

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

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POSTAL RATE AND FEE CHANGES, 1997)

POSTAL RATE COMMISSION
DOCKET NO. R97-1
SECRETARY

NASHUA PHOTO INC., DISTRICT PHOTO INC.,
MYSTIC COLOR LAB AND SEATTLE FILMWORKS, INC.
MOTION TO STRIKE TESTIMONY OF
POSTAL SERVICE WITNESS DAVID R. FRONK (USPS-T32)
(August 29, 1997)

Pursuant to Rule 1.C. of the Special Rules of Practice in this docket, Nashua Photo Inc. (hereinafter "Nashua"), District Photo Inc. ("District"), Mystic Color Lab ("Mystic"), and Seattle FilmWorks, Inc. ("Seattle") (hereinafter collectively referred to as "NDMS"), proceeding jointly herein, hereby move to strike lines 3-11 of page 24 of the testimony of Postal Service witness David R. Fronk (USPS-T32).¹

BACKGROUND

NDMS seek to strike the following testimony of Postal Service witness Fronk in this docket, where he recommends an increase in the First-Class nonstandard nonpresort mail surcharge:

d. Nonstandard Surcharge

The Postal Service proposes increasing the nonstandard surcharge for nonpresort mail weighing one ounce or less from 11 cents to 16 cents. In addition, the Postal Service proposes increasing the nonstandard surcharge for presort mail weighing one ounce or less from 5 cents to 11 cents.

These increases reflect the results of new nonstandard surcharge cost data (see USPS Library Reference H-112). The proposed surcharges are the

¹ Under Special Rule of Practice 1.C., this motion to strike a portion of witness Fronk's testimony is timely, as it has been filed more than 14 days before the scheduled appearance of the witness.

minimums needed to recover the additional mail processing costs associated with handling nonstandard mail. [USPS-T32, p. 24, lines 3-11.]

USPS Library Reference H-112 ("LR-H-112"), cited by witness Fronk, purports to be a "Nonstandard Surcharge Cost Update."²

NDMS filed and served NDMS/USPS-T-32-1 in this proceeding on August 1, 1997.

In his responses to NDMS/USPS-T32-1, filed on August 18, 1997, with a motion for late acceptance, witness Fronk has sworn under oath as follows:

On August 1 NDMS asked:	"Did you prepare, or participate in any way in the preparation of, LR-H-112?"
On August 18 witness Fronk responded:	"No."
On August 1 NDMS asked:	"Unless your answer to preceding part (a) is an unqualified negative, please describe your role with respect to preparation and conduct of the study contained in LR-H-112."
On August 18 witness Fronk responded:	"Not applicable."
On August 1 NDMS asked:	"With respect to LR-H-112, are you sponsoring that study?"
On August 18 witness Fronk responded:	"No"
On August 1 NDMS asked:	"Please indicate whether any other witness in this docket is sponsoring LR-H-112."
On August 18 witness Fronk responded:	"I am unaware of any other witness who is sponsoring LR-H-112."

A copy of witness Fronk's response to NDMS/USPS-T32-1 is attached as Exhibit A.

² LR-H-112 relies on Test Year Unit Cost data from USPS Library Reference H-106 ("LR-H-106"). In response to NDMS/USPS-T32-2, witness Fronk also certified that he did not prepare or participate in the preparation of LR-H-106, that he is not sponsoring that study, and that he is not aware of any other witness in this docket who is sponsoring LR-H-106. Thus, LR-H-112 relies on other data which also is not admissible as evidence in this docket.

ARGUMENT

In a rate case such as Docket No. R97-1, the Postal Service must file all of the prepared direct evidence upon which it proposes to rely in the proceeding simultaneously with the filing of a formal request for a recommended decision. *See* Rule 53 of the Commission's rules of practice and procedure, 39 C.F.R. section 3001.53. The prepared testimony submitted by the Postal Service with its request in this docket includes witness Fronk's direct testimony, including his testimony mentioning LR-H-112. Insofar as witness Fronk provided no expert testimony of his own regarding Postal Service costs, only referring to an unsponsored library reference, the question becomes whether LR-H-112 constitutes (or will constitute) record evidence in the case. If not, LR-H-112 is not a fair subject for incorporation by reference through witness Fronk's testimony, and that portion of witness Fronk's testimony exclusively derivative of LR-H-112 should not be included in the record of this proceeding. A witness should not be able to effectively bootstrap otherwise inadmissible documents into evidence and make proposals merely by referring to them in his testimony without submitting testimony as to his own expert opinion.

Based upon witness Fronk's testimony, LR-H-112 is not sponsored by witness Fronk or by any other known Postal Service witness in this proceeding. *See* witness Fronk's response to NDMS/USPS-T32-1, *supra*.

Unsponsored library references, such as LR-H-112 which witness Fronk attempts to incorporate by reference, does not constitute record evidence for purposes of rendering a recommended decision in this docket. *See* Rule 5, Special Rules of Practice, Docket No. R97-1 (Presiding Officer's Ruling No. R97-1/4, August 1, 1997, Attachment B). Such documents

have no protections applied to them to ensure reliability, a pre-condition to being made part of the record. Without such protection, any party would be able to submit a library reference in evidence, with virtually no scrutiny or limitation.

The Postal Service appears to believe that "sponsorship" of a library reference is not important with respect what is actually in evidence, but the Commission's recommended decision in this case must be based upon the record evidence. Section 31(b) of the Commission's rules of practice and procedure, entitled "Evidence," states in pertinent part:

Designation of a document as a library reference is a procedure for facilitating reference to the document in Commission proceedings and does not, by itself, confer any particular evidentiary status upon the document. The evidentiary status of the document is governed by this section. [Emphasis added.]

Section 31 of the Commission's rules of practice and procedure also clearly provides that documents shall be: presented as exhibits; offered into evidence; and received into evidence subject to a showing of relevance and materiality. *See* 39 C.F.R., sections 31(a), 31(b), 31(h).³

³ In addition to these general rules applicable to all documents, section 31 of the Commission's rules of practice and procedure prescribes further conditions for the admissibility of a study (such as LR-H-112). Section 31(k)(1) requires that when a study or analysis is offered into evidence or is relied upon as support for other evidence, there shall be a clear statement of the study plan (to include all relevant assumptions and the techniques of data collection, estimates or testing), and a clear statement of the facts and judgments upon which conclusions are based. The section 31(k) requirements were not met for LR-H-112, and witness Fronk's testimony has no solid basis on which to rest.

Rule 5 of the Special Rules of Practice governing this docket is directly on point and should be dispositive of the fundamental question of LR-H-112's inadmissibility. Rule 5 provides, in pertinent part, as follows:

Library references may be submitted when documentation or materials are too voluminous reasonably to be distributed... **Library material is not evidence unless and until it is designated and sponsored by a witness.** [The Special Rules of Practice are set out in Presiding Officer's Ruling No. R97-1/4, Attachment B (August 1, 1997) (emphasis added).]

LR-H-112 has not been sponsored by any Postal Service witness. Indeed, witness Fronk, who references LR-H-112, not only did not sponsor the library reference, but disclaimed any knowledge of its sponsorship by any other witness. And if LR-H-112 itself is not record evidence, witness Fronk's testimony attempting to incorporate it by mere reference, and thereby shoehorn it into the record as the exclusive basis for a proposed rate increase, cannot be permitted.

CONCLUSION

For the foregoing reasons, NDMS submit that lines 3-11 of page 24 of witness Fronk's testimony herein (USPS-T32, p. 24, ll. 3-11), which propose an increase in the First-Class nonstandard surcharge merely by reference to LR-H-112, an unsponsored library reference that cannot be record evidence in this proceeding, should be stricken.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William J. Olson", is written over a horizontal line.

William J. Olson

John S. Miles

Alan Woll

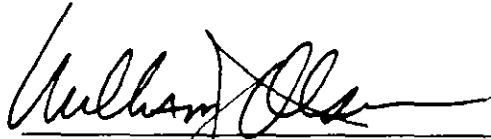
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Counsel for Nashua Photo Inc., District
Photo Inc., Mystic Color Lab, and
Seattle FilmWorks, Inc.

CERTIFICATE OF SERVICE

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



William J. Olson

August 29, 1997

RESPONSE OF U.S. POSTAL SERVICE WITNESS FRONK TO
INTERROGATORIES OF NASHUA PHOTO INC., DISTRICT PHOTO INC.,
MYSTIC COLOR LAB, AND SEATTLE FILMWORKS, INC. (NDMS)

NDMS/USPS-T32-1. Please refer to your testimony at p. 24, where you refer to LR-H-112.

- a. Did you prepare, or participate in any way in the preparation of, LR-H-112.
- b. Unless your answer to preceding part (a) is an unqualified negative, please describe your role with respect to preparation and conduct of the study contained in LR-H-112.
- c. With respect to LR-H-112, are you sponsoring that study?
- d. Please indicate whether any other witness in this docket is sponsoring LR-H-112.

RESPONSE:

- (a) No.
- (b) Not applicable.
- (c) No.
- (d) I am unaware of any other witness who is sponsoring LR-H-112.