

# DOCKET SECTION

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

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POSTAL RATE & FEE CHANGES, 1997

Docket No. R97-1

MOTION OF PERIODICALS INTERVENORS TO STRIKE PORTIONS OF THE  
REBUTTAL TESTIMONY OF POSTAL SERVICE WITNESS DEGEN (USPS-RT-6)  
AND REQUEST FOR WAIVER OF SPECIAL RULE OF PRACTICE 1C  
(March 13, 1998)

Pursuant to special rule 1C, the undersigned parties hereby (1) request waiver of the requirement in special rule 1C that motions to strike testimony be filed at least fourteen days prior to the scheduled hearing on the testimony, and (2) move to strike those portions of the rebuttal testimony of Postal Service witness Degen (USPS-RT-6) 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]) on the ground that, for the following reasons, they do not constitute proper rebuttal:

- (1) The two new studies present wholly new analyses, based on the creation of new databases and the application of new methodologies.
- (2) Section 31(k)(3) of the rules of practice describes the data and information that must be presented as foundation for the introduction into evidence of computer analyses. The purpose of the rule is "to achieve authentication, replication, and validation of computer programs early enough . . . so that sufficient time remains to analyze, test, and evaluate such programs before witnesses sponsoring such computer-based evidence are scheduled for cross-examination."<sup>1</sup> In

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<sup>1</sup> 50 Fed. Reg. 43,389-90 (Docket No. RM85-2, Order No. 640). Section 31(k)(3) applies to "Computer Analyses" and requires that the following specific information be filed (without request) at the time that testimony relying on such analyses and studies is filed: "a general description of the program that includes the objectives of the program, the processing tasks

violation of the mandatory requirements of rule 31(k)(3)), and without requesting waiver of those requirements, the Postal Service did not provide the input data for Degen's new computer analyses and retains exclusive possession of those data, which are essential to replication, validation, and understanding of the new studies.

- (3) Even had the Postal Service complied fully with the documentation requirements of rule 31(k)(3), the studies at issue are of a nature not appropriate for rebuttal testimony in an omnibus rate case. Because of the statutory 10-month deadline, adequate time does not remain to afford an opportunity for evaluation of the studies that comports with the due process rights of other parties, or for meaningful examination and consideration of the studies by the Commission. It is impossible in the time remaining in this proceeding to review, understand, and test the conclusions that witness Degen derives from these studies.
- (4) For the following reasons, the new Degen studies could have and should have been filed as part of the Postal Service's direct case:
  - (i) the Postal Service's direct case identified and responded to the same criticisms that the new studies purportedly are needed to rebut (objections that have in fact been well known to the Postal Service for years); the new studies, therefore, do not answer any new argument or proposal brought up by another party in its direct case but are simply an addition to the Postal Service's own case-in-chief, intended to shore up that case with respect to issues it addressed inadequately;
  - (ii) the Postal Service is obliged to "file in its Direct Case the studies on which it intends to rely,"<sup>2</sup> and, as the proponent of a new cost distribution methodology, bears the burden of proof on that issue; the Postal Service was in possession of the data used in its rebuttal testimony at the time it was formulating its direct case and retained exclusive possession of that data until the time it filed its rebuttal testimony.

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performed, the methods and procedures employed, and a listing of input and output data and source codes."

<sup>2</sup> Docket No. R80-1, Order No. 352, Order Modifying Presiding Officer's Ruling Striking USPS-RT-4 (November 24, 1980) at, 4.

1. Waiver of the Fourteen-Day Requirement of Special Rule 1C

Special Rule 1C provides that "motions to strike testimony of exhibits are to be submitted in writing at least 14 days before the scheduled appearance of the witness, unless good cause is shown."<sup>3</sup> Mr. Degen is currently scheduled to testify on *Friday, March 20, seven days from the date of this motion, and a motion is pending to reschedule that hearing for March 19, one day earlier.* This motion therefore does not meet the fourteen-day requirement.

It is manifest that good cause exists for this motion's failure to meet the fourteen-day requirement. The Degen testimony, along with numerous other pieces of Postal Service and intervenor rebuttal testimony, was filed on March 9, only four days prior to the filing of this motion and less than fourteen days prior to the scheduled hearing on that testimony. In these circumstances, the schedule makes compliance with the deadline literally impossible. More importantly, it is clear that review of Degen's testimony and preparation of this motion has been accomplished as expeditiously as is possible in the circumstances, given the complexity of the issues involved, the need to confer with expert consultants in order to determine the magnitude and duration of the efforts that would be necessary in order to evaluate and respond to Degen's studies, and the necessity of coordinating a coalition of intervenors who are endeavoring to act jointly in this *proceeding whenever possible.*

The signatories to this motion therefore believe that good cause has been amply demonstrated and respectfully request waiver of the fourteen-day requirement.

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<sup>3</sup> Presiding Officer's Ruling R97-1/4 (August 1, 1997), Attachment B.

2. Discussion of Grounds for Striking Portions of USPS-RT-6

- a. Under the Commission's precedents, Degen's new studies exceed the allowable bounds of rebuttal testimony containing new data, studies, or analyses

The two leading Commission precedents concerning the proper bounds of rebuttal testimony based on new studies or analyses were both decided on the same day during the conduct of Docket No. R80-1. The Presiding Officer granted a United Parcel Service (UPS) motion to strike Postal Service rebuttal testimony offered to support the Postal Service's claim in its direct case that a study of the San Francisco BMC produced results generally applicable to all 34 facilities in the BMC system. Asserting that its rebuttal was made necessary by criticisms of that claim in the direct testimony of UPS and others, the Postal Service presented as rebuttal new studies of two additional facilities.

Finding that the Postal Service "should have foreseen the issue of whether the results of the study were representative of the BMC system" and that it "could have conducted the [additional] studies . . . in time to file the results as part of its case-in-chief," the Presiding Officer granted UPS's motion to strike the Postal service testimony that relied on the new studies.<sup>4</sup> Although he conceded the correctness of the Postal Service's assertion that the testimony at issue was "in direct response to and rebuttal of the criticisms [of the Postal Service's case-in-chief] made by UPS witness Kloss and others,"<sup>5</sup> the Presiding Officer held:

[T]hat alone does not show that it is true rebuttal. Rebuttal answers some new argument brought up by the other party. The issue of whether the sample relied on in the Service's case-in-chief was representative in itself likewise part of that case-in-chief. If the Postal

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<sup>4</sup> Docket No. R80-1, Presiding Officer's Ruling Granting United Parcel Service Motion to Strike Testimony of Postal Service Witness Stralberg (November 19, 1980), at 3.

<sup>5</sup> Id. (quoting Postal Service Response (November 18, 1980), at 7 (emphasis in original)).

Service wants to say that the San Francisco BMC study is representative by producing studies from two other facilities that give similar results, it must do so in its case-in-chief unless it can offer a compelling reason why the Commission should accept late filed testimony. [*Id.* at 5.]

Lest this rule seem overly strict in the context of administrative proceedings before an expert body, where rules of evidence are normally more relaxed than in courts of law, the Presiding Officer's explanation of its rationale makes clear that the balance of equities requires such a result in light of the Commission's statutory 10-month deadline:

Such testimony belongs in the Postal Service's direct case in order that the parties could have an adequate period for discovery and analysis.<sup>4</sup> The Commission endeavors to have a complete record, but including these studies without giving the parties time for discovery and analysis would not serve that goal. Including this testimony would not comport with the due process rights of other parties.

<sup>4</sup>The Commission's procedures do not allow for discovery against rebuttal testimony since such testimony normally would not include new data or new studies.

*Id.* at 3.

Upon certification of the issue, the full Commission upheld the Presiding Officer's ruling, concluding that the new studies could and should have been presented as direct evidence:

Contrary to the Postal Service's statement, the general rule is that rebuttal does not properly include materials that could have been filed as direct testimony. . . . We are requiring that the Postal Service file in its Direct Case the studies on which it intends to rely. The gathering of new data is not rebuttal; rather, it is a modification of or addition to the direct case. The Postal Service is trying to say that UPS is wrong because two detailed studies that UPS could not have had any access to prove it. Such testimony, given our statutory 10-month deadline, does not enhance the record because it cannot be tested adequately on cross-examination.<sup>6</sup>

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<sup>6</sup> Docket No. R80-1, Order No. 352, Order Modifying Presiding Officer's Ruling Striking USPS-RT-4 (November 24, 1980), at 3-4. See also Docket No. R90-1, Order No. 874,

On the same day that he granted the UPS motion to strike USPS-RT-4, the Presiding Officer in Docket No. R80-1 denied a similar motion to strike the rebuttal testimony of Associated Third Class Mail Users (ATCMU) and Direct Mail/Marketing Association witness Renken. Renken's testimony, in order to rebut a proposal that originated in the direct case of the Officer of the Commission (OOC), presented the results of a newly prepared consultant's study concerning the relation of weight to sorting costs for the first three ounces of mail. Agreeing with ATCMU that the testimony could not have been filed or the study performed any earlier, because the issue of weight with respect to sorting costs was "brought before the Commission by the OOC's per-piece/per-pound weight proposal and, more specifically, by the cost assumptions of OOC witness Coberly," the Presiding Officer denied the motion to strike. However, he characterized Renken's testimony as constituting "the outer limit of the Commission's effort to accommodate the filing of arguably relevant testimony or evidence, potentially requiring extended discovery or delayed cross-examination, at a very late stage in the proceeding."<sup>7</sup>

In words plainly applicable to the studies presented by witness Degen in the current docket, the full Commission in Docket No. R80-1 summarized the distinction between the Renken testimony, which it believed to fall just within the bounds of permissible rebuttal, and the Postal Service rebuttal testimony that it had stricken:

The testimony at issue here differs from Mr. Renken's testimony for ATCMU. Mr. Renken did not design a study, present some results,

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*Commission Order Affirming Presiding Officer's Ruling Granting Postal Service Motion to Strike a Portion of the Rebuttal Testimony of Dow Jones Witness King (October 23, 1990), at 4 ("[n]ew analyses [in the rebuttal stage] cannot enhance our record because there is insufficient time for testing through discovery and cross-examination").*

<sup>7</sup> Docket No. R80-1, Presiding Officer's Ruling Denying Officer of the Commission Motion to Strike Testimony of Witness Ralph E. Renken (November 19, 1980), at 2, 3

and then conduct additional studies when other parties said the results did not represent what they were offered to represent.<sup>8</sup>

b. Description of the testimony subject to this motion

The instant motion concerns those portions of the rebuttal testimony of Postal Service witness Degen (USPS-RT-6) that report the results of a “Qualifier/Non-qualifier Analysis” and a “Decile Analysis” of Regular Rate Periodicals (specifically, USPS-RT-6 at. 31, I. 12 through 32, I. 9 and Table 5 [at 33]).

The purpose of these two new studies is to respond to the arguments of “Stralberg and others . . . that Periodicals unit costs are rising faster than the inflation in overall Postal service costs since 1986.” USPS-RT-6 at 26. That argument, as the Commission is aware, did not originate in Stralberg’s testimony, or any other intervenor testimony, in this case. On the contrary, 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 Service management at the highest levels, and communications to the Governors, urged the Postal Service to respond to their perplexity.

The response to these very old concerns, purportedly supported by witness Degen’s two new studies, is that “the increase appears to be explained by a change in mail preparation” (USPS-RT-6 at 26)--in particular, an “increase in container and bundle handlings” due to “a migration toward more aggregate pallets (e.g., 3-digit pallets replacing 5-digit pallets) so that the Postal Service is having to do more bundle sortation,” leading in turn to an assortment of costly consequences such as “[r]epeated handlings . . . caus[ing] bundle breakage that

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<sup>8</sup> Docket No. R80-1, Order No. 352, Order Modifying Presiding Officer’s Ruling Striking USPS-RT-4 (November 24, 1980), at 5.

results in piece handlings.” USPS-RT-6 at 28, 31, 32. Whatever else could be said about this hypothesis, it cannot be said that it is new. The “change in mail preparation” thesis was first advanced by Postal Service witness Hume in R90-1. The bundle breakage explanation was advanced, before being driven into retreat, by Postal Service witness Barker in the same docket. The notion that some kinds of aggregate pallets are the source of the problem was the subject of management speculation, and of schemes for remedies such as a “reverse presort discount,” long before the filing of the Postal Service’s direct case in this docket. The possibility that witness Degen, shocked by the allegation in ABP-T-1, MPA-T-1, MPA-T-2, and TW-T-1 that Periodicals mail-processing costs have been rising at an unseemly rate, at some time shortly before March 9, 1998 suddenly thought of aggregate pallets and bundle sortation and shouted “Eureka--these must be the real reasons for those cost increases,” is small. If these were the real reasons, the Postal Service could have known them and produced evidence of that knowledge four years ago, or at least in its direct case in this docket.

Given the bewildering series of Postal Service “explanations” for rising Periodicals mail processing costs that mailers have confronted and batted down over the last eight years, the last-minute evidence of the “true” explanation presented by witness Degen in his rebuttal testimony in this case incites suspicion. The undersigned parties are not afraid of new data, or even of the Postal Service’s constantly changing claims about what the data mean. We have been exhorting the Postal Service for years to collect more and better data, make public more of the data it does collect, and to undertake serious analysis and investigation to try to ascertain the reasons for rising Periodicals costs. In no instance have we tried to channel such an investigation in any particular direction or asked the Postal Service to do anything other than search out all the relevant facts and analyze them carefully and thoughtfully. While we are not afraid of new

information or analysis, therefore, we are far from confident that unverified information and untested analysis from the Postal Service has any value in furthering understanding of these issues. In the time remaining in this docket, it simply is not possible for any intervenor or for the Commission even to verify the accuracy of the data employed in Degen's two new studies, much less to validate his methodology and evaluate the cogency of the interpretations and conclusions he has reached.

c. Impossibility of testing, authenticating, or even understanding Degen's new studies in the time remaining in this case

There is no possibility of disagreement about the fact that: these two studies are new; that they are "computer analyses" subject to rule 31(k)(3); that rule 31(k)(3)'s requirement that input data be provided at the same time the testimony is filed has not been complied with; and that even if all the documentation required by rule 31(k)(3) had been provided on the day the testimony was filed it would still be impossible for the parties or the Commission to analyze that information or use it to test the validity of Degen's studies in the time remaining in this case.

For the "Qualifier/Non-qualifier Analysis," a "database of Periodicals volume and cost information was created for each fiscal year from FY 1993 to FY 1996" covering "all publications in the PERMIT system," and for each publication "the direct tally cost by cost pool was developed by matching the ISSN or publication number appearing in the IOCS tally to the publication number from PERMIT."<sup>9</sup> The "Decile Analysis" in turn created a "master dataset" from "the publication specific databases that were built to support the qualifier/non-qualifier analysis." Neither the PERMIT data for FY 1993, 1994, 1995 or 1996, nor the IOCS tally data for 1993,

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<sup>9</sup> USPS LR H-348 (Degen RT-6 workpapers), Part E.

1994 and 1995 have been provided by the Postal Service or are available elsewhere on the record of this or other proceedings. Thus, both sides of the transaction between PERMIT and IOCS through which Degen gets his purported unit mail-processing costs by publication--the heart of both analyses--are concealed from everyone but the Postal Service.

Degen's description of "Program Documentation" states: "Due to the sensitive nature of publication specific information the datasets with publication specific data are not being released."<sup>10</sup> This is highly convenient for the Postal Service, since it has taken care to insure that virtually all of the input data it uses is publication specific (rather than aggregating or coding the data in such a way that they could be used without revealing the identities of specific publications). Perhaps as an added precaution against the data he used somehow getting out and threatening to make understanding and evaluation of his analyses possible, witness Degen has run his programs in a UNIX environment, which is not easily available even to most professionals in the field, and has chosen to encode them in Fortran and EPL, the latter of which is described as "similar to the publicly available TSP," which may perhaps mean that the two are similar in the way that Spanish and French, both romance languages, are similar, or may mean something else, and which appears likely to be understood only by people who already know both EPL and TSP.

With the data provided by witness Degen and in the tight time frame, it is impossible to independently replicate his Decile Analysis results, to test whether his findings are statistically significant, or to verify his assertions regarding the characteristics of publications falling into each decile. In order to replicate the Decile Analysis results, intervenors would need to gain access to: (1) Fortran and

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<sup>10</sup> USPS LR H-348 (Degen RT-6 workpapers), Part E.

EPL (or TSP) software, (2) a programmer familiar with running Fortran and EPL in a UNIX environment, and (3) a mini-computer that runs UNIX. To help set a perspective, it took over a month and two technical conferences for our expert consultants to independently verify that witness Degen's USPS-T-12 mail processing distribution SAS programs do what he said they do, and Degen provided much more documentation for those programs than for the programs supporting his Decile Analysis.

Additionally, although witness Degen concedes that his Decile Analysis is meaningful only if his cost and volume data by decile are statistically reliable,<sup>11</sup> he provides no evidence that they are. Yet it is impossible, within the existing time frame and without written discovery and technical conferences, to test whether his Decile Analysis has "acceptable statistical reliability."

Additionally, witness Degen provides no data that would make it possible to assess the accuracy of his characterizations of the publications in each decile, characterizations that are central to his argument that Periodicals mail processing costs are rising because mailers are increasing their use of aggregate pallets.<sup>12</sup>

To document this analysis, Degen provides the source codes for 32 Fortran programs and 4 programs written in EPL, which apparently is a proprietary programming system. But he does not provide the data these programs operate on, and verifying his results is therefore for all practical purposes impossible. In any case, fully understanding his methodology would require extensive discovery, which is impossible in time remaining in this proceeding.

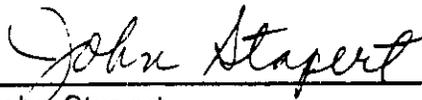
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<sup>11</sup> "The cost and volume estimates for each group [decile] should have equal and acceptable statistical reliability" USPS-RT-6 at 31-32.

<sup>12</sup> For example, statements such as: "[t]he real unit costs for the top group, which has only one mailer using predominantly 5-digit pallets, decline 36 percent since 1993. The next two groups by size are dominated by publications that use more aggregate pallets." USPS-RT-6 at 32.

WHEREFORE, the undersigned parties respectfully move that those portions of the rebuttal testimony of Postal Service witness Degen that report the results of a "Qualifier/Non-qualifier Analysis" and a "Decile Analysis" of Regular Rate Periodicals--namely, USPS-RT-6 at. 31, I. 12 through 32, I. 9 and Table 5 [at 33]-- be stricken from the record of this proceeding.

Respectfully submitted,

  
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Dr. John Stapert

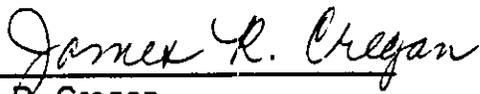
Associated Church Press  
P.O. Box 30215  
Phoenix, AZ 85046-0215  
(602) 569-6371 (office)  
(602) 569-6180 (facsimile)

On behalf of  
COALITION OF RELIGIOUS PRESS  
ASSOCIATIONS

  
\_\_\_\_\_  
John M. Burzio  
Timothy L. Keegan

Burzio & McLaughlin  
Canal Square, Suite 540  
1054 31st Street, N. W.  
Washington, D.C. 20007-4403  
(202) 965-4555 (office)  
(202) 965-4432 (facsimile)

Counsel for  
TIME WARNER INC.

  
\_\_\_\_\_  
James R. Cregan

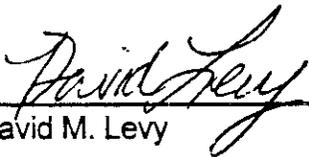
Magazine Publishers of America  
1211 Connecticut Ave., N.W., Suite 610  
Washington, D.C. 20036  
(202) 296-7277 (office)  
(202) 296-0343 (facsimile)

Counsel for  
MAGAZINE PUBLISHERS OF AMERICA

  
\_\_\_\_\_  
Michael F. McBride  
Samuel Behrends, IV  
Brenda Durham  
Joseph H. Fagan

LeBoeuf, Lamb, Greene & MacRae,  
L.L.P.  
1875 Connecticut Ave., N.W., Suite 1200  
Washington, D. C. 20009-5728  
(202) 986-8000 (office)  
(202) 986-8102 (facsimile)

Attorneys for  
DOW JONES & COMPANY, INC.

  
David M. Levy

Sidley & Austin  
1722 Eye Street, N.W.  
Washington, D.C. 20006-3704  
(202) 736-8214 (office)  
(202) 736-8711 (facsimile)

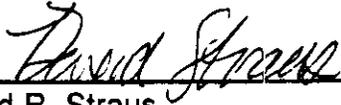
Joel T. Thomas  
11326 Dockside Circle  
Reston, VA 20191  
(703) 475-4646

Counsel for  
ALLIANCE OF NONPROFIT MAILERS

  
Timothy W. Bergin

Squire, Sanders & Dempsey L.L.P.  
1201 Pennsylvania Ave., N.W.  
P.O. Box 407  
Washington, D.C. 20044-0407  
(202) 626-6600 (office)  
(202) 626-6780 (facsimile)

Counsel for  
THE MCGRAW-HILL COMPANIES, INC.

  
David R. Straus

Thompson Coburn  
700 14th Street, N.W., Suite 900  
Washington, D.C. 20005-2010  
(202) 508-1000 (office)  
(202) 508-1010 (facsimile)

Stephen M. Feldman

Ramsey, Cook, Looper & Kurlander  
10420 Little Patuxent Parkway, Suite 250  
Columbia, MD 21044

Attorneys for  
AMERICAN BUSINESS PRESS

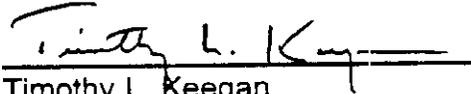
  
Tonda F. Rush  
Steven Douse

King & Ballou  
P.O. Box 50301  
Arlington, VA 22205  
(703) 534-5750 (office)  
(703) 534-5751 (facsimile)

Counsel for  
NATIONAL NEWSPAPER ASSOCIATION

### CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

  
Timothy L. Keegan

March 13, 1998