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

REVIEW OF NONPOSTAL SERVICES	Docket No. MC2008-1

RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO PITNEY BOWES MOTION TO COMPEL UNITED STATES POSTAL
SERVICE TO FILE A COMPLETE LIST OF NONPOSTAL SERVICES
(October 22, 2008)

On October 15, 2008, Pitney Bowes filed a motion requesting that the Commission "issue an Order directing the Postal Service to file a complete list and description of all existing and new offerings that may be subject to this proceeding."[1] Pitney Bowes bases this motion on its claim that "it has just learned" that there exists for sale ink cartridges for use in Pitney Bowes postage meters that bear Postal Service intellectual property, and that this indicates that the Postal Service failed to comply with Order No. 74.[2] Pitney Bowes accompanies its motion with a declaration from its Vice President of Marketing, Peter Wragg, supporting its position that the Postal Service has improperly "entered the meter supplies business."[3]

Pitney Bowes' motion is predicated on the premise that the Postal Service has deliberately concealed the existence of these Postal Service-branded meter ink cartridges from the Commission and the other parties to this proceeding, in

[1] Pitney Bowes Inc. Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services at 1, 9 (*hereinafter* "Pitney Bowes Motion").
[2] *Id.* at 1, 4.
[3] Declaration of Peter Wragg in Support of Pitney Bowes Inc.'s Motion to Compel United States Postal Service to File a Complete List of Nonpostal Services at ¶ 6.

contravention of Commission Orders.[4] This claim is patently false. There is simply no basis whatsoever to Pitney Bowes' claim that the Postal Service has violated any Order of the Commission. For this reason, the motion should be dismissed.

Before turning to the motion itself, some facts are in order, which demonstrate that these cartridges in no way constitute a product or service offered by the Postal Service. In November 2007, the Postal Service entered into a non-exclusive licensing agreement whereby a private, independent third party has been given the right to place certain Postal Service intellectual property on, among other things, the remanufactured postage meter cartridges produced by the third party.[5] The licensing agreement is a standard one, in which the Postal Service has no unique involvement in the provision of the cartridges beyond retaining quality control authority over the third party's activities in order to protect the integrity of the Postal Service's brand. The Postal Service receives a royalty payment in exchange for the license based on a percent of net sales (with a minimum guaranteed payment).[6]

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[4] Pitney Bowes Motion at 4.

[5] The fact that the license is non-exclusive and therefore allows the Postal Service to license its marks to other cartridge sellers further belies any assertion that these cartridges constitute a product or service provided by the Postal Service.

[6] The price charged for these cartridges is not set or controlled by the Postal Service. Thus, a question arises as to what exactly the Commission would regulate if licensing agreements such as this one were considered a "service" subject to regulation. Certainly, the criteria of section 3633 could not be applied to the prices charged for the cartridges, since those prices are set by a private party independent of the Postal Service. As such, Pitney Bowes cannot utilize Commission proceedings to restrain its private sector competitors. Furthermore, it does not appear logical to apply the criteria of section 3633 to the royalty payment received by the Postal Service, since the amount of revenue earned by the Postal Service is dependent primarily on the revenue earned by the third party: thus, there is no direct relationship between Postal Service costs and revenues in which to measure under the section 3633 criteria. Overall, this motion serves to highlight the inapplicability of the rules applicable to "products" to licensing agreements.

One of the programs that the Postal Service discussed in its Response to Order No. 74 was its "Licensing Programs."[7] The Postal Service noted that it derives revenue from licensing its intellectual property for use on consumer goods manufactured and sold by third parties:

> Managing and protecting intellectual property assets are also important to the economic health of a business entity in that intellectual property assets can be leveraged for revenue. For example, the Postal Service's well-known brand, its corporate signature, as represented by the Sonic Eagle (a trademark) can be licensed to third parties for use in connection with products or services sold by the third parties. This requires the Postal Service to exert quality control over the products or services to assure that consumers receive the quality they have come to expect when purchasing Postal Service products or services. The Postal Service would receive compensation in the form of royalty payments or a flat fee.
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> The subject matter of the Postal Service's intellectual property licenses to third parties can be broken down into three categories. These are: 1) USPS inventions; 2) USPS trademarks used on third party consumer goods; 3) USPS trademarks or copyrighted materials used by third parties for noncommercial purposes or limited commercial purposes.
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> <u>2. USPS Trademarks Used on Third Party Consumer Goods</u>
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> This program licenses use of intellectual property owned by the Postal Service, including stamp images, copyrighted material, the Postal Service corporate signature, other trademarks, service marks and trade dress. Licensees can pay specific fees for usage in the commercial marketplace, but in most cases pay a royalty for each item that contains Postal Service intellectual property. The licensed items are commercially available consumer products sold in various marketplaces and territories.
>
> *Commercial Trademark Licenses*
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> Currently, the Postal Service licenses its trademarks to 40 third-party vendors for use on consumer goods. By category of consumer goods, these are: *Apparel (5), Art (1), Cards & Stationary (1), Fabric (1), Fashion Accessories (8), Food (2), Gifts &*

[7] *See* Initial Response of the United States Postal Service to Order No. 74 at 20-23.

Collectibles (4), Mailing & Shipping (5), Pet Products (2), Toys & Games (11).[8]

The licensing agreement governing the Postal Service-branded meter ink cartridges that is the subject of this motion is one of the "Mailing & Shipping" agreements identified by the Postal Service in its Response to Order No. 74. While the Postal Service did not specifically list each individual licensing agreement in that Response, instead laying out a description of the agreements by category of consumer goods, the Postal Service did not understand Order No. 74 as mandating that it do so. That Order, as clarified by Order No. 77, required "a list and comprehensive description of each nonpostal service [tentatively defined by the Commission as all revenue-generating activities that are not "postal services"] including all that are represented by existing agreements and that generate revenue."[9] The Postal Service did not understand that requirement as mandating a discussion of each individual instance of where it has licensed its intellectual property, just as it did not understand it as mandating a discussion of

[8] The type of license at issue here (a license for Postal Service trademarks used on third party consumer goods sold through non-Postal Service channels) is distinct from the situation where the Postal Service purchases the consumer good for resale through its retail channels. The sale of the consumer good by the Postal Service, at a price set by the Postal Service, would be considered the sale of Officially Licensed Retail Products, which the Postal Service seeks to grandfather as part of this proceeding. See Postal Service Initial Brief at 83-85. While licensing the use of the Postal Service brand is not a "service" within the meaning of section 404(e), the sale by the Postal Service of OLRP merchandise is.

Furthermore, the type of license at issue here is also distinct from the licenses that the Postal Service issues when it provides a database or software with address information. In that case the Postal Service develops, maintains, distributes, and supports the products it sells. When the Postal Service provides the information electronically, it typically requires the purchaser to enter into a licensing agreement which limits the use of the information. As with consumer software sales, one of the main purposes of the licensing agreement is to limit the unauthorized copying or distribution of the electronic information. The existence of a license is simply a feature of the purchasing arrangement for this type of Postal Service product. In the case of licenses for the use of postal trademarks on third party consumer goods, the Postal Service lacks the type of control necessary to consider the consumer goods to be products of the Postal Service. The withdrawal of permission to use Postal Service intellectual property would not, for example, require the third party manufacturer of the printer cartridge to cease selling the product.

[9] *See* Order No. 77 at 2 n.3.

each individual instance of where it has sold or leased its real property and tangible personal property. Rather, considering the magnitude of the task required by Order No. 74, the Postal Service thought it appropriate to provide a description of its property programs as a whole, including a description of its Licensing Program that made it abundantly clear that the Postal Service has licensed its intellectual property to third parties for use on consumer goods (including five agreements relating to "Mailing & Shipping" goods), while also offering to provide additional information if it was deemed necessary.

No party, including Pitney Bowes, ever suggested that the Postal Service's Response was deficient because it did not list and describe each individual disposition of its real, personal, and intellectual property. This is the only claim that Pitney Bowes can make (nearly four months after the fact). However, this is not the claim that Pitney Bowes is in fact making in this motion. Instead, Pitney Bowes argues that the Postal Service deliberately failed to provide the Commission with notice of this agreement, and thus deliberately violated Order No. 74, thereby threatening the "integrity of this proceeding."[10] This accusation simply goes beyond the pale. Before making such a claim, one would reasonably expect Pitney Bowes to get its facts straight about what the Postal Service did and did not provide in response to Order No. 74.

The Postal Service responded to Order No. 74 in good faith, in recognition of the need to cooperate in the development of a comprehensive factual record that will enable the legal issues presented in this docket to be addressed and resolved appropriately. There is simply no basis whatsoever to conclude that the

[10] Motion at 1 n.3.

Postal Service has deliberately sought to circumvent that Order, such that there is a need for yet another Order requiring the Postal Service to provide a complete listing of its revenue-generating activities.

The motion also discusses, in section II.C, the legality of the Postal Service-branded meter ink cartridges. This discussion is completely gratuitous, as it in no way relates to the claimed purpose of the Motion: to require the Postal Service to "file a complete listing of all existing and new offerings that may be subject to this proceeding," and to allow "interested parties the opportunity to comment on the newly disclosed activities," because of the purported failure of the Postal Service to comply with Order No. 74.[11] Whether the licensing of Postal Service intellectual property to a third party for use on postage meter ink cartridges can be justified under section 401(5), section 404(e), or section 3642 is not relevant to the question of whether the Postal Service complied with Order No. 74.[12] Therefore, the Postal Service urges the Commission to refrain from prematurely drawing any conclusions as to the legality of this arrangement in its ruling on this motion.

However, the Postal Service must briefly respond to Pitney Bowes' argument (raised by it for the first time in this proceeding, and after the briefing stage has concluded) that the Postal Service's interpretation of the scope of section 404(e) is incorrect, and that Order No. 74 properly interprets the statute. While Pitney Bowes claims that its interpretation is consistent with the "plain

[11] Pitney Bowes Motion at 1.
[12] As the Postal Service noted in its Response to that Order, its intent was to provide all of its "not-postal" revenue-generating activities, regardless of its views concerning whether they properly are subject to Commission review in this proceeding. *See* Initial Response of the United States Postal Service to Order No. 74 at 6.

language" of the statute,[13] its discussion is notable only for the fact that it ignores that language. In particular, Pitney Bowes argues that the PAEA established "a binary system where activities are categorized as either postal or nonpostal."[14] The statute does not speak of "activities," however, but of "services." At the very most, section 404(e) can be read as categorizing all "services" as either "postal" or "nonpostal." This distinction seems to escape Pitney Bowes. Furthermore, its argument at page 7 of its Motion that interpreting section 404(e) in the manner suggested by the Postal Service "effectively reads out of the statute the specific limitations imposed in section 404" does not withstand even minimal scrutiny. First of all, it is not possible to "read out of the statute" limitations that in fact do not appear in the statute, which instead makes clear that not all "activities" of the Postal Service are "services."[15] Perhaps more fundamentally, interpreting section 404(e) so that it applies only to those "services" previously offered under former section 404(a)(6) *would* give that provision real effect, and Pitney Bowes cannot seriously maintain otherwise.

Pitney Bowes is also misleading when it characterizes the Postal Service as arguing that "the general powers enumerated in section 401 permit the Postal Service to engage in a limitless range of activities, beyond the scope of the Commission's review or knowledge."[16] The Postal Service has never argued that section 401 authorizes it "to engage in a limitless range of activities." However, the mere fact that the Postal Service could potentially act in a manner

[13] Pitney Bowes Motion at 3 n.5.
[14] *Id.*
[15] Indeed, as the Postal Service has pointed out previously, the statute specifically distinguishes between the disposal of real and personal property, and the provision of "services" in connection with that property. *See* 39 U.S.C. 401(5). Pitney Bowes chooses not to address this point.
[16] Pitney Bowes Motion at 7.

inconsistent with section 401 cannot logically be used as a justification for ensuring that the Commission has the authority to review Postal Service actions taken pursuant to that section, considering Congress specifically amended earlier versions of the PAEA legislation so as to divest the Commission of jurisdiction to enforce section 401 (except for section 401(2)). Claims that the Postal Service has violated section 401 belong therefore in federal court, not before the Commission. In addition, the Postal Service has never argued that the Commission could not require that it be kept informed about these activities. The argument that these activities must be regulated under chapter 36 in order to ensure "transparency" is simply incorrect.

Furthermore, Pitney Bowes' argument that because "the Postal Service was not offering USPS-branded replacement postage meter cartridges on January 1, 2006, this represents a new nonpostal service in violation of section 404(e)(2)" is faulty even if licensing agreements were within the scope of this proceeding.[17] First, this argument assumes that the Postal Service is selling the meter cartridges, which it is not. Second, this argument appears to require a conclusion that each individual licensing agreement entered into by the Postal Service is a separate "nonpostal service," and therefore that the Postal Service has no authority to derive revenue from its intangible assets in the future. Furthermore, if each individual disposition of intellectual property is a separate "nonpostal service," it would seem that each individual disposition of real property, or tangible personal property, would also have to be a separate "nonpostal service." Thus, Pitney Bowes' position essentially requires a

[17] *Id.* at 5-6.

conclusion that Congress intended to prevent the Postal Service from deriving revenue from the disposition of its property assets after January 1, 2006.

As has been suggested by other parties in this proceeding, however, to avoid this absurd result it is necessary to interpret the term “nonpostal service” on a broader scale. Thus, even if a licensing agreement could appropriately be considered a "service" -- which it cannot -- the proper “nonpostal service” would not be each individual licensing agreement, but the Licensing Program as a whole (the Public Representative called this “nonpostal service” “Licensing and Assignment Programs for Intangible Assets”).[18] If this is the case, the agreement at issue here is clearly a “variation…of a nonpostal product that was offered as of January 1, 2006,”[19] since it is a standard licensing arrangement, and the Postal Service has licensed its intellectual property in this manner since well before January 1, 2006. This arrangement thus falls comfortably within the sphere of activities long performed by the Postal Service.

Pitney Bowes also makes a variety of arguments concerning the legality of this individual licensing agreement under either section 404(e)(3) (if this individual licensing agreement was considered a “nonpostal service”), or section 3642 (if this individual licensing agreement was considered a “postal service”). The Postal Service, of course, rejects the notion that it is providing a “service” that can be logically regulated as a “product” when it licenses its intellectual

[18] *See* Initial Brief of the Public Representative at 26.
[19] Pitney Bowes Motion at 6. Of course, a separate claim would be that, to the extent that licensing agreements are “services,” this particular licensing arrangement is justified under section 3642.

property to a private, independent third party. This issue is still unresolved.[20] If the Commission finds that the licensing of intellectual property is a "service," presumably it would make a determination prior to December 20th as to whether the Postal Service's "Licensing Program" as a whole satisfies the criteria of section 404(e)(3), since the "Licensing Program" as a whole would be the appropriate "nonpostal service." Any further determination as to the legality of this individual agreement under title 39 would not be appropriate on the basis of the record as it now stands in this proceeding.

Pitney Bowes has presented no evidence demonstrating that the Postal Service failed to comply with Order No. 74, such that there is a need for a further Order directing the Postal Service to once again provide a comprehensive listing of its revenue-generating activities that are not "postal services." The relief requested in its motion should therefore be denied.

Respectfully submitted,

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[20] *See* Order No. 77.