

ORDER NO. 168

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

Before Commissioners:

Dan G. Blair, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Tony L. Hammond

Review of Nonpostal Services

Docket No. MC2008-1 (Phase II)

NOTICE AND ORDER INITIATING PHASE II PROCEEDINGS

(January 9, 2009)

In Order No. 154, the Commission authorized 14 nonpostal services to continue.¹ Finding the record insufficient in certain respects, the Commission deferred ruling on three issues more fully addressed below, involving licensing, the warranty repair program, and sales of music compact discs. This Order establishes procedures to develop a more complete record on these issues beginning with an opportunity for the Postal Service to present its case on these issues and followed by an opportunity for interested persons to respond.²

¹ PRC Order No. 154, Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, December 19, 2008 (Order No. 154).

² The Commission also indicated a separate docket would be established to develop regulations applicable to authorized nonpostal services. That docket will be initiated shortly.

Licensing. In Order No. 154, the Commission generally authorized the licensing of the Postal Service's intellectual property to continue as a nonpostal service. *Id.* at 73. As an interim measure, however, the Commission grandfathered the licenses of the Postal Service's brands on products relating to the Postal Service's operations, categorized by the Postal Service as Mailing & Shipping, pending the outcome of Phase II. This issue was brought to the forefront late in the first phase of this proceeding by Pitney Bowes upon learning that Postal Service-branded postage meter ink cartridges were being sold.³ The Commission found that the record on licenses related to Postal Service operations to be insufficiently developed for it to determine whether those licenses should be terminated or authorized to continue.⁴

Further proceedings in this Phase II are needed to develop a more complete record regarding licensing programs for products related to Postal Service operations generally, as well as the specific meter ink cartridge license cited by Pitney Bowes. Other related issues may also be explored.⁵ The Postal Service shall file a sworn statement(s) by a knowledgeable individual(s) on or before January 29, 2009 providing details of each Mailing & Shipping services license and any additional information and evidence deemed relevant in support of its continuing the commercial licensing of

³ Pitney Bowes Inc. Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services, October 15, 2008. Pitney Bowes' motion, supported by pleadings responsive to the matter, challenged the appropriateness of the Postal Service licensing its trademark for products related to Postal Service operations. See also PRC Order No. 126, Order Granting, In Part, Pitney Bowes Inc. Motion to Compel, November 4, 2008.

⁴ Order No. 154 at 76. Order No. 154 directed the Postal Service to "promptly notify the Commission of any other such licenses [that relate to postal operations] that may exist." *Id.*, n.146. This Order is not intended to modify that directive. The Postal Service indicates five vendors are licensed to sell Mailing & Shipping products bearing the Postal Service's intellectual property. Initial Response of the United States Postal Service to Order No. 74, June 9, 2008, at 22. See also Response of the United States Postal Service to Order No. 126 Regarding Licensing Agreements and Notice of Filing of Sworn Statement, November 17, 2008; and Errata to Response of the United States Postal Service to Order No. 126 Regarding Licensing Agreements, November 19, 2008.

⁵ See Order No. 154 at 75, n.145. The relevant market and the Postal Service's regulatory role in the production and distribution of postage evidencing systems may be addressed.

products related to Postal Service operations.⁶ The sworn statement shall also address the requirements of section 404(e)(3) of title 39. Interested persons, including any licensees, who support continuing Postal Service branding of such products may also submit relevant evidence by January 29, 2009. Such sworn statements shall address the requirements of section 404(e)(3) of title 39 and may address any other matter deemed relevant to issues before the Commission in this Phase II. As discussed below, interested persons will be afforded an opportunity to respond to these submissions.

Warranty repair program. In Order No. 154, the Commission concluded that the warranty repair program, under which the Postal Service is compensated by the original equipment manufacturer (OEM) for repairs by the Postal Service of the OEM's equipment still under warranty was, with one possible exception, not subject to review under 39 U.S.C. 404(e). *Id.* at 84-85. The exception concerns plans (which may already be implemented) by the Postal Service to expand the activity to other customers of the OEM.⁷ Order No. 154 deferred a determination on this issue to Phase II.

Assuming it wishes to offer the expanded warranty repair service, the Postal Service shall provide details of this service in the form of a sworn statement(s) by a knowledgeable individual(s). The statement(s) shall also identify the commencement date of such service, provide annual revenues for fiscal years 2006 through 2008, address the requirements of section 404(e) of title 39, and any other matter the Postal Service believes is relevant to the issue before the Commission. Interested persons who support the Postal Service providing such services may also submit sworn statements by January 29, 2009 that address any matter deemed relevant to issues before the Commission.

⁶ Sworn statements submitted in Phase II are subject to the Commission's Rules of Practice and Procedure. 39 CFR 3001.1 *et seq.*

⁷ Statement of Patrick R. Donahoe on Behalf of United States Postal Service (Donahoe Statement), June 23, 2008, at 15. See *also* Initial Response of the United States Postal Service to Order No. 74, June 9, 2008, at 28-29.

Sales of CDs. In Order No. 154, the Commission addressed the Postal Service's proposal to classify greeting cards and other stationery items as postal services. Order No. 154 at 34-35. While the Commission found that greeting cards and stationery may be classified as a competitive postal service, it expressed reservations about the sale of compact discs (CDs) featuring various recording artists, specifically noting that they "are not authorized as 'greeting cards'." *Id.* at 35. Recognizing the scale of the Postal Service operations, the Commission observed that details of certain activities may have been overlooked in response to Order No. 74.⁸ Thus, the Commission suggested that the Postal Service review its various retail programs and provide details of any omissions, including those related to CD sales, for consideration in Phase II of this proceeding.

To the extent it wishes to pursue this issue, the Postal Service shall file by January 29, 2009 a sworn statement(s) by a knowledgeable individual(s) which provides complete details of each retail program for which information may have been inadvertently omitted in response to Order No. 74 and which the Postal Service seeks to have classified as a postal service or, alternatively, to continue to offer as a nonpostal service. In either case, the Postal Service should provide sufficient justification to support its proposed treatment, *i.e.*, that it may be appropriately classified as a postal service or, alternatively, that it satisfies section 404(e)(3). In addition, the Postal Service should also provide the commencement date of each program (product or service) and the annual revenues for fiscal years 2006 through 2008. Interested persons who support the Postal Service providing such services may also submit sworn statements by January 29, 2009 that address any matter deemed relevant to issues before the Commission.

Prehearing conference and additional procedures. Phase II is designed to provide the Postal Service and interested persons an opportunity to present evidence

⁸ PRC Order No. 74, Order Granting Motion to Compel and Revising the Procedural Schedule, April 29, 2008 (Order No. 74).

and arguments in support of their respective positions.⁹ Following the submission of the sworn statements discussed above, the Commission will convene a prehearing conference on February 11, 2009 to discuss the balance of the procedural schedule. This shall include the need for hearings, the due dates for responses to the statements due January 29, 2009, the opportunity for rebuttal thereto, and briefing dates.

It is Ordered:

1. Docket No. MC2008-1, Phase II, is established to develop a more complete record on the activities discussed in the body of this Order concerning Postal Service branding of Mailing & Shipping products, the warranty repair program, the retail sale of recorded music, and any other retail activities which, upon further consideration, may be identified by the Postal Service for review in this proceeding.
2. The Commission will sit *en banc* in this proceeding.
3. The Postal Service and other participants that support continuation of such services shall file supporting evidence as provided in the body of this Order on or before January 29, 2009.
4. Any interested persons may file a notice of intervention pursuant to rule 20 or 20a of the Commission's Rules of Practice and Procedure, 39 CFR 3001.20 and 3001.20a, no later than February 10, 2009. The notice shall state whether the intervenor requests a hearing. Any person who submitted a filing in the initial phase of this proceeding will be deemed to be a participant in Phase II and need not submit a notice of intervention.

⁹ The record already compiled in the first part of this proceeding may be incorporated by reference

5. A prehearing conference will be held in the Commission's hearing room on February 11, 2009, at 10:00 AM, to establish dates, as necessary, for the completion of discovery, need for hearings, filing of rebuttal evidence, and other matters related to this proceeding as set forth in the body of this Order.
6. Robert Sidman is designated as Public Representative to represent the interests of the general public in this proceeding.
7. The Secretary shall arrange for publication of this Notice and Order in the *Federal Register*.

By the Commission.

Steven W. Williams
Secretary

or adopted as part of a separate statement. If the Postal Service continues to rely upon the information in that record, it shall be subject to written and oral cross-examination in this Phase II proceeding.