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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268–0001

FIRST-CLASS MAIL AND PERIODICALS SERVICE STANDARD CHANGES, 2021	Docket No. N2021-1

UNITED STATES POSTAL SERVICE'S RESPONSE TO DOUGLAS F. CARLSON MOTION TO STRIKE A PORTION OF THE DIRECT TESTIMONY OF POSTAL SERVICE WITNESS STEVEN W. MONTEITH (USPS-T-4)
(May 28, 2021)

The United States Postal Service hereby opposes the motion of Douglas Carlson to strike Postal Service witness Steven Monteith's testimony reference to a United States Postal Service Office of Inspector General ("OIG") Audit Report finding that "71 percent of respondents expected their sent mail to arrive in seven days."[1] Mr. Carlson is challenging the reliability of the survey; such challenges go to the weight given the survey, not its admissibility. The Commission can take official notice of such a finding and is fully capable assigning this survey its proper weight. The motion to strike is without merit and should be denied.

Mr. Carlson argues that his request for extraordinary relief is appropriate because Rule 3010.323 bars "unsupported and undocumented research from entry into evidence."[2] He further tries to justify his request to remove the OIG Audit Repot reference from consideration by questioning the reliability of the Audit Report and underlying survey. He states "[t]he judgment in the OIG report should be viewed skeptically because the OIG report in which the finding appeared was an advocacy document promoting relaxation of service standards during the eight weeks that the report defined as peak season."[3] Lastly, Mr. Carlson claims that "prejudice

[1] Direct Testimony of Steven W. Monteith on Behalf of the United States Postal Service (USPS-T-4), PRC Docket No., N2021-1 (Apr. 21, 2021), at 13-14.

[2] Douglas F. Carlson Motion to Strike a Portion of the Direct Testimony of Postal Service Witness Steven W. Monteith (USPS-T-4), PRC Docket No. N2021-1 (May 27, 2021) [hereinafter "DFC Motion to Strike"], at 7.

[3] *Id.* at 5.

to other participants is extraordinary because [they] do not have the time, expertise, or money to conduct [their] own market research to rebut the finding from the OIG study, the details of which remain cloaked in secrecy."[4]

I. Extraordinary Relief is Inappropriate Here

Commission Rule of Practice 3010.164 provides that "[m]otions to strike are requests for extraordinary relief" and "shall not be used as a substitute for rebuttal testimony, briefs, comments, or any other form of pleading." 39 C.F.R. § 3010.164; Order No. 1143, Denying Postal Service Motion to Strike, PRC Docket No. MC96-3 (Dec. 12, 1996), at 3-4 (noting that legal arguments on weight accorded to evidence should be made on brief). Striking material from consideration "because of questionable probity is unnecessary in administrative proceedings, where decision-makers are able to accord appropriate weight to evidence." Order No. 1143 at 4.

Federal courts have long recognized that "[c]hallenges to survey methodology go to the weight given the survey, not its admissibility." *Wendt v. Host Int'l, Inc*., 125 F.3d 806, 814 (9th Cir. 1997) (*citing Prudential Ins. Co. of Am. v. Gibraltar Fin. Corp*., 694 F.2d 1150, 1156 (9th Cir.1982)); *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig*., 45 F. Supp. 3d 724, 753–54 (N.D. Ohio 2014) (noting that "'testimony concerning the results of the survey that meets the basic requirements of usefulness and reliability is admissible into evidence, and the trier of fact may accord it the weight it deems proper'" (quoting 4 Weinstein's Federal Evidence § 702.06[3] (2nd ed.1997))).

Here, Mr. Carlson fails to explain why extraordinary relief is appropriate, and provides no explanation as to why the Commission is incapable of according the appropriate weight to witness Monteith's testimony and reference to a publicly available survey finding that "71 percent of respondents expected their sent mail to arrive in seven days." Rather, Mr. Carlson

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[4] *Id.* at 7.

argues that Commission Rule 3010.323 bars the Postal Service from citing the OIG survey findings unless the Postal Service provides additional information mentioned in Rule 3010.323. This argument does not preclude the possibility of the Commission taking notice of the publicly available report and according the survey finding its appropriate weight. Indeed, the Commission can use its authority as a regulatory body to take official notice of an OIG audit report in the course of its deliberations. As discussed in Order No. 1143, the Commission is also fully capable of assigning this testimony reference its appropriate weight.

II. Participants Will Not Be Prejudiced by Preserving the Portion of Witness Monteith's Testimony that Mr. Carlson Seeks to Strike

Mr. Carlson offers no rational basis to question the reliability of the OIG findings and underlying survey; he offers only speculation and conjecture as a basis for questioning its reliability. Here, witness Monteith's reliance on the OIG survey findings to bolster his testimony is reasonable; participants will not be prejudiced by preserving this portion of witness Monteith's testimony.

First, OIG's survey findings should be presumed to be reliable. The OIG has published the details about the market research conducted at RISC-WP-19-009 entitled *Addressing the Diverse Needs and Wants of Rural America: Opportunities for the U.S. Postal Service. See* USPS OIG Audit Report: Peak Season Air Transportation (NO-20-215-R21), Feb. 21, 2021, n. 13. In the report, the OIG certified that the survey was conducted in accordance with the Council of the Inspectors General on Integrity and Efficiency's Quality Standards for Inspection and Evaluation. USPS OIG RISC Report: Addressing the Diverse Needs and Wants of Rural America: Opportunities for the U.S. Postal Service (RISC-WP-19-009), Sept. 16, 2019, at back cover. The report also provides additional information about the survey, including how the OIG analyzed the survey data and a summary and justification to the survey's methodological approach. *Id.* at Appendices A, C.

According the OIG's survey findings a presumption of reliability is consistent with the Federal Rules of Evidence. Federal Rule of Evidence 803(8) excludes from the hearsay rule public reports that set out "a matter observed while under a legal duty to report," including "factual findings from a legally authorized investigation." Fed. R. Evid. 803(8)(A)(i), (iii). Congress, in promulgating Rule 803(8), favored admissibility, citing the presumed "reliability of the public agencies usually conducting the investigation, and [the agencies] lack of any motive for conducting the studies other than to inform the public fairly and adequately." *Kehm v. Procter & Gamble Mfg. Co*., 724 F.2d 613, 618-19 (8th Cir. 1983). r

Second, the admission of OIG's survey findings would not prejudiced participants in any way. Under the Federal Rules of Evidence, it is settled law that an "expert may base an opinion on facts or data in the case that the expert has been aware of or personally observed." Fed. R. Evid. 703. These facts and data "need not be admissible for the opinion to be admitted." *Id*. Witness Monteith is an expert in the postal industry given his substantial experience in the field. His reliance on the OIG's survey finding to bolster his testimony that the service standards proposal is unlikely to have material impact on customer satisfaction is entirely reasonable.

Further, witness Monteith offered this survey finding for illustrative purposes, as an explanation of witness Thomas Thress's finding that electronic diversion, not delivery performance, is primarily responsible for the decline in mail volume. Mr. Monteith did not offer the finding to prove that consumers believe that the Postal Service's current service standard for First-Class Mail is seven days. He simply provides it as one illustration of why mail volume is less sensitive to changes in delivery performance as compared to other factors in demand. Thus, Mr. Carlson's claims that participants would need to rebut the survey's findings is unfounded.

Lastly, participants have had plenty of opportunity to probe witness Monteith's basis for relying upon the survey finding in discovery. The survey finding was first introduced in witness Monteith's direct testimony filed on April 21, 2021.

For the foregoing reasons, the Presiding Officer should deny Mr. Carlson's motion to strike.

Respectfully submitted,

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