average Periodicals costs and rates, which would result in enormous savings to Complainants (without any change in their mailing practices, or any cost savings to the Postal Service) while exposing most smaller Periodicals to corresponding rate increases.

Docket No. C2004-1, Tr. 6/1925 (line citations omitted).

The intent of P.O. Ruling R2006-1/75 was to exclude this material from the current record, based on the overall considerations the ruling explicitly stated would guide the decision on proposed designations. These include, among others, the rule's fundamental purpose, identified as providing a convenient and efficient mechanism for entering relevant and accurate material from another docket into a pending record, where there is a clear nexus between the proposed designation and a major pending issue. P.O. Ruling R2006-1/75 at 3.

Rule 31(e) is not a tool for according outdated information evidentiary status. *Id.* In addition, even if some benefits might accrue to admission, countervailing considerations that seriously diminish evidentiary value may warrant exclusion, such as the effect of the passage of time on the material's continued probity and validity, a material change in underlying costing methods or operations, and the extent and nature of internal references. *Id.*

McGraw-Hill's interpretation of the ruling is reasonable; however, Section IV of Ruling R2006-1/75 is captioned "Disposition of Proposed Counter-Designations." *Id.* at 7. Subsection C is captioned "McGraw-Hill's Proposed Counter-Designations," without limitation to the parts opposed by Time Warner. *Id.* at 12. Much of the ensuing discussion addresses the Time Warner Opposition, but disposition of the proposed counter-designations (not limited to "parts") is prefaced with the following statement: "Admission of the proposed McGraw-Hill counter-designations ... raises several concerns." *Id.* at 14. These included, among others, the fact that there were changes in the Time Warner proposal in this case, relative to the Docket No. C2004-1 proposal; new sacking regulations; and the difficulty of deleting some portions of testimony, given its presentation, without impeding readability. *Id.* It was then stated: "These considerations have influenced my decision on these proposals." *Id.* Again, there was no limitation to the parts opposed by Time Warner, although it is acknowledged that much of the remaining discussion was couched in these terms for organizational purposes. In addition, Attachment D-2 is couched in terms of segments and entries, not "parts."

Initial review of the material that now comprises the suggested extension led to the conclusion that it has qualities that generally are not objectionable: it is a short passage; it appears immediately before other material in the Schaefer testimony that was deemed admissible; and it includes a reference to part of witness Mitchell's Docket No. C2004-1 designated testimony. At the same time, there are several explicit references to Docket No. C2004-1, with the heading and follow-on sentence including, within a short span, language claiming that "Complainants' Proposal is Fundamentally Misdirected," mentioning "the Complainants' focus," and claiming that the "Complainants' proposal in this proceeding" is one "which would result in enormous savings to Complainants ... while exposing most smaller Periodicals to corresponding rate increases."

Accordingly, the statements were viewed as discussion of a proposal no longer in issue (thus stale), and stale in a way likely to cause confusion if the statements were admitted. Moreover, attempting to purge the segment of objectionable material was viewed as leaving the record with only fragmentary statements of little evidentiary value, given the structure of the heading and sentence. The reasoning that was applied to the pertinent entry in Attachment D-2 was presented in P.O. Ruling R2006-1/75, but the organization of the discussion inadvertently left matters unclear. This result was unintended, and the discussion here provides additional explanation.

Language in the heading in issue also refers quite specifically to "the" rate proposal — an obvious reference to the Docket No. C2004-1 proposal, not to the more general points made in the portion of designated material this proposed extension ostensibly counters. Furthermore, the reference in this material to certain transcript pages in the Mitchell testimony does not appear to "counter" any Time Warner designation. These considerations, logically flowing from application of rule 31(e), led to striking the balance in favor of excluding the proposed material, notwithstanding Time Warner's position or McGraw-Hill's assertions.

Upon reconsideration, it continues to appear that the highly specific references in this material to a proposal no longer under consideration not only render the material

stale, but do so in a way likely to cause confusion if admitted into the record. McGraw-Hill mentions that the sentence in interest leads to material that has been designated, and seeks admission for that purpose. This was considered, but not mentioned or deemed material at the time of the original ruling because the admitted material was considered to be able to stand on its own. Upon reconsideration, this material continues to appear to be able to stand on its own; therefore, admission of the sentence (and/or related heading) is not essential.

It would seem that no prejudice attaches to this disposition, as McGraw-Hill and others can draw comparisons (or address similarities) between the Docket No. C2004-1 proposal and the Time Warner proposal in this case without reliance on this very small portion of the Schaefer testimony. Accordingly, the exclusion of the proposed segment is re-affirmed.¹⁰

*McGraw-Hill's supposition that there is an inadvertent omission in the list of authorized designations due to typographical errors.*¹¹ McGraw-Hill's supposition, based on its reconciliation of certain aspects of P.O. Ruling R2006-1/75, pleadings and entries in the attachment, is that a typographical error may have occurred, resulting in the erroneous exclusion of a designation it had proposed.¹²

¹⁰ It is acknowledged that at the time the McGraw-Hill Motion for Counter-Designation was filed, no concrete proposal was on the table, as no filing was due at that point. The Time Warner Opposition appears to have been filed in strict compliance with the letter of rule 31(e), which requires a party to file its motion to designate evidence from other dockets a specified number of days prior to filing testimony in the pending docket. P.O. Ruling R2006-1/75 had the benefit of seeing the actual Time Warner presentation.

¹¹ Specifically, in the Second Segment, Third Entry in original Attachment D-2.

¹² The reference in the McGraw-Hill Counter-Designation Motion to material appended to MH-T-1 (Docket No. C2004-1) as exhibits has been deemed to refer to the material witness Schaefer referred to as Attachment 1 in his testimony.

The material McGraw-Hill believes should have been entered reads:

3. Production Constraints for Time-Sensitive Publications

McGraw-Hill publishes a number of time-sensitive weeklies. One example is *Aviation Week*, a highly regarded source for in-depth coverage of the aerospace industry. Timely delivery of *Aviation Week* is critical to its approximately 110,000 subscribers worldwide. In order to reach subscribers in key markets in a timely manner, *Aviation Week* is shipped via airfreight to a number of domestic and international locations.

Docket No. C2004-1, Tr. 6/1939 (line citations omitted).

This conclusion also appears to have been based on the assumption that the scope of the Time Warner Opposition limited the scope of the ruling on admission of the material¹³ and the expectation that general statements regarding difficulties the McGraw-Hill proposal posed in terms of the rule 31(e) considerations would be supplemented with more specific discussion. This led to McGraw-Hill's conclusion that only one correction makes sense in light of witness Schaefer's testimony, Time Warner's objections, and P.O. Ruling R2006-1/75.

The reasoning set out above is also applicable here; however, McGraw-Hill maintains that the third "Second Segment" entry in Attachment D-2 should be changed. On reconsideration, it appears that this material is unlikely to be misinterpreted or cause confusion, and it may be admitted into evidence.¹⁴

Summary. An attachment supplementing Presiding Officer's Ruling No. R2006-1/75 is provided. It is noted that P.O. Ruling R2006-1/68 stated that designations from

¹³ McGraw-Hill states, for example, that "Time Warner objected to 'Tr. 1934 [p. 16], l. 24 through Tr. 1939 [p.19], l. 10', but page 19 of witness Schaefer's testimony corresponds to Tr. 1937, not Tr. 1939 (which corresponds to page 21)." McGraw-Hill Motion at 3.

¹⁴ The McGraw-Hill web site refers to a publication entitled, "*Aviation Week & Space Technology*". If a change in title has occurred since submission of the original testimony (or the title referred to on the web site has been the correct title all along), this would be deemed harmless error.

other dockets would be transcribed into a separate volume. No new sets of designations need be provided.

RULING

1. The Motion by The McGraw-Hill Companies for Clarification of Presiding Officer's Ruling on Periodicals-related Designations from Other Cases, filed October 10, 2006, is granted in part.
2. An attachment to this ruling supplements Presiding Officer's Ruling No. R2006-1/75 to reflect the clarification and reconsideration provided in this ruling.

George Omas
Presiding Officer

Revised Attachment D-2

The McGraw-Hill Companies, Inc. Counter-Designations — Commission-authorized
(Supplementing Presiding Officer's Ruling No. R2006-1/75)

Original Docket:

C2004-1

Document:

MH-T-1

Fifth Segment	Cover	Tr. 6/1916
First Segment		Tr. 6/1919, line 1 <i>through</i> line 22
Second Segment		Tr. 6/1922, line 6 <i>through</i> Tr. 6/1923, line 7
		Tr. 6/1924, line 15 <i>through</i> Tr. 6/1925, line 4
		Tr. 6/1925, line 15 (beginning with "Witness") <i>through</i> Tr. 6/1934, line 24 (through footnote 8)
		Tr. 6/1937, line 11 <i>through</i> Tr.6/1943, line 16
Third Segment		Tr. 6/1946, line 6 <i>through</i> Tr. 6/1947, line 9
Fourth Segment		Tr. 6/1952, line 15 <i>through</i> Tr. 6/1953, line 8
Fifth Segment	Exhibits	Tr. 6/1961-62
	Declaration	Tr. 6/1956-60

Note: References corresponding to pages and line numbers in pre-filed testimony have been omitted and the order of designations has been reorganized to conform to order of appearance in transcript.