

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001

POSTAL RATE AND FEE CHANGES,        )  
2006    )                   Docket No. R2006-1

**REPLY OF ALLIANCE OF NONPROFIT MAILERS  
AND NATIONAL POSTAL POLICY COUNCIL  
TO OPPOSITION OF GREETING CARD ASSOCIATION  
TO MOTION OF USPS TO STRIKE PORTIONS OF TESTIMONY  
OF GCA WITNESS CLIFTON (GCA-T-1)  
(September 22, 2006)**

Pursuant to section 20 of the Commission's Rules of Practice, the Alliance of Nonprofit Mailers ("ANM") and the National Postal Policy Council ("NPPC") respectfully submit this reply to the September 20 opposition of the Greeting Card Association ("GCA") to the September 13 motion of the USPS to strike the "Declaration" of Harry Kelejjan attached to the testimony of GCA witness James A. Clifton (GCA-T-1), and the portions of Dr. Clifton's testimony that rely on Dr. Kelejjan's Declaration. Allowing GCA to offer this material into evidence without discovery and cross-examination of Dr. Kelejjan would be unfair to other parties and contrary to the Commission's rules. Accordingly, GCA should be required either to offer him as a sponsoring witness or withdraw the disputed material.

Dr. Kelejjan's "Declaration" is opinion testimony. It is a writing embodying the opinions of a purportedly expert declarant, commissioned by one party in an attempt to discredit the opinions offered in the testimony of a witness for another party. In his

“Declaration,” Dr. Kelejian contends that the elasticity estimates offered by USPS witness Thress (USPS-T-7) suffer from a variety of econometric errors in “model selection procedure” and the “procedures for estimating the parameters of those models.” Kelejian Decl. at 10. Like most opinion testimony submitted in Commission proceedings, Dr. Kelejian’s “Declaration” includes a statement of qualifications and a *curriculum vitae* aimed at persuading the fact finder of the credibility and expertise of the witness.

The Commission’s rules make clear that testimony of this kind may not be admitted into evidence without giving adverse participants an opportunity for discovery and cross-examination of the declarant on whose expertise the proponent is asking the Commission to rely. “*Any participant* shall have the right to public hearings of presentation of evidence,” as well as the right to cross-examination of any “testimony adverse to the participant conducting the cross-examination.” Rule 30(e)(1) (emphasis added). Written cross-examination—i.e., written responses to interrogatories—shall be allowed, particularly with respect to “factual or statistical evidence.” Rule 30(e)(2). And oral cross-examination “will be permitted for clarifying written cross-examination and for testing *assumptions, conclusions or other opinion evidence.*” Rule 30(e)(3) (emphasis added). Allowing participants to evade cross-examination through the simple device of labeling opinion testimony “Declarations” would effectively nullify these requirements.

That a portion of Dr. Kelejian’s testimony involves “mathematical analysis” (GCA Opp. at 7) does not justify a different outcome. GCA is correct that some aspects of mathematics are “hard edged”—i.e., unambiguously true or false. But the econometric issues on which Dr. Kelejian primarily focuses—model selection and the estimation

procedures—are matters of judgment. See J. Johnston, *Econometric Methods* 498-516 (3<sup>rd</sup> ed. 1984); William H. Greene, *Econometric Analysis* 1-5 (5<sup>th</sup> ed. 2003) (treatise cited by Dr. Kelejian). The choice of an econometric model depends, to a large degree, on “the intuition and good sense of the researchers themselves and, more importantly, the intuition and good sense of informed critics.” Johnston, *supra*, at 509. “How to weigh and interpret the jigsaw of computation and information will still depend on the vital spark of human imagination and powers of judgment.” *Id.* at 516. Because the weight (if any) to be given to the opinions of Dr. Kelejian about the validity of Mr. Thress’ econometric models depends in large part on the quality of his judgment and reasoning, adverse parties are entitled to test these matters through cross-examination.

GCA’s suggestion that adverse parties can test Dr. Kelejian’s judgment by “directing discovery or cross-examination to GCA witness Clifton” (GCA Opp. at 6) likewise misses the point. Dr. Clifton is undoubtedly competent to testify about his “understanding of” Dr. Kelejian’s opinions (*id.* at 7). The underlying bases for Dr. Kelejian’s opinions, however, can be tested only by questioning Dr. Kelejian himself.

GCA also gains nothing by comparing Dr. Clifton’s reliance on Dr. Kelejian with Mr. Thress’ reliance on (1) “an elasticity model rooted in the work of his colleague Dr. Tolley” and (2) “modeling techniques designed by Mr. Box and Mr. Cox” (GCA Opp. at 6). Dr. Tolley submitted repeatedly to cross-examination and discovery concerning his elasticity model and underlying analyses during his years as a rate case witness for the USPS. See R2000-1 Op. & Rec. Decis. (Nov. 13, 2000) at ¶¶ 2042-44 (summarizing litigation history of Tolley-Thress demand models). And the Box-Cox transformation is a standard econometric technique widely recognized in the

econometric literature, including the treatises cited by Dr. Kelejian. See Greene, *supra*, chapter 10 (“Nonlinear Regression Models”). Dr. Kelejian’s declaration possesses neither of these indicia of trustworthiness.<sup>1</sup>

Finally, GCA has failed to identify any undue prejudice to GCA from requiring Dr. Kelejian to submit to discovery and cross-examination. GCA concedes that it can present Dr. Kelejian as a testifying expert if the Commission so orders. GCA Opp. at 9. The costs of his “time spent in preparation and testifying” (*id.*) are the same kind of litigation costs ordinarily borne by any proponent of opinion testimony in a Commission rate case. In the context of the \$400 million in annual contribution that GCA is asking the Commission to shift from single-piece First-Class Mail to users of Standard Mail, requiring GCA to play by the same procedural rules as other participants is entirely fair.

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<sup>1</sup> Similarly, none of the cases cited by GCA for the proposition that “a testifying expert witness can rely on opinions of another non-testifying expert” (GCA Opp. at 5-6) upheld the admission of an out-of-court declaration commissioned by the sponsoring party to serve as opinion testimony for the benefit of the sponsoring party in the litigation at issue. For example, in *Arkwright Mutual Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1182 (8<sup>th</sup> Cir. 1997), the court upheld the admission of the testimony of testifying expert on the ground that his conclusions were independently supported by his own analysis. The report of the non-testifying expert (who did not testify because he died before trial) was not itself admitted. *Id.*

For these reasons, the Commission should require that GCA submit Dr. Kelejian for discovery and cross-examination concerning his declaration.

Respectfully submitted,

/s/

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