

BEFORE THE
POSTAL REGULATORY COMMISSION
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Postal Regulatory Commission
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REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1 (Phase II)

UNITED STATES POSTAL SERVICE
MOTION FOR A STAY OF ORDER NO. 392
RELATING TO MAILING AND SHIPPING LICENSES
(February 26, 2010)

In Order No. 392, issued on January 14, 2010, the Commission found that the licensing of Postal Service intellectual property on commercial mailing and shipping products, produced and sold by private sector licensees in non-postal retail locations, was inappropriate under the standards of section 404(e)(3). See Order No. 392 at 12-26. The Commission therefore ordered the termination of those licenses, either at such time as existing inventories are exhausted, or December 31, 2010, whichever is earlier. Id. at 27. The Commission allowed the Postal Service to request an extension of this deadline, upon a showing that it would cause “hardship” (presumably to the Postal Service or to another party). Id.

For the reasons discussed below, the Postal Service hereby requests a stay of the Commission’s determination that the Postal Service take immediate steps to terminate and close-out its existing commercial product license agreements relating to mailing and shipping. This stay should be in effect at least until such time as the D.C. Circuit issues its ruling in United States Postal Service v. Postal Regulatory Commission, Docket No. 09-1032, which will determine the threshold issue of whether the licensing of intellectual property is a

“nonpostal service” subject to review under the standards of section 404(e)(3).¹ After this decision is rendered, the Postal Service would then be in a position to determine what, if any, further actions or pleadings are appropriate.

As the Commission has noted in the past, the factors to be considered in determining whether a stay of an agency order pending the resolution of judicial proceedings is warranted are set forth in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C.Cir.1958). See Order No. 97 (November 4, 1975). These are (1) the likelihood that the moving party will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be substantially harmed if the stay is granted; and (4) the public interest in granting or denying the stay. Id.; Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (hereinafter “WMATC”). As noted in WMATC, “[a]n order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.” 559 F.2d at 844. Based on these principles, the Commission should stay its Order, and thus maintain the status quo at least until such time as the D.C. Circuit renders its decision in the pending appeal of Order No. 154.

In considering the first factor, the Commission need not make any probabilistic determination as to the likely outcome of the pending appeal. As explained in WMATC, so long as the other factors provide sufficient support for a stay, a stay may be issued when the moving party "makes a substantial case on

¹ The Postal Service does not request a stay of Order No. 392 as it pertains to the other two activities considered as part of this Phase II proceeding: the warranty repair program, and the retail sale of CDs and DVDs.

the merits." See id. at 843. This recognizes the tension inherent in the expectation that motions for stay be ordinarily directed to the agency decision-maker in the first instance. Id. at 844-45 (noting, "Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and then the equities of the case suggest that the status quo should be maintained."). While clearly the Postal Service and the Commission disagree as to the consistency of certain portions of Order No. 154 with the statute, the Postal Service has presented a "serious legal question" to the court as to whether the Commission has properly interpreted the statute by asserting that the leasing or licensing of property pursuant to section 401(5) constitutes a "nonpostal service" subject to the Commission's review authority under section 404(e).

Furthermore, immediate implementation of the Commission's order will have consequences that impose irreparable harm on the Postal Service with respect to at least two of these agreements: the Measurements Unlimited license and the LePage's 2000 license. This is discussed in the Supplemental Statement of Gary A. Thuro, also filed today. The Measurements Unlimited license agreement is set to expire naturally on December 31, 2010, with a 360-day sell-off period. Because Measurements Unlimited has already exceeded its minimum guaranteed royalty for the contract term, any further sales of the licensed product result in additional royalties for the Postal Service. Requiring immediate termination of the agreement, and thereby immediate onset of the sell-off period, would truncate the period in which such sales could occur; in

particular, the Postal Service would lose any royalties accruable during the scheduled 2011 sell-off.

Immediate termination of the LePage's 2000 license agreement would also result in the loss of royalty payments for the Postal Service. Under that agreement, the Postal Service receives a guaranteed minimum royalty each year, as well as any additional royalties based on the sales of the licensed products; indeed, throughout the current contract term, the royalty payments for each year have consistently exceeded the guaranteed minimum. Thus, immediate onset of the close-out process would at the very least eliminate the Postal Service's entitlement to the guaranteed minimum royalty for 2011 (\$225,000), plus any additional royalties that would likely accrue in that year. In addition, the license contains an automatic renewal provision triggered by LePage's meeting certain gross sales figures prior to the close of the current contract term, which is set to expire on January 15, 2012. Assuming that LePage's achieves these sales figures, the amount of prospective lost royalties payable to the Postal Service would total in the millions of dollars, even if sales during the new contract period were to deteriorate from the historical averages.²

Irreparable harm constitutes actual harm that is likely to occur, and that cannot subsequently be recovered through compensatory remedial measures. See, e.g., Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673–74 (D.C. Cir. 1985). Under the license agreement terms that provide for termination as a result of court or agency order, the royalty payments due to the Postal Service under the

² In addition, the LePage's 2000 license contemplates potential future contract periods, which would be negotiated in good faith prior to the final year of the last contract period. Assuming that the parties extended the license for an additional five-year term, the monetary losses to the Postal Service become substantially higher and the irreparable harm proves greater.

terminated agreements would not be recoverable, even if the Postal Service were to succeed on the merits of the pending appeal. Rather, the only recourse for the Postal Service and its licensees, following any successful outcome in court, would be to negotiate new license agreements, if they wished to continue their relationship. However, during the pendency of these negotiations the minimum guaranteed royalties that would have otherwise been accruable to the Postal Service under the existing agreements will not be paid. The Postal Service would also be required to bear the additional costs in negotiating the new agreements, costs that it would not have had to bear except for the fact that it was required to terminate the earlier contract. Furthermore, there is always the prospect that a new deal could not be reached, or that the Postal Service would not be able to negotiate royalty payments equivalent to what it is currently entitled under the existing agreements.

In the face of this harm to the Postal Service, maintenance of the status quo will not lead to any material harm to other interested persons. During the Phase II proceedings, the only license agreement that drew criticism from a competitor of the licensed products was the Clover Technologies, Inc. agreement, which was challenged by Pitney Bowes. However, this agreement has already been terminated, and is thus not affected by the Commission's decision, or this motion. See Supplemental Sworn Statement of Gary A. Thuro Regarding the Clover Technologies Group License Agreement (November 18, 2009). Pitney Bowes has further clarified that it has no opposition to the agreements that are affected by the Commission's Order (its only interest is having those agreements be regulated by the Commission). See Notice of Pitney Bowes Inc. Regarding the Status of USPS-Branded Replacement Postage

Meter Ink Cartridges and Postage Meter Supplies (November 19, 2009). The lack of specific opposition to any of the other license agreements by those who compete with the Postal Service's licensees is a strong indication that a continuation of the status quo would not be materially adverse to any party.

Similarly, no harm to the public interest would result from a continuation of the status quo. While the Commission has found that the public interest is served by the Postal Service not entering into these types of licensing agreements, it has also recognized that the public interest can accommodate a close-out period, and has furthermore held open the possibility of adjustments to the December 2010 deadline in the case of "hardship." If such a remedy is consistent with the public interest, so is a brief delay in the onset of the close-out process required by the Commission's Order, at least until such time as its authority to dictate the termination of these agreements is resolved.

Respectfully submitted,

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